



Caution

As of: October 18, 2026 7:03 AM Z

Park Redlands Covenant Control Comm. v. Simon

Court of Appeal of California, Fourth Appellate District, Division Two

May 16, 1986

No. E001723

Reporter

181 Cal. App. 3d 87 *; 226 Cal. Rptr. 199 **; 1986 Cal. App. LEXIS 1596 ***

PARK REDLANDS COVENANT CONTROL COMMITTEE, Plaintiff and Respondent, v. RICHARD L. SIMON et al., Defendants and Appellants

Prior History: [***1] Superior Court of San Bernardino County, No. SCV 220542, Duke D. Rouse, Judge.

Disposition: That portion of the judgment purporting to enforce the age and occupancy covenants in the Park Redlands Declaration of Restrictions against defendants is reversed. That portion of the judgment declaring by implication the enforceability of paragraphs 18, 19, 21 and 23 of those restrictions is affirmed. Each side shall bear its own costs on appeal.

Case Summary

Procedural Posture

Appellants sought review of an order of the Superior Court of San Bernardino County (California) enforcing respondent homeowners' association's restrictive covenants regarding age and occupancy.

Overview

Respondent homeowners' association filed a complaint against appellants, arguing that as a result of appellants having their two adult children and a grandchild live with them periodically, they were violating two restrictive covenants limiting residents of the development to those aged 45 and

over and fixing the maximum number of occupants per residence at three. The trial court granted respondent an injunction. The court reversed. The age and occupancy requirements violated the Unruh Civil Rights Act, [Cal. Civ. Code § 53](#), and the California constitutional right of privacy, respectively. The age restriction was impermissible discrimination against children and families with children. The occupancy restriction violated appellants' right to privacy. While respondent contended that such a restriction was necessary because of spatial limitation, there was absolutely no reference at all to physical facilities. Rather, the occupancy restriction appeared to be arbitrary and capricious.

Outcome

The order enforcing the two restrictive covenants was reversed because the age restriction covenant unlawfully discriminated on the basis of age, and the occupancy restriction unlawfully violated appellants' right to privacy.

LexisNexis® Headnotes

Civil Rights Law > General Overview

Real Property Law > Encumbrances > Restrictive Covenants > General Overview

HN1 See [Cal. Civ. Code § 53](#).

Real Property Law > Common Interest
Communities > Condominiums > General Overview

Real Property Law > Common Interest
Communities > Condominiums > Condominium
Associations

Real Property Law > Common Interest
Communities > Homeowners Associations

Real Property Law > Encumbrances > Restrictive
Covenants > General Overview

HN2 A condominium homeowners' association is a business within the purview of Unruh Civil Rights Act, [Cal. Civ. Code § 53](#).

Civil Rights Law > General Overview

Real Property Law > Encumbrances > Restrictive
Covenants > General Overview

HN3 The Unruh Act, [Cal. Civ. Code § 53](#), prohibits arbitrary discrimination, both benign and improperly intentioned, against minorities or majorities.

Civil Rights Law > General Overview

Labor & Employment Law > ... > Age
Discrimination > Defenses > General Overview

Real Property Law > Encumbrances > Restrictive
Covenants > General Overview

HN4 To bring age discrimination under the one exception to the Unruh Act, [Cal. Civ. Code § 53](#), as yet sanctioned by California courts, the discrimination must occur (1) to meet the special needs of senior citizens, and (2) it must take place in the context of housing designed especially for the elderly.

Constitutional Law > Substantive Due
Process > Privacy > General Overview

HN5 The right of privacy is the right to be left alone. It is a fundamental and compelling interest.

This right should be abridged only when there is a compelling public need.

Constitutional Law > Substantive Due
Process > Privacy > General Overview

Real Property Law > Encumbrances > Restrictive
Covenants > General Overview

HN6 To be upheld, that any restriction curtailing the right of privacy, the aim of which is to regulate population density, must do so by reference to floor space and facilities by tying maximum permissible occupancy in a dwelling to objective standards such as across-the-board minimum floor space per person requirement, person per quantum of open space, persons per a bedroom or bathroom, or any other generally accepted standard which defines overcrowding.

Civil Rights Law > ... > Elements > Color of State
Law > General Overview

Constitutional Law > Substantive Due
Process > Privacy > General Overview

HN7 State action is not required to create a violation of the California Constitutional right of privacy.

Civil Rights Law > ... > Elements > Color of State
Law > General Overview

HN8 State action is present where an executive officer aids or encourages the violation of rights.

Headnotes/Summary

Summary

CALIFORNIA OFFICIAL REPORTS SUMMARY

A homeowners' association committee brought an action against an owner of a house within the

development to enforce two restrictive covenants limiting residents of the development to those aged forty-five and over and fixing the maximum number of occupants per residence at three. The committee alleged that defendant owners breached these covenants by having their two adult children and a grandchild live with them periodically. Defendants cross-complained for declaratory relief as to the validity of those two restrictions plus an interpretation of the validity of four other covenants having to do with the enforcement of covenants and prohibiting usage of units which increased the rate of insurance on the total building or that impaired the structural integrity of the building or constituted an offense or nuisance activity. The trial court enjoined the two adult children and the grandchild from residing with defendants, enjoined more than three persons including defendants from regularly or permanently residing in their premises, and by implication declared the validity of the four other covenants. (Superior Court of San Bernardino County, No. SCV 220542, Duke D. Rouse, Judge.)

The Court of Appeal affirmed in part and reversed in part. The court held that the restriction requiring all people residing in the development to be 45 years or older was invalid under the Unruh Civil Rights Act, [Civ. Code, § 53](#), since the age restriction was not necessary to meet the special needs of senior citizens (the sole reason for the age discrimination being to exclude families with children), and since the housing in the development was not designed especially for the elderly. The court held that the restriction on the number of residents per unit violated defendants' right to privacy as contained in the California Constitution. It denied defendants the right to choose with whom they lived and to live as a family, the covenant was not the least restrictive alternative to address the interest of the homeowner's association of limiting population density as it applied without reference to the size of a house or the number of rooms in the house, and state action was involved in denying defendants their right to privacy as the restrictive covenant was imposed by a city in return for its approval of a special use permit allowing the

construction of houses smaller than the minimum imposed by its ordinance. Finally, the court held that the other covenants challenged by defendant were valid. (Opinion by McDaniel, J., with Rickles, Acting P. J., and Kaufman, J., concurring. Separate concurring opinion by Kaufman, J.)

Headnotes

[CA\(1a\)](#) (1a) [CA\(1b\)](#) (1b) [CA\(1c\)](#) (1c)

Covenants, Conditions and Restrictions § 9—Restrictions—Minimum Age Requirements—Validity.

--A restrictive covenant requiring all residents of a development to be over 45 years old violated [Civ. Code, § 53](#) (part of the Unruh Civil Rights Act), as it constituted age discrimination which was not justified by being tailored to meet the special needs of senior citizens where the age of 45 was chosen solely to exclude children and families with children from the development, and was not justified as being for housing designed for the elderly. The housing had none of the attributes usually associated with such housing.

[CA\(2\)](#) (2)

Civil Rights § 2—Definitions and Distinctions—Homeowners Association—As Business Entity.

--The homeowners' association of a residential development was a business entity for purposes of the Unruh Civil Rights Act (see [Civ. Code, § 53](#)) since the responsibilities discharged by the association included protection and enhancement of the project's economic value.

[CA\(3\)](#) (3)

Civil Rights § 1—Function of Unruh Act.

--The function of the Unruh Civil Rights Act (see [Civ. Code, § 53](#)) is to prohibit arbitrary

discrimination, both benign and improperly intentioned, against minorities or majorities.

CA(4) (4)

Constitutional Law § 58—First Amendment and Other Fundamental Rights of Citizens—Scope and Nature—Right of Privacy—California Constitution.

--The scope of the right to privacy in the California Constitution includes the right to choose with whom one lives and proscribes restrictions on the numbers of people who can choose to live together.

CA(5) (5)

Covenants, Conditions and Restrictions § 11—Restrictions—Restraints Upon Use of Property—Restrictions on Number of People Who Can Live Together in Residence—Validity—Right to Privacy.

--A married couple's right to privacy as contained in the California Constitution was violated by a restrictive covenant affecting their home which limited the number of occupants to three and prevented guests from staying over sixty days a year, where the couple had two children and the right to privacy included the right to choose with whom they lived and to live as a family. Furthermore, the covenant did not address the interest of the homeowners' association for the development in limiting population density in the least restrictive manner, as the restriction applied equally to residents without reference to the size or the number of rooms in their house.

CA(6) (6)

Constitutional Law § 58—First Amendment and Other Fundamental Rights of Citizens—Scope and Nature—Right of Privacy—Restrictive Covenants—State Action Creating and Enforcing.

--State action was involved in creating and enforcing covenants restricting the number of persons who could reside in each unit of a housing development in violation of the subdivision residents' right to privacy under the California Constitution, where the restriction was imposed by a city in return for its approval of a special use permit allowing the construction of houses smaller than the minimum imposed by city ordinance, where the city refused a subsequent developer's request to remove the covenants and forced the developer to record the restrictive covenant with a new restriction requiring the approval of amendments to the covenant, and where state courts were used as an aid to enforce the restrictions.

CA(7) (7)

Covenants, Conditions and Restrictions § 13—Restrictions—Performance, Breach and Forfeiture—Validity of Covenants.

--Restrictive covenants affecting a residential subdivision giving the homeowners' association power to declare, in good faith, that the restrictions were breached, to take action to remedy the breach, to determine in its sole discretion whether work was necessary to preserve the value of a unit or yard, and to assess the lot for charges incurred to do the work if the owner failed to take corrective action within 30 days of receiving notice of the defects, did not violate unit owners' due process rights.

CA(8) (8)

Covenants, Conditions and Restrictions § 9—Restrictions on Use of Property—Benefit to Adjoining Landowners—Running With the Land.

--A restrictive covenant affecting a residential subdivision setting standards for usage of units, banning activity increasing the rate of insurance on the total building without the written consent of adjoining owners, and banning activities that

impaired the structural integrity of the building or were offensive or a nuisance, was valid. It was for the benefit of adjoining landowners and ran with the land.

Counsel: Marshall Miles for Defendants and Appellants.

Wynn & Wingfield and Robert L. Goodrich for Plaintiff and Respondent.

Judges: Opinion by McDaniel, J., with Rickles, Acting P. J., and Kaufman, J., concurring. Separate concurring opinion by Kaufman, J.

Opinion by: McDANIEL

Opinion

[*90] **200] The action in the trial court was brought to enforce two features of a restrictive covenant recorded in connection with approval by the City of Redlands of a particular subdivision development, Park Redlands. The complaint against Richard Simon and his wife (defendants) was filed by Park Redlands Covenant Control Committee (plaintiff), a creature of the Park Redlands Homeowners' Association, comprised of the residents of this development. Their grievance *****2]** was that defendants, as a result of having their two adult children and a grandchild live with them periodically, were in violation of two restrictive covenants limiting residents of the development to those aged forty-five and over and fixing the maximum number of occupants per residence at three.

Besides answering plaintiff's complaint, defendants cross-complained for declaratory relief, seeking an interpretation of the validity of the two restrictions **[*91]** noted plus interpretation of the validity of four other covenants in the recorded declaration of restrictions. The trial court decreed the injunction as prayed, i.e., by enjoining the two adult children and the grandchild from residing with defendants until the former had attained the age of forty-five

years and further by enjoining "more than three (3) persons, including [defendants] . . . from permanently or regularly residing in their said premises." Only by implication did the trial court's judgment declare the validity of the four other covenants also challenged by the cross-complaint.

Defendants appealed, challenging the permanent injunction and the adverse declaration of rights. We shall reverse that part of *****3]** the judgment which operates to enforce the age and occupancy restrictions against defendants and affirm it otherwise.

Facts

The facts are essentially undisputed. In 1979, Richard and Betty Simon purchased a home in the Park Redlands subdivision in the City of Redlands. The Simons have 2 grown children, a 31-year-old daughter, who is married and has a small child, and a 26-year-old son. The daughter and grandchild followed a pattern of returning intermittently to live with the Simons for varying periods of time; evidently, the daughter's husband travels extensively, and she fears being alone with the child while he is away. The son has returned home occasionally to live with defendants while attending ****201]** a local college, and his visits have overlapped those of his sister.

Park Redlands is a unique housing development in that 41 of the 44 houses in the development are approximately 900 to 1,000 square feet and are placed on approximately 5,500 square foot lots, considerably smaller than the minimum size (8,000 square feet) otherwise regularly required in residential developments in the City of Redlands. The remaining three houses, which include the Simons', are constructed *****4]** on more standard, one-quarter acre lots (approximately) and contain 2,000 square feet (approximately). In order to build this miniaturized subdivision, the original developer obtained a special use permit from the city. The developer also recorded a package of restrictions which attached to all lots in the development; it is certain of these restrictions

which the trial court decreed enforceable against defendants with which they take exception on this appeal.

Plaintiff Park Redlands Covenant Control Committee, a subunit of the Park Redlands Homeowners' Association, sought to enforce against the [*92] Simons two provisions contained in a single paragraph of the restriction, which in pertinent part reads: "3. Residence and Age Requirements . . . This project is designed and intended for the use and residence of persons who have attained age 45. The number of residents in a unit shall be no more than three (3). Guests may visit, but not reside in a unit. A visit shall be considered a period of up to sixty (60) days per year." In the Simons' cross-complaint, they sought to have paragraph 3, above, as well as paragraphs 18, 19, 21, and 23 of the restrictions declared invalid.

[***5] Paragraph 18 gives plaintiff the power to declare a breach of the restrictions ". . . pursuant to its sole discretion exercised in accordance with Paragraph 4 [which provides that discretion must be '. . . exercised in good faith and independent of the grantees . . .']," as well as power to record a notice of breach on the property affected, and power to institute a lawsuit to remedy the breach. This paragraph also requires the grantee against whom legal action is instituted to pay for costs and attorneys' fees incurred by the committee in enforcing. No claim was made for attorneys' fees in this case.

Paragraph 19 gives plaintiff essentially the same power to institute legal actions and collect attorneys' fees where an owner fails to obey a written directive (enforcing a restriction) of plaintiff.

Paragraph 21 gives plaintiff power to determine ". . . in its sole discretion . . . whether work is . . . reasonably necessary . . ." to preserve the value of a unit or yard. The committee gives written notice to the owner, and if the defects aren't remedied within 30 days, the committee will cause the work to be

done and assess against the lot for the charges incurred.

Paragraph [***6] 23 sets out standards for usage of "units," banning activity increasing the rate of insurance on the "total building" without written consent of adjoining owners. Activity that impairs structural integrity of "the building" as well as offensive or nuisance activity is also banned.

Discussion

Defendants contend that the age and occupancy restrictions, as applied to them, are violative of the Unruh Civil Rights Act and the California constitutional right of privacy, respectively. They also attack paragraphs 18, 19, 21 of the restrictions as violative of federal due process standards, and attack paragraph 23 as invalid because not for the benefit of adjoining property owners.

[*93] I

Validity of the Age Restriction Under the Unruh Act

[CA\(1a\)](#) (1a) Defendant argues that the restriction requiring all people residing in Park Redlands to be 45 years or older is invalid under the [Civil Code section 53](#),¹ part of the Unruh Civil Rights Act. We agree.

¹ [HN1 Civil Code section 53](#) reads: "(a) Every provision in a written instrument relating to real property which purports to forbid or restrict the conveyance, encumbrance, leasing, or mortgaging of such real property to any person of a specified sex, race, color, religion, ancestry, or national origin, is void and every restriction or prohibition as to the use or occupation of real property because of the user's or occupier's sex, race, color, religion, ancestry, or national origin is void. [para.] (b) Every restriction or prohibition, whether by way of covenant, condition upon use or occupation, or upon transfer of title to real property, which restriction or prohibition directly or indirectly limits the acquisition, use or occupation of such property because of the acquires user's, or occupier's sex, race, color, religion, ancestry, or national origin is void. [para.] (c) In any action to declare that a restriction or prohibition specified in subdivision (a) or (b) of this section is void, the court takes judicial notice of the recorded instrument or instruments containing such prohibitions or restrictions in the same manner that it takes judicial notice of the matters listed in [Section 452 of the Evidence Code](#)."

[***7] **[**202]** [CA\(2\)](#) (2) Plaintiff's first point here is that the Unruh Act only operates to outlaw discrimination by *business enterprises*, and, because Park Redlands Homeowners Association is not such an enterprise, no limitation is created by the act. Not so. The California Supreme Court in [O'Connor v. Village Green Owners Assn. \(1983\) 33 Cal.3d 790 \[191 Cal.Rptr. 320, 662 P.2d 427\]](#), squarely held that [HN2](#) a condominium homeowners' association is a business within the purview of the act, stating: "A theme running throughout the description of the association's powers and duties is that its overall function is to protect and enhance the project's economic value. Consistent with the Legislature's intent to use the term 'business establishments' in the broadest sense reasonably possible [citation], we conclude that the Village Green Owners Association is a business establishment within the meaning of the act." ([Id.](#), at p. 796.) Although the business responsibilities discharged by a condominium homeowners' association and a tract housing homeowners' association of the kind here involved may be somewhat different, both have a similar economic function making them indistinguishable [***8] as *business establishments*.

[CA\(1b\)](#) (1b) In response to defendant's challenge to the validity of the age restriction, plaintiff argues that the age restriction is one in favor of a minority class, individuals over 45, and is socially necessary to meet the needs of senior citizens.

[*94] [CA\(3\)](#) (3) Plaintiff misconstrues the function of [HN3](#) the Unruh Act. It prohibits arbitrary discrimination, both benign and improperly intentioned, against minorities or majorities. [CA\(1c\)](#) (1c) Furthermore, [HN4](#) to bring age discrimination under the one exception to the Unruh Act as yet sanctioned by California courts, the discrimination must occur (1) to meet the special needs of senior citizens, and (2) it must take place in the context of housing designed especially for the elderly. ([Marina Point, Ltd. v. Wolfson \(1982\) 30 Cal.3d 721, 742-743 \[180 Cal.Rptr. 496, 640 P.2d 115, 30 A.L.R.4th 1161\]](#).) The presence of

neither of these factors has been demonstrated here.

First, it must come as some surprise to those 45 years of age to find themselves classified as senior citizens. When the Director of the Community Development Administration of the City of Redlands was asked on direct examination why this age cut-off was [***9] chosen, the following colloquy developed:

"Question. What is your opinion at this time as to the reasonableness as to the restriction to individuals of age 45 or greater?

"Answer. I -- for different opinions, it could be 50 -- A.R.P. is 50 now -- it could be 55.

"Question. In your opinion is it [a] reasonable restriction?

"Answer. Well, 45 is probably -- because that's usually beyond the age that people have children, so --"

It appears that the age 45 was chosen not to facilitate special needs of the elderly, but solely to engage in impermissible discrimination against children and families with children. ([Marina Point, Ltd. v. Wolfson, supra, 30 Cal.3d 721, 745.](#))

Finally, nowhere in the record is it shown that the single family homes in Park Redlands [**203] are designed as specialized facilities for the elderly. Attributes of housing especially designed for the elderly include ". . . more and wider walkways with fewer stairs, an interior and exterior designed to permit easy social contact, provision for common rooms, short distances between buildings, easy refuse collection, light maintenance and well-lighted walkways and halls" ([Wolfson, supra \[***10\], at p. 742, fn. 10.](#)) In response to the trial court's question, "What does this development consist of?" the director responded, ". . . I guess you call it a miniature single family subdivision. 44 Units. Lots are smaller Set-backs are less; the parking is less. The idea being that it was geared for less intense use of the property." [*95] Thus, the foregoing demonstrates

that Park Redlands is not a specialized facility for the elderly; thus, the age restriction is patently violative of the Unruh Act, and therefore unenforceable.

II

Validity of Limitation on Number of Residents

Defendants contend this restriction violates the right of privacy enunciated in [City of Santa Barbara v. Adamson \(1980\) 27 Cal.3d 123 \[164 Cal.Rptr. 539, 610 P.2d 436, 12 A.L.R.4th 219\]](#). The subissues which this contention imports are (1) the scope of the right of privacy upon which *Adamson* is based, (2) whether the right of privacy thus enunciated is violated by this restriction and (3) whether the right of privacy can be violated by enforcement of a private restrictive covenant.

A. Scope of the Right of Privacy Enunciated by *Adamson*

[CA\(4\)](#) (4) On this first subissue, the scope [***11] of the California constitutional right of privacy, plaintiff's strongest argument is that the right of privacy upon which the zoning ordinance in *Adamson* ran aground is a right which prevents *discrimination* against nonfamily living groups, in favor of family groups, limiting the number of people who can live in a house, rather than a right which proscribes limitations upon the numbers of people who can choose to live together. This argument fails as we shall explain.

In *Adamson*, the City of Santa Barbara had enacted an ordinance which limited the use of homes in one-family, two-family and multiple-family residence zones to families, defined as (1) "An individual, or two (2) or more persons related by blood, marriage or legal adoption living together as a single housekeeping unit" or (2) "A group of not to exceed five (5) persons, excluding servants, living together as a single housekeeping unit." ([Id.](#), at p. 127.)

Just before discussing the nature of the restrictions which the ordinance imposed, the court stated in its

opinion, "Valid laws can, of course, be written to help promote and protect values that family life enhances. The question in this case is whether [***12] that kind of law may deny to individuals who are not family members certain benefits that family members enjoy." ([Id.](#), at p. 128.) This statement is the source of plaintiff's argument. Given this formulation, one would expect a court to discuss *discrimination*, most likely in the context of an equal protection or Unruh Act analytical framework. The court did not. To the contrary, immediately after discussing the [*96] provisions of the ordinance and possible exceptions, the court reformulated the question facing it: "Do the ordinance's restrictions, with those three exceptions, respect the commands of the California Constitution concerning people's rights to enjoy life and liberty, to possess property, and to pursue and obtain happiness and privacy?" ([Id.](#), 27 [Cal.3d at p. 129.](#))

The court then defined the right of privacy, saying "The court in [White v. Davis \[13 Cal.3d 757 \(120 Cal.Rptr. 94, 533 P.2d 222\)\]](#) quoted these words from 'a statement drafted by the proponents of the provision [that added "privacy" to the California Constitution] and included in the state's election brochure' [citation]: "'[HN5](#) The right of [**204] privacy is the right to be [***13] left alone. *It is a fundamental and compelling interest.* It protects our *homes*, our *families*, our thoughts, our emotions, our expressions, our personalities, our *freedom of communion*, and our *freedom to associate with the people we choose* [para.] The right of privacy is an important American heritage and essential to the fundamental rights guaranteed by the [First](#), [Third](#), [Fourth](#), [Fifth](#) and [Ninth Amendments to the U.S. Constitution](#). *This right should be abridged only when there is a compelling public need*" (*Italics added.*)" ([Id.](#), at p. 130.) The rest of the opinion was devoted to the strict scrutiny analysis required for incursions upon fundamental constitutional rights, and held that the Santa Barbara ordinance could not stand.

The right of privacy which was the basis of attack

on the *Santa Barbara* "rule of five" (no more than five unrelated people could live together in a single dwelling unit) is thus broadly defined. The Supreme Court in *Adamson* italicized relevant portions of the voter's pamphlet, and the passages italicized were those which define the right of privacy involved as one protecting homes, families, freedom [***14] of communion, and freedom to associate with the people one chooses. This expansive view of the right of privacy at issue here was reaffirmed in [*Robbins v. Superior Court* \(1985\) 38 Cal.3d 199 \[211 Cal.Rptr. 398, 695 P.2d 695\]](#), in which the Supreme Court declared invalid county welfare regulations which required single, eligible recipients to live in county housing facilities. The court stated, after citing to *Adamson*, "Plaintiffs argue persuasively that the county's 'in-kind' benefits policy infringes on their constitutional right to privacy. Residence at the Bannon Street facility compels the individual to give up his home and the ability to choose his associates. He is forced to live in a particular location without the freedom to choose his own living companions." (*Id.*, at p. 213.) Consequently, it is beyond refutation that the basis of decision in *Adamson* was not the *discrimination* between family and non-family effected by the ordinance, but the violation of the right to choose with whom one lives, a component of the "right of privacy" guaranteed by the California Constitution.

[*97] B. *Is This Covenant Violative of the Simons' Right of Privacy* [***15] ?

[*CA\(5\)*](#) (5) The covenant, by limiting the number of occupants of the Simons' house to three, prevented the Simons from providing a place to live to any more than one of their two children at a time for longer than sixty days per year. Should economic or medical necessity force the second child to seek to live with his/her parents for longer than 60 days, the Simons would have to bar the door to the child. Thus, both the more general right to choose with whom they live, and the right to live as a family, are directly impinged upon by this restriction.

The interests advanced to justify this restriction are well summarized by plaintiff's brief, which states: ". . . the director of the Redlands City Planning Department [sic] testified that *special allowances* were made for this housing project in light of its designation of three (3) or fewer occupants, including smaller lot size, fewer parking spaces etc., and that the particular area will become a slum if not upheld." These interests can be reduced to one: the restriction is obviously designed to control population density within Park Redlands.

Conceding, arguendo, that the interest advanced is compelling, the limitation is yet unenforceable [***16] against defendants here because it is not the least restrictive means of achieving this goal. In *Adamson*, as well as in this district's decision in [*City of Chula Vista v. Pagard* \(1981\) 115 Cal.App.3d 785 \[171 Cal.Rptr. 738\]](#), it was made plain, [*HN6*](#) to be upheld, that any restriction curtailing the right of privacy, the aim of which is to regulate population density, *must* do so by reference to floor space and facilities. The court in *Pagard* stated: "Such appropriately drawn ordinance may and should address the population density problem directly by tying maximum permissible occupancy in a dwelling to objective standards [**205] such as across-the-board minimum floor space per person requirement, person per quantum of open space, persons per a bedroom or bathroom, or any other generally accepted standard which defines 'overcrowding.'" (*Id.*, at p. 797.)

In this case, the restriction at issue is an amorphous restriction with absolutely *no reference at all to physical facilities*. As applied, it restricts to 3 the number of occupants who live in both 900- to 1,000-square-foot houses, and 2,000-square-foot houses, the latter being the size which the Simons [***17] own and live in. The restriction operates to abridge the constitutionally guaranteed right of privacy in a completely capricious fashion, at least as to the 2,000-square-foot units.

[*98] C. *Can the Simons' Right of Privacy Be*

Violated By a Private Restrictive Covenant

[CA\(6\)](#) (6) Adamson and its progeny have all involved governmental restrictions, such as zoning ordinances, except one case. Speaking of the right to privacy generally, however, there is both Supreme Court and appellate authority to the effect that [HN7](#) state action is not required to create a violation of the California Constitutional right of privacy. ([White v. Davis \(1975\) 13 Cal.3d 757, 773-776 \[120 Cal.Rptr. 94, 533 P.2d 222\]](#); [Laguna Publishing Co. v. Golden Rain Foundation \(1982\) 131 Cal.App.3d 816 \[182 Cal.Rptr. 813\]](#), conc. opn. by Kaufman, J., p. 859; [Kinsey v. Macur \(1980\) 107 Cal.App.3d 265, 272 \[165 Cal.Rptr. 608\]](#); [Porten v. University of San Francisco \(1976\) 64 Cal.App.3d 825, 829 \[134 Cal.Rptr. 839\]](#).)

We do not need to go so far, however, because there is abundant state action present in the case here. The one offspring of Adamson which did not involve a governmental [***18](#) restriction was [Welsch v. Goswick \(1982\) 130 Cal.App.3d 398 \[181 Cal.Rptr. 703\]](#). In *Welsch*, the appellate court reversed the trial court determination that a private covenant restricting property to single-family residential use was violated by the defendants' use of their home as a private care facility for six elderly ladies. The appellate court reversed this determination on the ground that ". . . recent changes in the social fabric convince us that the operation of a residential care facility for six or fewer residents is not inconsistent with a single-family residential purpose restriction." ([Id.](#), at p. 408.) The Goswicks, who operated the home, had also challenged the covenant on the ground that ". . . enforcement of the restrictive covenant to prohibit their providing residential care and shelter to six unrelated elderly persons unconstitutionally infringes on their right to privacy." ([Id.](#), at p. 401.) The majority explicitly refrained from deciding this case on that basis (*ibid.*), but Justice Staniforth, writing in concurrence, was not so timid.

Justice Staniforth's concurrence based his vote for reversal solely on the invasion of the Goswicks'

right [***19](#) to privacy worked by the covenant (*id.*, conc. opn., p. 409). He concluded Adamson limits governmental entities only; private restrictive covenants were not expressly limited. He found state action, however, under [Shelley v. Kraemer \(1948\) 334 U.S. 1 \[92 L.Ed. 1161, 68 S.Ct. 836, 3 A.L.R.2d 441\]](#), and stated, "I conclude the trial court's enforcement of the covenant and preventing the Goswicks' present use is unconstitutional under Adamson [citation], because it lends the affirmative aid of the courts, through an eviction order, to furthering an unconstitutional invasion of the Goswicks' privacy." (*Id.*, conc. opn., at p. 412.) Lest Justice Staniforth's concurrence be dismissed as the calling [*99](#) out of one small voice in the wilderness, it should be noted that the Supreme Court in *Robbins* cited Justice Staniforth's entire concurrence in support of its statement of the right of privacy as encompassing the right to choose those with whom one lives. ([Robbins v. Superior Court, supra, 38 Cal.3d 199, 213.](#))

Justice Staniforth based his determination of the presence of state action on [**206](#) judicial enforcement of the covenant; that is [***20](#) present in the case here. The trial court ordered enforcement of the covenant against defendants and ordered persons whose presence violated the covenant "to quit."

However, there is a far more compelling basis for holding that state action is present here. [HN8](#) State action is present where an executive officer aids or encourages the violation of rights. ([Lombard v. Louisiana \(1963\) 373 U.S. 267 \[10 L.Ed.2d 338, 83 S.Ct. 1122\]](#); Nowak, Rotunda, Young, Constitutional Law (2d ed.) ch. 14, § 3, p. 509.) In the case here, testimony was given at trial, by the same director of the city planning agency, that the city had entered into an agreement with the developer of Park Redlands, in substance, that in return for a special use permit for building 900- to 1,000-square-foot homes on 5,500-square-foot lots, smaller than the minimum imposed by ordinance, the developer would impose the minimum age and number limitations in the recorded restrictions on

the land. The development was conveyed, and a different entrepreneur actually built the houses. This latter owner tried to remove the age and number restrictions, but the City of Redlands, by bringing to bear some unknown leverage, [***21] forced him to rerecord the restrictions, along with a new restriction, which read in part: "Paragraph 3 [listing age and number restrictions], which has heretofore been amended, is further amended by adding the following:

"Prior to recordation, any amendment proposed under the provisions of this section shall first be submitted for approval by the City of Redlands. No amendment shall be effective unless and until approval by the City of Redlands has been obtained."

This court will not, ostrich-like, ignore the heavy-handed role played by the City of Redlands in (1) creating, and (2) continuing the existence of this "purely private" restriction. Neither the city nor the residents of the development can take refuge in the private party status of the developer of Park Redlands to accomplish circumvention of these basic California constitutional guarantees to which the Simons are entitled.

[*100] III

Due Process and Validity Challenges to Paragraphs 18, 19, 21, and 23.

[CA\(7\)](#) (7) Defendants' challenges to the trial court's decree which hold paragraphs 18, 19 and 21 to be valid is without merit, and we shall affirm that part of the judgment. ([Sniadach v. Family Finance Corp](#) [***22] . (1969) 395 U.S. 337 [23 L.Ed.2d 349, 89 S.Ct. 1820].) [CA\(8\)](#) (8) Otherwise, we shall affirm the trial court's decree upholding paragraph 23 as a valid running covenant.

That portion of the judgment purporting to enforce the age and occupancy covenants in the Park Redlands Declaration of Restrictions against defendants is reversed. That portion of the judgment declaring by implication the

enforceability of paragraphs 18, 19, 21 and 23 of those restrictions is affirmed.

Each side shall bear its own costs on appeal.

Concur by: KAUFMAN

Concur

KAUFMAN, J. Because I am persuaded there was clearly state action here, I have concurred in the opinion prepared for the court by Justice McDaniel, but I concur separately also to say I think it is disgraceful the law permits a person to buy property with full knowledge of restrictions on its use and with full knowledge that others have purchased their homes relying on such restrictions and yet permits the purchaser to later repudiate and ignore such restrictions with impunity.

As to the City of Redlands, the lesson is clear. It must never again reduce its standards [**207] on account of the special configuration of a development or recorded restrictions [***23] on use pertaining to the number or ages of the prospective occupants.

Finally, while I am bound by the decisions of the California Supreme Court prohibiting age discrimination in housing, I find those decisions legally and practically inane. They invoke First Amendment guarantees, freedom of association, to strike down age limitations, failing to recognize that in so doing they infringe to the same extent the same constitutional right, the freedom of association, of the other owners, not to mention their reasonable expectations, property rights and their right freely to enter into binding [*101] contracts. The rights overlooked are at least as significant and as sacrosanct as the rights of those for whom our high court in its paternalistic wisdom is so solicitous.



Parsons v. Bristol Development Co.

Supreme Court of California

June 17, 1965

L. A. No. 27434

Reporter

62 Cal. 2d 861 *; 402 P.2d 839 **; 44 Cal. Rptr. 767 ***; 1965 Cal. LEXIS 303 ****

CEJAY PARSONS, Plaintiff and Appellant, v.
BRISTOL DEVELOPMENT COMPANY et al.,
Defendants and Respondents

Subsequent History: [****1] Appellant's Petition
for a Rehearing was Denied July 14, 1965.

Prior History: APPEAL from a judgment of the
Superior Court of Orange County. Samuel
Dreizen, Judge.

Action to recover for services rendered by an
architect and to foreclose a mechanic's lien.

Disposition: Affirmed. Judgment for defendants
affirmed.

Core Terms

phase, written instrument, percent, estimate,
construction loan fund, extrinsic evidence,
appellate court, abandon, construction loan, defeat,
invoke, notice

Case Summary

Procedural Posture

Plaintiff architect appealed a judgment of the
Superior Court of Orange County (California),
which held that he was not entitled to judgment
against defendant developer in an action to recover
for services he performed under a contract.

Overview

Defendant developer hired plaintiff architect to
design a building and to assist in construction. The

project was in two phases, and plaintiff was paid
for phase one, as well as a percentage of his total
fee for phase two. Defendant was compelled to
abandon the project because he could not obtain a
construction loan. Defendant adverse possessor
then filed an action against defendant developer
claiming title. Plaintiff brought an action against
defendants to recover for services performed and to
foreclose a mechanic's lien on the lot. The trial
court entered judgment for defendant developer,
holding that his obligation to make further payment
to plaintiff was conditioned upon the existence of a
construction loan. Plaintiff appealed. The court
affirmed, holding that there was evidence that
plaintiff knew defendant's ability to undertake
construction turned upon the availability of loan
funds, and the risk that a loan might not be obtained
was a risk that was clearly anticipated. Defendant
did not represent that funds had been obtained, and
plaintiff knew that funds had not been obtained but
chose to proceed with his work on the project
anyway.

Outcome

The court affirmed the judgment in favor of
defendant developer because there was evidence
that plaintiff architect knew that defendant's ability
to pay him depended on the availability of loan
funds, and it was a clear risk that a loan might not
be obtained. The court also held that plaintiff chose
to continue his work even though he knew there
were no loan proceeds.

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > General Overview

Contracts Law > Contract Interpretation > General Overview

Evidence > ... > Preliminary Questions > Admissibility of Evidence > General Overview

Evidence > ... > Procedural Matters > Preliminary Questions > General Overview

HN1 Appeals, Standards of Review

The interpretation of a written instrument is essentially a judicial function to be exercised according to the generally accepted canons of interpretation so that the purposes of the instrument may be given effect. [Cal. Civ. Code, §§1635-1661](#), [Cal. Code Civ. Proc. §§1856-1866](#). Extrinsic evidence is admissible to interpret the instrument, but not to give it a meaning to which it is not reasonably susceptible, and it is the instrument itself that must be given effect. [Cal. Civ. Code §1638](#), [Cal. Civ. Code § 1639](#), [Cal. Code Civ. Proc. § 1856](#). It is therefore solely a judicial function to interpret a written instrument unless the interpretation turns upon the credibility of extrinsic evidence. Accordingly, an appellate court is not bound by a construction of the contract based solely upon the terms of the written instrument without the aid of evidence citations, where there is no conflict in the evidence citations, or a determination has been made upon incompetent evidence citation.

Evidence > Inferences & Presumptions > General Overview

HN2 Evidence, Inferences & Presumptions

It is only when conflicting inferences arise from conflicting evidence, not from uncontroverted evidence, that the trial court's resolution is binding. The very possibility of conflicting inferences, actually conflicting interpretations, far from relieving the appellate court of the responsibility of interpretation, signals the necessity of its assuming that responsibility.

Civil Procedure > Appeals > Standards of Review > General Overview

Contracts Law > Contract Interpretation > General Overview

HN3 Appeals, Standards of Review

Even in the absence of extrinsic evidence, the trial court's interpretation of a written instrument must be accepted if such interpretation is reasonable, or if it is one of two or more reasonable constructions of the instrument, or if it is "equally tenable" with the appellate court's interpretation. Such statements are not in conflict with case law if they are interpreted, as they should be, to mean only that an appellate court must determine that the trial court's interpretation is erroneous before it may properly reverse a judgment. They do not mean that the appellate court is absolved of its duty to interpret the instrument.

Contracts Law > Contract Conditions & Provisions > Express Conditions > General Overview

HN4 Contract Conditions & Provisions, Express Conditions

When payment of money is to be made from a specific fund, and not otherwise, the failure of such fund will defeat the right of recovery.

Contracts Law > Contract Conditions &

Provisions > Express Conditions > General Overview

HN5 Contract Conditions & Provisions, Express Conditions

Each party to a contract has a duty to do what the contract presupposes he will do to accomplish its purpose. Thus, a party who prevents fulfillment of a condition of his own obligation cannot rely on such condition to defeat his liability.

Contracts Law > ... > Estoppel > Equitable Estoppel > General Overview

HN6 Estoppel, Equitable Estoppel

Reasonable reliance resulting in a foreseeable prejudicial change in position is the essence of equitable estoppel, and therefore a compelling basis for preventing a party from invoking a condition that he represented as being satisfied.

Headnotes/Summary

Headnotes

CALIFORNIA OFFICIAL REPORTS HEADNOTES

CA(1) (1)

Contracts—Interpretation—Functions of Courts.

--The interpretation of a written instrument, even though it involves what might properly be called questions of fact, is essentially a judicial function to be exercised according to the generally accepted canons of interpretation so that the purposes of the instrument may be given effect.

CA(2) (2)

Evidence—Extrinsic Evidence.

--Extrinsic evidence is admissible to interpret a written instrument, but not to give it a meaning to which it is not reasonably susceptible, and it is the instrument itself that must be given effect.

CA(3) (3)

Contracts—Interpretation—Functions of Courts—Evidence to Aid Construction.

--It is solely a judicial function to interpret a written instrument unless the interpretation turns on the credibility of extrinsic evidence.

CA(4) (4)

Id.—Interpretation—Functions of Courts—Evidence to Aid Construction.

--An appellate court is not bound by a construction of a contract based solely on the terms of the written instrument without the aid of evidence, where there is no conflict in the evidence, or a determination has been made on incompetent evidence. (Disapproving language in [Estate of Rule, 25 Cal.2d 1, 11 \[152 P.2d 1003, 155 A.L.R. 1319\]](#) to the effect that an appellate court must accept a trial court's interpretation of a written instrument when "conflicting inferences may be drawn" from extrinsic evidence, and language invoking [Estate of Rule in E. K. Wood Lumber Co. v. Higgins, 54 Cal.2d 91, 94 \[4 Cal.Rptr. 523, 351 P.2d 795\]](#); [Faus v. Pacific Electric Ry. Co., 146 Cal.App.2d 370, 375 \[303 P.2d 814\]](#); [Overton v. Vita-Food Corp., 94 Cal.App.2d 367, 370 \[210 P.2d 757\]](#); also disapproving a similar statement concerning conflicting inferences from uncontroverted evidence in [Estate of Jones, 55 Cal.2d 531, 538 \[11 Cal.Rptr. 574, 360 P.2d 70\]](#).)

CA(5) (5)

Id.—Interpretation—Functions of Courts—Evidence to Aid Construction.

--Statements that even in the absence of extrinsic evidence the trial court's interpretation of a written instrument must be accepted by an appellate court if such construction is reasonable, or if it is one of two or more reasonable constructions of the instrument, or if it is equally tenable with the appellate court's interpretation, are proper if they are interpreted to mean only that an appellate court must determine that the trial court's interpretation is erroneous before it may properly reverse a judgment; they do not mean that the appellate court is absolved of its duty to interpret the instrument.

CA(6) (6)

Architects—Compensation.

--Under a contract for an architect's services containing several subdivisions pertaining to payment of the architect's fee and providing in one such subdivision that payment would be made only from construction loan funds, the builder's failure to obtain satisfactory financing arrangements for the project released it from any obligation to pay the architect any more than the 25 per cent of his full fee that he had already received under the contract where the construction loan condition was not limited to the payment provision in the contract subdivision in which it appeared but applied to all subdivisions relating to payment of the architect's fee, since the parties contemplated payment over and above 25 per cent of the architect's full fee only on commencement of construction and the evidence showed that the architect knew the builder's ability to undertake construction turned on availability of loan funds.

CA(7) (7)

Contracts—Interpretation—Conditions.

--When payment of money is to be made from a specific fund, and not otherwise, the failure of such fund will defeat the right of recovery.

CA(8) (8)

Id.—Interpretation—Terms Implied.

--Each party to a contract has a duty to do what the contract presupposes he will do to accomplish its purpose.

CA(9) (9)

Id.—Breach—Prevention of Performance.

--A party who prevents fulfillment of a condition of his own obligation under a contract cannot rely on such condition to defeat his liability.

CA(10) (10)

Estoppel—Equitable Estoppel—Operation.

--In an action against a builder by an architect to recover the balance of his fee allegedly due under a contract for his services, the doctrine of equitable estoppel was not available to the architect so as to deny the builder the right to invoke a condition of the contract that payment to the architect would be made only from construction loan funds where, at the time the architect chose to proceed with his work on the project, the builder did not represent that construction loan funds had been obtained and the architect did not reasonably rely on the existence of such funds.

CA(11) (11)

Architects—Compensation.

--In an action to recover the balance of an architect's fee allegedly due under a contract conditioning payment of such compensation on the obtaining of construction loan funds by the builder, no breach of the builder's duty to notify the architect when it became clear that construction loan funds could not be obtained appeared where

the architect did not show that he failed to receive such notice, and where, even assuming that he had no notice, he did not prove the extent to which he suffered damages by continuing to work after he should have received notice.

Counsel: Floyd H. Norris as Amicus Curiae on behalf of Plaintiff and Appellant.

Felix H. McGinnis for Plaintiff and Appellant.

Launer, Chaffee & Hanna, Daniel L. Stack, Miller, Nisson, Kogler & Wenke and Clark Miller for Defendants and Respondents.

C. Douglas Wikle, Walter Atkinson, W. Alan Thody, Dell L. Falls, Cooper & Boller, Rowland, Paras & Clowdus and Gloyd T. Clowdus as Amici Curiae on behalf of Defendants and Respondents.

Judges: In Bank. Traynor, C. J. McComb, J., Peters, J., Tobriner, J., Peek, J., Mosk, J., and Burke, J., concurred.

Opinion by: TRAYNOR

Opinion

[*863] [**841] [***769] In December 1960 defendant Bristol Development Company entered into a written contract with plaintiff engaging him as an architect to design an office building for a lot in Santa Ana and to assist in supervising construction. Plaintiff's services were to be performed in two phases. He completed [****2] phase one, drafting preliminary plans and specifications, on January 20, 1961, and Bristol paid him \$ 600.

The dispute concerns Bristol's obligation to pay plaintiff under phase two of the contract. The contract provided that "a condition precedent to any duty or obligation on the part [*864] of the Owner [Bristol] to commence, continue or complete Phase 2 or to pay Architect any fee therefor, shall be the obtaining of economically satisfactory financing arrangements which will enable Owner, in its sole

judgment, to construct the project at a cost which in the absolute decision of the Owner shall be economically feasible." It further provided that when Bristol notified plaintiff to proceed with phase two it should pay him an estimated 25 per cent of his fee, and that it would be obligated to pay the remaining 75 per cent "only from construction loan funds."

Using plaintiff's preliminary plans and specifications, Bristol obtained from a contractor an estimate of \$ 1,020,850 as the cost of construction, including the architect's fee of 6 per cent. On the basis of this estimate, it received an offer from a savings and loan company for a construction loan upon condition that [****3] it show clear title to the Santa Ana lot and execute a first trust deed in favor of the loan company.

Shortly after obtaining this offer from the loan company, Bristol wrote plaintiff on March 14, 1961, to proceed under phase [**842] [***770] two of the contract. In accordance with the contract, Bristol paid plaintiff \$ 12,000, an estimated 25 per cent of his total fee. Thereafter, plaintiff began to draft final plans and specifications for the building.

Bristol, however, was compelled to abandon the project because it was unable to show clear title to the Santa Ana lot and thus meet the requirements for obtaining a construction loan. Bristol's title became subject to dispute on May 23, 1961, when defendant James Freeman filed an action against Bristol claiming an adverse title.¹ On August 15, 1961, Bristol notified plaintiff to stop work on the project.

[****4] Plaintiff brought an action against Bristol and Freeman to recover for services performed under the contract and to foreclose a mechanic's lien on the Santa Ana lot. The trial court, sitting without a jury, found that Bristol's obligation to

¹ Freeman had previously conveyed the Santa Ana lot to Bristol on October 1, 1960, with the understanding that Bristol would construct an office building upon the lot and pay Freeman an annuity.

make further payment under the contract was conditioned upon the existence of construction loan funds. On the ground that this condition to plaintiff's right to further payment was not satisfied, the court entered judgment for defendants. Plaintiff appeals.

The trial court properly admitted evidence extrinsic to the written instrument to determine the circumstances under [*865] which the parties contracted and the purpose of the contract. ([Code Civ. Proc., § 1860](#); [Civ. Code, § 1647](#); see Corbin, *The Interpretation of Words and the Parol Evidence Rule*, 50 Cornell L.Q. 161.) There is no conflict in that evidence. Bristol contends, however, that an appellate court is compelled to accept any reasonable interpretation of a written instrument adopted by a trial court whether or not extrinsic evidence has been introduced to interpret the instrument and whether or not that evidence, if any, is in conflict. We do not agree with this contention.

[****5] Since there has been confusion concerning the rules for appellate review of the interpretation of written instruments (see [Estate of Platt, 21 Cal.2d 343, 352 \[131 P.2d 825\]](#) [concurring opinion]; [Estate of Shannon, 231 Cal.App.2d 886, 889-890 \[42 Cal.Rptr. 278\]](#)), it is appropriate here to define the scope of such review.

CA(1) (1) HN1 The interpretation of a written instrument, even though it involves what might properly be called questions of fact (see Thayer, *Preliminary Treatise on Evidence*, pp. 202-204), is essentially a judicial function to be exercised according to the generally accepted canons of interpretation so that the purposes of the instrument may be given effect. (See [Civ. Code, §§ 1635-1661](#); [Code Civ. Proc., §§ 1856- 1866](#).) **CA(2) (2)** Extrinsic evidence is "admissible to interpret the instrument, but not to give it a meaning to which it is not reasonably susceptible" ([Coast Bank v. Minderhout, 61 Cal.2d 311, 315 \[38 Cal.Rptr. 505, 392 P.2d 265\]](#); [Nofziger v. Holman, 61 Cal.2d 526, 528 \[39 Cal.Rptr. 384, 393 P.2d 696\]](#); [Imbach v.](#)

[Schultz, 58 Cal.2d 858, 860 \[27 Cal.Rptr. 160, 377 P.2d 272\]](#)), and it is the instrument itself that must be given effect. [****6] ([Civ. Code, §§ 1638, 1639](#); [Code Civ. Proc., § 1856](#).) **CA(3) (3)** It is therefore solely a judicial function to interpret a written instrument unless the interpretation turns upon the credibility of extrinsic evidence. **CA(4) (4)** Accordingly, "An appellate court is not bound by a construction of the contract based solely upon the terms of the written instrument without the aid of evidence [citations], where there is no conflict in the evidence [citations], or a determination has been made upon incompetent evidence [citation]." ([Estate of Platt, 21 Cal.2d 343, 352 \[131 P.2d 825\]](#). Accord, [Moore v. Wood, 26 Cal.2d 621, 629-630 \[160 P.2d 772\]](#); [Western Coal & Mining Co. v. Jones, 27 Cal.2d 819, 826-827 \[167 P.2d 719, 164 A.L.R. 685\]](#); [Estate of \[*866\] Wunderle, 30 Cal.2d 274, 280 \[181 P.2d 874\]](#); [Estate of Fleming, 31 Cal.2d 514, 523 \[190 P.2d 611\]](#); [Meyer v. \[**843\] \[***771\] State Board of Equalization, 42 Cal.2d 376, 381 \[267 P.2d 257\]](#).)²

[****7] **CA(5) (5)** It is true that cases have said that **HN3** even in the absence of extrinsic evidence the trial court's interpretation of a written instrument must be accepted "if such interpretation

² We disapprove language in [Estate of Rule, 25 Cal.2d 1, 11 \[152 P.2d 1003, 155 A.L.R. 1319\]](#), to the effect that an appellate court must accept a trial court's interpretation of a written instrument when "conflicting inferences may be drawn" from extrinsic evidence. The rule of [Estate of Platt, 21 Cal.2d 343, 352 \[131 P.2d 825\]](#), and the cases applying it make it clear that **HN2** it is only when conflicting inferences arise from conflicting evidence, not from uncontroverted evidence, that the trial court's resolution is binding. "The very possibility of . . . conflicting inferences, actually conflicting interpretations, far from relieving the appellate court of the responsibility of interpretation, signalizes the necessity of its assuming that responsibility." ([Estate of Rule, supra, 25 Cal.2d at p. 17](#) [dissenting opinion].) Language in [E. K. Wood Lumber Co. v. Higgins, 54 Cal.2d 91, 94 \[4 Cal.Rptr. 523, 351 P.2d 795\]](#); [Faus v. Pacific Electric Ry. Co., 146 Cal.App.2d 370, 375 \[303 P.2d 814\]](#); [Overton v. Vita-Food Corp., 94 Cal.App.2d 367, 370 \[210 P.2d 757\]](#), invoking *Estate of Rule*, is likewise disapproved. A similar statement concerning conflicting inferences from uncontroverted evidence in [Estate of Jones, 55 Cal.2d 531, 538 \[11 Cal.Rptr. 574, 360 P.2d 70\]](#), is also disapproved. The cases cited in support of such a rule by the *Jones* case did not involve the interpretation of written instruments.

is reasonable, or if [it] is one of two or more reasonable constructions of the instrument" (Prickett v. Royal Ins. Co., 56 Cal.2d 234, 237 [14 Cal.Rptr. 675, 363 P.2d 907, 86 A.L.R.2d 711]; Lundin v. Hallmark Productions, Inc. 161 Cal.App.2d 698, 701 [327 P.2d 166]), or if it is "equally tenable" with the appellate court's interpretation (Estate of Northcutt, 16 Cal.2d 683, 690 [107 P.2d 607]; accord, Estate of Cuneo, 60 Cal.2d 196, 201 [32 Cal.Rptr. 409, 384 P.2d 1]). Such statements are not in conflict with Estate of Platt, supra, 21 Cal.2d 343, if they are interpreted, as they should be, to mean only that an appellate court must determine that the trial court's interpretation is erroneous before it may properly reverse a judgment. (See Estate of Shannon, 231 Cal.App.2d 886, 893 [42 Cal.Rptr. 278].) They do not mean that the appellate court is absolved of its duty to interpret the instrument.

Since there is no conflict in the extrinsic evidence in the present [****8] case we must make an independent determination of the meaning of the contract. After providing for payment of an estimated 25 per cent of plaintiff's fee upon written notice to proceed with phase two, paragraph 4 of the contract makes the following provisions for payment:

[*867] "4.

"(a)

"(b) Upon completion of final working plans, specifications and engineering, or authorized commencement of construction, whichever is later, a sum equal to Seventy-Five (75%) Per Cent of the fee for services in Phase 2, less all previous payments made on account of fee; provided, however, that this payment shall be made only from construction loan funds.

"(c) The balance of the fee shall be paid in equal monthly payments commencing with the first day of the month following payments as set forth in Paragraph 4(b); provided, however, that Ten (10%) Per Cent of the fee based upon the reasonable

estimated cost of construction shall be withheld until thirty (30) days after the Notice of Completion of the project has been filed.

"(d) If any work designed or specified by the Architect is abandoned or [sic] suspended in whole or in part, the Architect is to be paid forthwith [****9] to the extent that his services have been rendered under the preceding terms of this paragraph. Should such abandonment or suspension occur before the Architect has completed any particular phase of the work which entitles him to a partial payment as aforesaid, the Architect's fee shall be prorated based upon the percentage of the [**844] [***772] work completed under that particular phase and shall be payable forthwith."

CA(6) (6) Invoking the provision that "payment shall be made only from construction loan funds," Bristol contends that since such funds were not obtained it is obligated to pay plaintiff no more than he has already received under the contract.

Plaintiff, on the other hand, contends that he performed 95 per cent of his work on phase two and is entitled to that portion of his fee under subdivision (d) of paragraph 4 less the previous payment he received. He contends that subdivision (d) is a "savings clause" designed to secure partial payment if, for any reason, including the lack of funds, the project was abandoned or suspended. Plaintiff would limit the construction loan condition to subdivision (b), for it provides "that *this payment* shall be made only from [****10] construction loan funds" (emphasis added), whereas the other subdivisions are not expressly so conditioned.

The construction loan condition, however, cannot reasonably be limited to subdivision (b), for subdivisions (c) and [*868] (d) both refer to the terms of subdivision (b) and must therefore be interpreted with reference to those terms. Thus, the "balance of the fee" payable "in equal monthly payments" under subdivision (c) necessarily refers

to the preceding subdivisions of paragraph 4.³ In the absence of evidence to the contrary, subdivision (d), upon which plaintiff relies, must likewise be interpreted to incorporate the construction loan condition (*Civ. Code, § 1641*), for it makes explicit reference to payment under preceding subdivisions by language such as "under the preceding terms" and "partial payment as aforesaid." Subdivision (d) merely provides for accelerated payment upon the happening of a contingency. It contemplates, however, that construction shall have begun, for it provides for prorated payment upon the abandonment or suspension in whole or in part of "any work designed or specified by the Architect." Implicit in the scheme is the purpose to provide, [****11] after initial payments, for a series of payments from construction loan funds, with accelerated payment from such funds in the event that construction was abandoned or suspended. Although plaintiff was guaranteed an estimated 25 per cent of his fee if the project was frustrated before construction, further payment was contemplated only upon the commencement of construction. This interpretation is supported by evidence that plaintiff knew that Bristol's ability to undertake construction turned upon the availability of loan funds. Accordingly, the trial court properly determined that payments beyond an estimated 25 per cent of plaintiff's fee for phase two were to be made only from construction loan funds.

CA(7) (7) HN4 When "payment of money is to be made from a specific fund, and not otherwise, the failure of such fund will defeat the [****12] right of recovery." (*Rains v. Arnett, 189 Cal.App.2d 337, 347 [11 Cal.Rptr. 299]*.) Although there are exceptions to this rule, plaintiff has neither alleged nor proved facts that entitle him to recover on the ground of any exception.

CA(8) (8) HN5 Each party to a contract has a duty to do what the contract presupposes he will do to

accomplish its purpose. (*Bewick v. Mecham, 26 Cal.2d 92, 99 [156 P.2d 757, 157 A.L.R. 1277]*.) **CA(9) (9)** Thus, "A party who prevents fulfillment of a condition of his own obligation . . . cannot rely [**869] on such condition to defeat his liability." (*Bewick v. Mecham, supra, 26 Cal.2d at p. 99; Pacific Venture Corp. v. Huey, 15 Cal.2d 711, 717 [104 P.2d 641]*.) Plaintiff, however, has not shown that Bristol failed to make the proper and reasonable efforts that were contemplated to secure the loan from which he was to be paid. (Cf. *Rosenheim v. Howze, 179 Cal. 309 [176 P. 456]*.) The risk that a loan might not be obtained even though Bristol [**845] [****773] acted properly and in good faith was a risk clearly anticipated even though the reason the loan failed may not have been foreseen.

CA(10) (10) Nor has plaintiff established grounds [****13] for applying the doctrine of equitable estoppel to deny Bristol the right to invoke the construction loan condition. (See *Code Civ. Proc., § 1962, subd. 3*.) If, by its letter of March 14, asking plaintiff to proceed with his work under phase two of the contract, Bristol had induced plaintiff to believe that funds had been obtained, and if plaintiff had reasonably relied upon such representation, Bristol could not invoke the condition to defeat its contractual liability. **HN6** Reasonable reliance resulting in a foreseeable prejudicial change in position is the essence of equitable estoppel, and therefore a compelling basis for preventing a party from invoking a condition that he represented as being satisfied. (See *Crestline Mobile Homes Mfg. Co. v. Pacific Finance Corp., 54 Cal.2d 773, 778-781 [8 Cal.Rptr. 448, 356 P.2d 192]*; cf. *Drennan v. Star Paving Co., 51 Cal.2d 409, 414-415 [333 P.2d 757]*.) Bristol, however, did not represent that funds had been obtained, and plaintiff did not reasonably rely upon the existence of construction loan funds when he undertook work under phase two of the contract. A representative of Bristol told plaintiff before he began phase [****14] two of his work that although Bristol would be able to pay plaintiff \$ 12,000, an estimated 25 per cent of his fee, "they

³Although neither the amount of each monthly payment nor the number of payments was specified, the amount and number could be determined from the time estimated to construct the building.

would not be able to proceed unless actual construction funds were obtained." Plaintiff, knowing that funds had not been obtained, nevertheless chose to proceed with his work on the project.

CA(11) (11) Finally, plaintiff has not shown that Bristol breached the duty to give him notice when it became clear that construction funds could not be obtained. Without such funds the purpose of the contract would have been frustrated and plaintiff could not have been paid the balance of his fee. Plaintiff therefore would have been excused from performing so long as there was a reasonable doubt as to his compensation. Whether or not such funds were obtained was a matter [*870] peculiarly within Bristol's knowledge. Accordingly, Bristol had a duty to notify plaintiff that the project was imperiled when Freeman filed his action against Bristol on May 23, for Bristol then knew or should have known that it would be unable to obtain a loan. Plaintiff, however, has not shown that he failed to receive such notice, and even if it is assumed that he had no notice, he did not prove the [****15] extent to which he suffered damages by continuing to work after he should have received notice.

The judgment is affirmed.



Positive

As of: October 18, 2026 7:14 AM Z

Patel v. Liebermensch

Supreme Court of California

December 22, 2008, Filed

S156797

Reporter

45 Cal. 4th 344 *; 197 P.3d 177 **; 86 Cal. Rptr. 3d 366 ***; 2008 Cal. LEXIS 14504 ****

SUNIL PATEL, Plaintiff and Respondent, v.
MORRIS LIEBERMENSCH et al., Defendants and
Appellants.

sought further review.

Overview

Subsequent History: Reported at [Patel \(Sunil\) v. Liebermensch \(Morris\), 2008 Cal. LEXIS 14919 \(Cal., Dec. 22, 2008\)](#)

Prior History: [****1] Court of Appeal Fourth Appellate District, Division One, No. D048582. Superior Court of San Diego County, No. GIC839199, Joan Marie Lewis and Judith F. Hayes, Judges.

[Patel v. Liebermensch, 154 Cal. App. 4th 373, 64 Cal. Rptr. 3d 608, 2007 Cal. App. LEXIS 1370 \(Cal. App. 4th Dist., 2007\)](#)

Core Terms

escrow, manner of payment, option contract, sales contract, terms of the contract, specific performance, reasonable time, ascertain, seller, deed, buy, future agreement, essential terms, deposit

Case Summary

Procedural Posture

Plaintiff buyer sued defendant sellers for specific performance of a real estate option contract. The trial court entered judgment for the buyer, and the Court of Appeal, Fourth Appellate District, Division One (California), reversed. The buyer

The contract did not specify the length of the escrow period. After the buyer exercised the option, the parties entered into discussions regarding the length of escrow and were unable to agree. The jury returned special verdicts finding that the parties had entered into an option contract giving the buyer the right to purchase the property and that the terms of the contract were sufficiently clear to carry out this objective. The trial court accordingly granted specific performance and required the parties to perform their respective contractual duties within 60 days after mailing of the notice of entry of judgment. The court held that the contract was not too uncertain to enforce under [Civ. Code, § 3390, subd. 5](#), because there was no substantial dispute or uncertainty over the manner of payment. The length of the escrow period was an incidental matter that had no effect on the ultimate payment to be made at the close of escrow. The escrow period was not a necessary term in the contract of sale, and time of payment was a contract term determinable by implication as a matter of law pursuant to [Civ. Code, § 1657](#). The essential terms of the contract were easily ascertainable.

Outcome

The court reversed the judgment of the court of appeal.

LexisNexis® Headnotes

Contracts Law > Remedies > Specific Performance

Real Property Law > Purchase & Sale > Remedies > Specific Performance

HN1 Remedies, Specific Performance

The equitable remedy of specific performance cannot be granted if the terms of a contract are not certain enough for the court to know what to enforce. [Civ. Code, § 3390, subd. 5](#). However, the law does not favor but leans against the destruction of contracts because of uncertainty; and it will, if feasible, so construe agreements as to carry into effect the reasonable intentions of the parties if they can be ascertained.

Real Property Law > Purchase & Sale > Contracts of Sale > Formalities

HN2 Contracts of Sale, Formalities

An agreement for the purchase or sale of real property does not have to be evidenced by a formal contract drawn with technical exactness in order to be binding. Equity does not require that all the terms and conditions of the proposed agreement be set forth in the contract. The usual and reasonable conditions of such a contract are, in the contemplation of the parties, a part of their agreement. In the absence of express conditions, custom determines incidental matters relating to the opening of an escrow, furnishing deeds, title insurance policies, prorating of taxes, and the like. The material factors to be ascertained from the written contract are the seller, the buyer, the price to be paid, the time and manner of payment, and the property to be transferred, describing it so it may be identified.

Real Property Law > Purchase & Sale > Contracts of Sale > Escrow

Real Property Law > Purchase & Sale > Contracts of Sale > Formalities

HN3 Contracts of Sale, Escrow

While parties are free to include escrow specifications in a contract of sale, they are not necessary terms. Insofar as the period of escrow effectively determines the time of payment, the provisions of [Civ. Code, § 1657](#), apply to the interpretation of the contract.

Business & Corporate
Compliance > ... > Contract
Formation > Offers > Definite Terms
Contracts Law > Contract
Formation > Offers > Definite Terms

Real Property Law > Purchase & Sale > Contracts of Sale > Formalities

HN4 Offers, Definite Terms

See [Civ. Code, § 1657](#).

Business & Corporate
Compliance > ... > Contract
Formation > Offers > Definite Terms
Contracts Law > Contract
Formation > Offers > Definite Terms

Real Property Law > Purchase & Sale > Contracts of Sale > Formalities

HN5 Offers, Definite Terms

A reasonable time for payment may be implied in a contract for the sale of real property. Under [Civ. Code, § 1657](#), the purchase price is deemed payable upon delivery of the deed.

Business & Corporate
Compliance > ... > Contract
Formation > Offers > Definite Terms
Contracts Law > Contract
Formation > Offers > Definite Terms

HN6 Offers, Definite Terms

The parties' conduct subsequent to the formation of a contract, including the dispute which arises and the remedy sought, may be relevant in determining which terms they considered essential. However, few contracts would be enforceable if the existence of subsequent disputes were taken as evidence that an agreement was never reached.

Business & Corporate
Compliance > ... > Contract
Formation > Offers > Definite Terms
Contracts Law > Contract
Formation > Offers > Definite Terms

HN7 Offers, Definite Terms

A promise may be sufficiently definite when it contains an option given to the promisor or promisee, yet if an essential element is reserved for the future agreement of both parties, the promise can give rise to no legal obligation until such future agreement. Since either party by the terms of the promise may refuse to agree to anything to which the other party will agree, it is impossible for the law to affix any obligation to such a promise.

Business & Corporate
Compliance > Contracts > Contract
Formation > Meeting of Minds
Contracts Law > Contract
Formation > Acceptance > Meeting of Minds

HN8 Contract Formation, Meeting of Minds

Parties' undisclosed intentions do not become part of a contract. The mere state of mind of the parties

is not the object of inquiry. The terms of the contract are determinable by an external, not by an internal standard -- or by what has been termed the objective rather than the subjective test.

Headnotes/Summary

Summary

CALIFORNIA OFFICIAL REPORTS SUMMARY

The trial court entered judgment for the buyer in an action for specific performance of a real estate option contract. The contract did not specify the length of the escrow period. After the buyer exercised the option, the parties entered into discussions regarding the length of escrow and were unable to agree. The jury returned special verdicts finding that the parties had entered into an option contract giving the buyer the right to purchase the property and that the terms of the contract were sufficiently clear to carry out this objective. The trial court accordingly granted specific performance and required the parties to perform their respective contractual duties within 60 days after mailing of the notice of entry of judgment. (Superior Court of San Diego County, No. GIC839199, Joan Marie Lewis and Judith F. Hayes, Judges.) The Court of Appeal, Fourth Dist., Div. One, No. D048582, reversed.

The Supreme Court reversed the judgment of the Court of Appeal. The court held that the contract was not too uncertain to enforce under [Civ. Code, § 3390, subd. 5](#), because there was no substantial dispute or uncertainty over the manner of payment. The length of the escrow period was an incidental matter that had no effect on the ultimate payment to be made at the close of escrow. The escrow period is not a necessary term in a contract of sale, and time of payment is a contract term determinable by implication as a matter of law pursuant to [Civ. Code, § 1657](#). The essential terms of the contract were easily ascertainable. (Opinion by Corrigan, J.,

expressing the unanimous view of the court.)

Headnotes

CALIFORNIA OFFICIAL REPORTS HEADNOTES

CA(1) (1)

Specific Performance § 10—Principles Governing Grant of Relief—Contract—Certainty— Construction Favoring Reasonable Intentions of Parties.

The equitable remedy of specific performance cannot be granted if the terms of a contract are not certain enough for the court to [*345] know what to enforce ([Civ. Code, § 3390, subd. 5](#)). However, the law does not favor but leans against the destruction of contracts because of uncertainty; and it will, if feasible, so construe agreements as to carry into effect the reasonable intentions of the parties if they can be ascertained.

CA(2) (2)

Real Estate Sales § 39—Construction and Operation of Contract—Stipulations as to Time and Order of Performance—Incidental Matters.

An agreement for the purchase or sale of real property does not have to be evidenced by a formal contract drawn with technical exactness in order to be binding. Equity does not require that all the terms and conditions of the proposed agreement be set forth in the contract. The usual and reasonable conditions of such a contract are, in the contemplation of the parties, a part of their agreement. In the absence of express conditions, custom determines incidental matters relating to the opening of an escrow, furnishing deeds, title insurance policies, prorating of taxes, and the like. The material factors to be ascertained from the written contract are the seller, the buyer, the price to be paid, the time and manner of payment, and the

property to be transferred, describing it so it may be identified.

CA(3) (3)

Real Estate Sales § 39—Construction and Operation of Contract—Stipulations as to Time and Order of Performance—Incidental Matters— Escrow Specifications.

While parties are free to include escrow specifications in a contract of sale, they are not necessary terms. Insofar as the period of escrow effectively determines the time of payment, the provisions of [Civ. Code, § 1657](#), apply to the interpretation of the contract.

CA(4) (4)

Real Estate Sales § 39—Construction and Operation of Contract—Stipulations as to Time and Order of Performance—Reasonable Time Implied.

A reasonable time for payment may be implied in a contract for the sale of real property. Under [Civ. Code, § 1657](#), the purchase price is deemed payable upon delivery of the deed.

CA(5) (5)

Contracts § 3—Consent—Relevance of Subsequent Conduct.

The parties' conduct subsequent to the formation of a contract, including the dispute which arises and the remedy sought, may be relevant in determining which terms they considered essential. However, few contracts would be enforceable if the existence of subsequent disputes were taken as evidence that an agreement was never reached.

CA(6) (6)

Contracts § 18—Certainty—Option Agreement.

A promise may be sufficiently definite when it contains an option given to the promisor or [*346] promisee, yet if an essential element is reserved for the future agreement of both parties, the promise can give rise to no legal obligation until such future agreement. Since either party by the terms of the promise may refuse to agree to anything to which the other party will agree, it is impossible for the law to affix any obligation to such a promise.

CA(7) (7)

Specific Performance § 10—Principles Governing Grant of Relief—Contract—Certainty—Time of Payment—Real Estate Option Contract.

A real estate option contract for purchase of a condominium was sufficiently certain to enforce by specific performance, even though it did not specify the length of the escrow period. The parties made no provision for future agreement. The essential terms of their option contract were easily ascertainable. In the absence of a specified time of payment, a reasonable period was allowable under [Civ. Code, § 1657](#). Undisclosed intentions, even if shown, would not have become part of the contract. The mere state of mind of the parties is not the object of inquiry. The terms of the contract are determinable by an external, not by an internal standard—or by what has been termed the objective rather than the subjective test. Measured by any reasonable standard there was mutual assent to a contract which was sufficiently certain.

[[Cal. Real Estate Law & Practice \(2008\) ch. 74, § 74.11](#); [Cal. Forms of Pleading and Practice \(2008\) ch. 528, Specific Performance, § 528.20](#); 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 116.]

Counsel: Lee R. Goldberg for Defendants and Appellants.

Mitchell & Gilleon, James C. Mitchell and Daniel

M. Gilleon for Plaintiff and Respondent.

Judges: Opinion by Corrigan, J., expressing the unanimous view of the court.

Opinion by: Corrigan

Opinion

[***368] [**179] **CORRIGAN, J.**—In [****2] this action for specific performance of a real estate option contract, the Court of Appeal reversed a judgment for the plaintiff. Over a vigorous dissent, the court held that the contract was too uncertain to enforce because it lacked the essential terms of time and manner of payment. We reverse. It is settled that if a contract for the sale of real property specifies no time of payment, a reasonable time is allowed. The manner of payment is also a term that may be supplied by implication, and was not significantly uncertain in this case. The Court of Appeal majority erred by failing to enforce a straightforward option contract. It also improperly relied on the [*347] parties' conduct after their dispute arose to conclude that they had failed to reach a binding agreement.

BACKGROUND

Defendant Morris Liebermensch and his wife Zita owned a condominium unit in San Diego, through a family partnership. They acquired the property with the idea that one of their children might want to live there after finishing college. However, none of the children used the unit, and it was vacant in July 2003 when plaintiff Sunil Patel expressed interest in leasing the property with an option to buy. On July 25, [****3] Liebermensch faxed Patel the following proposal:

“We propose to rent our condominium at 7255 Navajo Road, Apt. #370, San Diego, CA 92119 at a monthly rate of \$ 1,400.00 starting August 7, 2003 for one year ending August 6, 2004; with a security deposit of \$ 1,200.00 and the following option to buy:

“Through the end of the year 2003, the selling price is \$ 290,000. The selling price increases by 3% through the end of the year 2004 and cancels with expiration of your occupancy. Should this option to buy be exercised, \$ 1,200.00 shall be refunded to you.

“Please indicate your acceptance by signing below and returning to me at the above referenced fax.”

Patel signed the proposal, with a handwritten amendment providing an option to renew until August 2005. Zita Liebermensch prepared a form rental agreement, adding a paragraph stating “OPTION TO BUY IS ATTACHED.” Patel and Morris Liebermensch signed the agreement. Liebermensch also signed the option proposal and initialed Patel's amendment.

In July 2004, Patel sent Liebermensch a letter, enclosing a notice that he was exercising the option to purchase for the agreed price of \$ 298,700. In the letter, he said he and his wife were “anxious to [****4] complete the purchase as soon as reasonably possible so as to take advantage of the current interest rates.” Liebermensch sent Patel a purchase agreement dated August 16, 2004, referring to the parties' option agreement and Patel's notice exercising the option. The purchase agreement included an “as is” clause, a requirement of a 10 percent deposit with the escrow company, and a specification that “The SELLER will require ninety (90) days or sooner to close escrow with the right to extend the closing for an additional thirty (30) days if necessary in order to exercise a [1031](#) exchange.” At trial, Liebermensch conceded that the parties had not previously discussed the subject of a tax-deferred [*348] exchange under [26 United States Code section 1031](#) (section 1031 exchange). Mrs. Liebermensch testified that she and her husband had not discussed the matter in 2003 when the option contract [***369] was negotiated, although she was familiar with the subject of [section 1031](#) exchanges.

Patel responded with a proposed agreement in which the “as is” clause was qualified by giving the

buyer an option to cancel if not fully satisfied, and which provided that if the seller required more than 30 days to close [**180] escrow, [****5] the deposit would be reduced to \$ 5,000 and the seller would “be responsible for all escrow and other expenses after 30 days of opening escrow.” Patel testified that he included the latter clause because his mortgage broker had informed him an interest rate could not be guaranteed for as long as 90 to 120 days.

Liebermensch rejected this proposal. According to Patel, Liebermensch told him “if you want to buy the condominium, you buy it on my bid.” At some point, Patel and his wife Bela signed Liebermensch's original purchase agreement and sent it to Liebermensch. However, Liebermensch did not respond.

Patel filed suit, seeking specific performance of the option agreement. The jury returned special verdicts finding that the parties had entered into an option contract giving Patel the right to purchase the property, and that the terms of the contract were sufficiently clear to carry out its objective.¹ Based on those verdicts, the trial court entered judgment granting Patel specific performance. The parties were required to perform their respective duties under the contract within 60 days after the notice of entry of judgment was mailed.

The Court of Appeal reversed, in a split decision. The majority reasoned that the Liebermensches were bound by the terms of the option contract only if it included all the essential terms of a real estate purchase contract. Here, the contract did not specify the time or manner of payment. The majority decided that, while it might be reasonable in some circumstances to imply standard terms on

¹The latter issue was improperly presented to the [****6] jury. Whether a contract is certain enough to be enforced is a question of law for the court. (*Bustamante v. Intuit, Inc.* (2006) 141 Cal.App.4th 199, 208–209 [45 Cal. Rptr. 3d 692]; cf. *Sterling v. Taylor* (2007) 40 Cal.4th 757, 771 [55 Cal. Rptr. 3d 116, 152 P.3d 420].) However, as noted by the dissenting justice below, the correct result was reached in the trial court despite the error.

these points into the contract, here it was not. The majority noted the tax consequences facing the Liebermensches, and concluded that the parties' ongoing dispute over economic conditions after Patel exercised the option demonstrated they had never agreed on all material terms of the transaction.

[*349]

The dissenting justice would have supplied terms for time and manner of payment by implication, allowing a reasonable time and assuming that the manner of payment was cash or cash [****7] equivalent upon delivery of the deed. The dissent faulted the majority for relying on negotiations arising after Patel exercised his option.

We granted Patel's petition for review.

DISCUSSION

CA(1) (1) Settled principles of contract law govern this case. HN1 The equitable remedy of specific performance cannot be granted if the terms of a contract are not certain enough for the court to know what to enforce. (*Civ. Code*, § 3390, subd. 5; *Buckmaster v. Bertram* (1921) 186 Cal. 673, 676 [200 P. 610].) However, “ “[t]he law does not favor but leans against the destruction of contracts because of uncertainty; and it will, if feasible, so construe agreements as to carry into effect the reasonable intentions of the parties if [they] can be ascertained” ’ ” (*McIlmoil v. Frawley Motor Co.* (1923) 190 Cal. 546, 549 [213 ***370] P. 971]; accord, *Bohman v. Berg* (1960) 54 Cal.2d 787, 797 [8 Cal. Rptr. 441, 356 P.2d 185] (citing cases); *Blackburn v. Charnley* (2004) 117 Cal.App.4th 758, 766 [11 Cal. Rptr. 3d 885]; *Okun v. Morton* (1988) 203 Cal.App.3d 805, 817 [250 Cal. Rptr. 220].)

HN2 CA(2) (2) “An agreement for the purchase or sale of real property does not have to be evidenced by a formal contract drawn with technical exactness in order to be binding.” (*King v. Stanley* (1948) 32 Cal.2d 584, 588 [197 P.2d 321] (*King*).) “Equity does not require that all the [****8] terms and

conditions of the proposed agreement be set forth in the contract. The usual and reasonable conditions of such a contract are, in the contemplation of the parties, a part of their agreement. In the absence of express conditions, custom determines incidental matters relating to the opening of an escrow, furnishing deeds, title insurance policies, prorating of taxes, and the like. [Citations.] The material [**181] factors to be ascertained from the written contract are the seller, the buyer, the price to be paid, the time and manner of payment, and the property to be transferred, describing it so it may be identified [citations].” (*Id.* at pp. 588–589.)

Here, the Court of Appeal agreed with the Liebermensches that the absence of terms specifying the time and manner of payment made the parties' contract too uncertain to enforce. It is clear, however, that there was no substantial dispute or uncertainty over the *manner* of payment by Patel. ² [*350] While the purchase agreement drafted by Liebermensch after Patel exercised his option added a requirement that Patel make a “good faith” 10 percent deposit with the escrow company, and Patel countered with a deposit proposal of his own, these were [****9] merely incidental matters that had no effect on the ultimate payment to be received by the Liebermensches at the close of

² It is not clear why the *King* court included “manner of payment” in its recitation of material terms. (*King, supra*, 32 Cal.2d at p. 589.) The supporting authority cited in *King* does not refer to the subject. (*Breckinridge v. Crocker* (1889) 78 Cal. 529 [21 P. 179]; *Grafton v. Cummings* (1878) 99 U.S. 100 [25 L. Ed. 366]; *O'Donnell v. Lutter* (1945) 68 Cal.App.2d 376 [156 P.2d 958]; see *King, supra*, 32 Cal.2d at p. 589.) In any event, the manner of payment, like the time of payment, is a matter that may be determined by reference to custom and reason when the contract is silent on the question. (*Vezaldenos v. Keller* (1967) 254 Cal.App.2d 816, 825 [62 Cal. Rptr. 808]; *Dennis v. Overholtzer* (1960) 178 Cal.App.2d 766, 775 [3 Cal. Rptr. 193], disapproved on other grounds in *Ellis v. Mihelis* (1963) 60 Cal.2d 206, 221 [32 Cal. Rptr. 415, 384 P.2d 7].) This is not a case in which [****10] financing provisions were included in the contract but with insufficient certainty to protect the seller's interests. (Cf. *Krasley v. Superior Court* (1980) 101 Cal.App.3d 425, 430–431 [161 Cal. Rptr. 629]; *Stockwell v. Lindeman* (1964) 229 Cal.App.2d 750, 756–758 [40 Cal. Rptr. 555].)

escrow.³ It was the length of the escrow period, unspecified in the contract, that was the sticking point. *King*, however, makes it plain that the escrow period is not a necessary term in a contract of sale, and that in any event “time of payment” is a contract term determinable by implication as a matter of law.

The contract in *King*, evidenced by an exchange of letters between the parties, made no reference to time of payment or the period of escrow. (*King*, *supra*, 32 Cal.2d at pp. 586–587.) The defendant claimed the escrow instructions included terms to which she had not [***371] agreed. (*Id.* at p. 589.) This court rejected her arguments, reasoning in part as follows:

“The escrow instruction signed by the plaintiff that he was to pay the seller's title and escrow charges constituted compliance with the defendant's condition [that plaintiff would take care of escrow expenses], *which was unaffected by the addition of the 30-day time limitation*. In a contract for the sale of real estate the delivery of the deed and the payment of the purchase price are dependent and concurrent [****11] conditions (*Civ. Code*, § 1657; *Cates v. McNeil* [(1915)] 169 Cal. 697, 706 [147 P. 944]; *Whittier v. Gormley* [(1906)] 3 Cal.App. 489 [86 P. 726]). But it was well within the contemplation of the parties that the money should remain in the escrow for such time as would be necessary to determine the matter of merchantable title, and 30 days is a reasonable time for that purpose. *Inasmuch as the instructions were merely supplementary to the executory contract and not the contract itself*, the parties could have arranged for a different period” (*King*, *supra*, 32 Cal.2d at pp. 590–591, italics added.)

[*351]

CA(3) (3) Thus, *HN3* while parties are obviously free to include escrow specifications in the contract

of sale, they are not necessary terms. Insofar as the period of escrow effectively determines the time of payment, the provisions of *Civil Code section 1657* apply to the interpretation of the contract: *HN4* “If no time is specified for the performance of an act required to be performed, a reasonable time is allowed. If the act is in its nature capable of being done instantly—as, for example, if it consists in the payment of money only—it must be performed immediately upon the thing to be done being exactly ascertained.” **CA(4) (4)** A [****12] legion of cases supports the proposition [**182] that *HN5* a reasonable time for payment may be implied in a contract for the sale of real property.⁴ Under *Civil Code section 1657*, the purchase price is deemed payable upon delivery of the deed. (*King*,

⁴ E.g., *King*, *supra*, 32 Cal.2d at page 590; *Cates v. McNeil*, *supra*, 169 Cal. at page 706; *Copple v. Aigeltinger* (1914) 167 Cal. 706, 709 [140 P. 1073]; *House of Prayer v. Evangelical Assn. for India* (2003) 113 Cal.App.4th 48, 53–54 [7 Cal. Rptr. 3d 24]; *Hastings v. Matlock* (1985) 171 Cal.App.3d 826, 838 [217 Cal. Rptr. 856]; *Henry v. Sharma* (1984) 154 Cal.App.3d 665, 669 [201 Cal. Rptr. 478]; *Vezaldenos v. Keller*, *supra*, 254 Cal.App.2d at page 825; *San Francisco Hotel Co. v. Baior* (1961) 189 Cal.App.2d 206, 213 [11 Cal. Rptr. 32], disapproved on other grounds in *Ellis v. Mihelis*, *supra*, 60 Cal.2d at page 216; *Greenstone v. Claretian Theo. Seminary* (1959) 173 Cal.App.2d 21, 32 [343 P.2d 161] (disapproved on other grounds in *Ellis*, *supra*, 60 Cal.2d at p. 221); *Dennis v. Overholtzer*, *supra*, 171 Cal.App.2d at page 775; *Slye v. Brock* (1935) 3 Cal.App.2d 670, 674–675 [40 P.2d 290]; *Fogler v. Purkiser* (1932) 127 Cal.App. 554, 558–559 [16 P.2d 305]; *Whittier v. Gormley*, *supra*, 3 Cal.App. at page 491.

Here, as in *House of Prayer v. Evangelical Assn. for India*, *supra*, 113 Cal.App.4th at page 53, [****13] “[d]efendants have cited no case, and we are aware of no case, that concludes an agreement to sell real property is invalid because the written agreement, sufficient in every other respect, omits the time of payment.” The Liebermensches refer us to *Bruggeman v. Sokol* (1954) 122 Cal.App.2d 876 [265 P.2d 575]. There, however, far more than time and manner of payment was unresolved, including the price and description of the bulk of the property and the terms and conditions of interim financing. (*Id.* at pp. 881–882.)

Because time and manner of payment are terms that may be supplied by implication, it is inaccurate to refer to them as material elements that must appear in writing in every real estate sale agreement. (See *House of Prayer v. Evangelical Assn. for India*, *supra*, 113 Cal.App.4th at pp. 53–54; fn. 2, *ante*.) To the extent it imposes such a requirement, *King v. Stanley*, *supra*, 32 Cal.2d 584, is disapproved.

³ The trial court included no deposit requirements in its grant of specific performance. The Liebermensches have taken no exception to this omission, either in the Court of Appeal or in this court.

[\[***372\]](#) *supra*, 32 Cal.2d at p. 590; *Whittier v. Gormley*, *supra*, 3 Cal.App. at p. 491.)

CA(5) (5) The Court of Appeal majority recognized that a reasonable period may be supplied by implication, but decided that here the parties' unsuccessful attempts to complete the transaction showed the option agreement did not represent a meeting of the minds on all essential terms. This was error. **[****14]** **HN6** The parties' conduct subsequent to the formation of a contract, "including the dispute which arises and the remedy sought," may be relevant in determining which terms they considered essential. (*Rest.2d Contracts*, § 131, *com. g*, p. 338; see *Seaman's Direct Buying Service, Inc. v. Standard Oil Co.* (1984) 36 Cal.3d 752, 762–763 [206 Cal. Rptr. 354, 686 P.2d 1158]; *House of Prayer v. Evangelical Assn. for India*, *supra*, 113 Cal.App.4th 48, 53–54.) However, **[*352]** few contracts would be enforceable if the existence of subsequent disputes were taken as evidence that an agreement was never reached.

CA(6) (6) In this case, by signing the option contract the Liebermensches bound themselves to its terms. (*Palo Alto Town & Country Village, Inc. v. BBTC Company* (1974) 11 Cal.3d 494, 502–503 [113 Cal. Rptr. 705, 521 P.2d 1097].) They could have, but did not, provide for an extended escrow period in the contract. The Liebermensches suggest this was a matter left for future agreement, as in *Etco Corp. v. Hauer* (1984) 161 Cal.App.3d 1154 [208 Cal. Rptr. 118]. Not so. In *Etco* and similar cases, a provision specifically contemplating future agreement on an essential term was held unenforceable. **HN7** "[A] promise may be sufficiently definite when it contains an option given to the promisor or promisee, yet if an essential **[****15]** element is reserved for the future agreement of both parties, the promise can give rise to no legal obligation until such future agreement. Since either party by the terms of the promise may refuse to agree to anything to which the other party will agree, it is impossible for the law to affix any obligation to such a promise." (*Ablett v. Clauson* (1954) 43 Cal.2d 280, 284–285

[\[272 P.2d 753\]](#), quoting 1 Williston, *Contracts* (rev. ed. 1936) 131, § 45; see *Etco, supra*, at pp. 1156, 1158; see also *Roberts v. Adams* (1958) 164 Cal.App.2d 312, 316–318 [330 P.2d 900] (discussing cases).)

HN8 CA(7) (7) The parties here made no provision for future agreement. The essential terms of their option contract are easily ascertainable. In the absence of a specified time of **[**183]** payment, a reasonable period is allowable under *Civil Code section 1657*.⁵ Even if the Liebermensches had shown that they were contemplating a *section 1031* exchange when they agreed to the option contract, their undisclosed intentions would not have become part of the contract. "The mere state of mind of the parties is not the object of inquiry. The terms of the contract are determinable by an external, not by an internal standard—or by what has been termed the objective rather **[****16]** than the subjective test. (*Zurich etc. Assur. Co. v. Industrial Acc. Com.* [(1933)] 132 Cal.App. 101, 104 [22 P.2d 572].) Measured by any reasonable standard there is here mutual assent to a contract which is sufficiently certain so that the court was within its power in decreeing specific performance." (*King, [***373]* *supra*, 32 Cal.2d at pp. 591–592; see also 1 Witkin, *Summary of Cal. Law* (10th ed. 2005) *Contracts*, § 116, pp. 155–156.)

[*353]

DISPOSITION

We reverse the judgment of the Court of Appeal.

George, C. J., Kennard, J., Baxter, J., Werdegarr, J., Chin, J., and Moreno, J., concurred.

End of Document

⁵The Liebermensches do not argue that the 60 days allotted by the trial court's judgment is an unreasonable period.



Positive

As of: October 18, 2026 7:14 AM Z

People v. Aguirre

Court of Appeal of California, Third Appellate District

May 24, 2021, Opinion Filed

C088852

Reporter

64 Cal. App. 5th 652 *; 279 Cal. Rptr. 3d 126 **; 2021 Cal. App. LEXIS 436 ***; 2021 WL 2070079

THE PEOPLE, Plaintiff, v. LUIS CARLOS AGUIRRE, Defendant and Respondent; STATE DEPARTMENT OF STATE HOSPITALS, Objector and Appellant. [And 36 other cases.*]

Prior History: [***1] APPEAL from the omnibus order for sanctions of the Superior Court of San Joaquin County, No. MAN-CR-FE-2017-00010388, Richard A. Vlavianos, Judge.

Disposition: Affirmed.

Case Summary

Overview

HOLDINGS: [1]-Monetary sanctions were properly imposed on the State Department of State Hospitals for failing to timely admit, pursuant to a trial court order, 31 of 37 defendants found incompetent to stand trial (IST). In IST cases, the department is directly involved before the court such that it qualifies as a person under [Code Civ. Proc., § 177.5](#); [2]-The trial court properly determined that the department lacked good cause, based in part on multiple prior sanctions for the same problem.

Outcome

Orders affirmed.

LexisNexis® Headnotes

Governments > Legislation > Interpretation

Civil Procedure > Sanctions

* *People v. Avila* (Nos. LOD-CR-FE-2017-0013589, MAN-CR-FE-2017-0015474); *People v. Ayala* (No. STK-CR-FE-2017-0012142); *People v. Barrales* (No. STK-CR-FE-2016-0016094); *People v. Benipal* (Nos. MAN-CR-FE-2015-0016626, MAN-CR-MI-2015-0004023, MAN-CR-MDV-2016-0014533, MAN-CR-MI-2015-0003729); *People v. Black* (No. MAN-CR-FECOD-2016-0012243); *People v. Brown* (No. STK-CR-FER-2017-0008439); *People v. Caporusso* (No. LOD-CR-FE-2018-0000639); *People v. Carpenter* (No. STK-CR-FER-2018-0002839); *People v. Catalano* (Nos. MAN-CR-FE-2017-0015001, MAN-CR-FE-2017-0006107, MAN-CR-FE-2014-0000622, MAN-CR-FE-2015-0002368); *People v. Chum* (No. STK-CR-FE-2017-0013624); *People v. Crenshaw* (No. STK-CR-FE-2016-0015271); *People v. Crites* (No. STK-CR-FER-2017-0004240); *People v. Davis* (No. MAN-CR-FE-2017-0010360); *People v. Day* (No. STK-CR-FE-2016-0013228); *People v. Edwards* (No. STK-CR-FE-2016-0007645); *People v. Furgerson* (No. STK-CR-FE-2016-0009675); *People v. Garduno* (No. MAN-CR-FE-2017-0013068); *People v. George* (No. STK-CR-FE-2016-0006472); *People v. Glass* (No. MAN-CR-FE-2015-0002266); *People v. Guilford* (No. STK-CR-FE-2016-0010040); *People v. Harris* (No. STK-CR-FER-2017-0005289); *People v. Jackson* (No. STK-CR-FE-2017-0013355); *People v. Johnson* (No. STK-CR-FER-2016-0016043); *People v. Lott* (Nos. STK-CR-FER-2017-0005145, STK-CR-FE-2016-0016085); *People v. McDonald* (No. STK-CR-FE-COD-2015-0007343); *People v. Moppins* (No. STK-CR-FER-2016-0002241); *People v. Nawabi* (Nos. MAN-CR-FE-2017-0000935, MAN-CR-FE-2016-0000465, MAN-CR-FE-2014-0000414, MAN-CR-FE-2014-0000684, MAN-CR-FE-2018-0002301); *People v. Newton* (Nos. STK-CR-FE-2013-0007996, STK-CR-FE-2016-0013154); *People v. Palma* (No. STK-CR-FE-2016-0015891); *People v. Poindexter* (STK-CR-FE-2017-14999); *People v. Ramirez* (Nos. STK-CR-FDV-2017-0013745, STK-CR-FDV-2017-0003906); *People v. Riberal* (No. STK-CR-FER-2018-000785); *People v. Steeley* (No. STK-CR-FDV-2018-0002926); *People v. White* (No. STK-CR-FE-2016-0015469); *People v. Wilhite* (No. STK-CR-FER-2016-0014229); *People v. Williams* (No. STK

CR-FE-2017-0015101).

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

HN1 The court reviews orders imposing sanctions for abuse of discretion. The trial court must exercise its discretion in a reasonable manner with one of the statutorily authorized purposes in mind and must be guided by existing legal standards. A mere difference of opinion between the appellate and trial courts is insufficient to warrant reversal. Questions of law, on the other hand, are subject to de novo review. When a trial court relies on a statute as authority to award sanctions, the court review the interpretation of the statute de novo.

Governments > Legislation > Interpretation

HN2 The rules of statutory construction require the court to ascertain the intent of the enacting legislative body so that the court may adopt the construction that best effectuates the purpose of the law. In determining such intent, a court must look first to the words of the statute themselves, giving to the language its usual, ordinary import and according significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose. A construction making some words surplusage is to be avoided. The words of the statute must be construed in context, keeping in mind the statutory purpose. The goal is to select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences.

Governments > Legislation > Interpretation

HN3 A statute's plain meaning controls the court's

interpretation unless its words are ambiguous. A statute is regarded as ambiguous if it is capable of two constructions, both of which are reasonable. When a statute is ambiguous, the court typically considers evidence of the Legislature's intent beyond the words of the statute. The court may examine a variety of extrinsic aids, including the statutory scheme of which the provision is a part, the history and background of the statute, the apparent purpose, and any considerations of constitutionality, in an attempt to ascertain the most reasonable interpretation of the measure.

Governments > Legislation > Interpretation

HN4 The court relies on the legislative history of an ambiguous statute as dispositive only when that history is itself unambiguous.

Governments > Legislation > Interpretation

HN5 The word "including" in a statute is ordinarily a term of enlargement rather than limitation. The word includes for purposes of statutory construction is not synonymous with means or constitutes. Where the word include is used to refer to specified items, it may be expanded to cover other items.

Civil Procedure > Sanctions > Eligibility for Sanctions > Parties Subject to Sanction

HN6 It is reasonable to construe the word "person" in [Code Civ. Proc. § 177.5](#), (sanctions for violations of lawful orders) in terms of a non-exhaustive list of categories of persons the court may sanction under the statute.

Governments > Legislation > Interpretation

HN7 According to the ejusdem generis rule of statutory construction, where general words follow

the enumeration of particular classes of persons or things, the general words will be construed as applicable only to persons or things of the same general nature or class as those enumerated. But the rule does not require that the general word is expressly limited to the enumerated list; rather, the rule only requires that any unenumerated person be of the same kind as the enumerated persons.

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Competency to Stand Trial

Civil Procedure > Sanctions > Eligibility for Sanctions > Parties Subject to Sanction

HN8 In cases involving defendants declared incompetent to stand trial (IST), the State Department of State Hospitals is directly involved in the IST proceeding before the court such that it qualifies as a person pursuant to [Code Civ. Proc., § 177.5](#) (sanctions for violations of lawful orders).

Civil Procedure > Sanctions > Misconduct & Unethical Behavior

Civil Procedure > Sanctions > Eligibility for Sanctions

HN9 [Code Civ. Proc., § 177.5](#) (sanctions for violations of lawful orders) requires only that a court find the person violated the order without good cause or substantial justification. This does not require a willful violation, but merely one committed without a valid excuse.

Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion

Evidence > Burdens of Proof > Allocation

Civil Procedure > Sanctions

HN10 The court reviews orders imposing sanctions for violations of lawful orders for abuse of discretion. The trial court must exercise its

discretion in a reasonable manner with one of the statutorily authorized purposes in mind and must be guided by existing legal standards. A mere difference of opinion between the appellate and trial courts is insufficient to warrant reversal. An appellate tribunal is not authorized to substitute its judgment for that of the trial judge. A trial court's exercise of discretion will not be disturbed unless it appears that the resulting injury is sufficiently grave to manifest a miscarriage of justice. In other words, discretion is abused only if the court exceeds the bounds of reason, all of the circumstances being considered. The sanctioned person has the burden to establish an abuse of discretion.

Headnotes/Summary

Summary

[*652] CALIFORNIA OFFICIAL REPORTS SUMMARY

The trial court imposed sanctions on the State Department of State Hospitals ([Code Civ. Proc., § 177.5](#)) for failing to timely admit 31 of 37 defendants found, in separate criminal trials, to be incompetent to stand trial (IST). (Superior Court of San Joaquin County, No. MAN-CR-FE-2017-00010388, Richard Vlavianos, Judge.)

The Court of Appeal affirmed the sanction orders. In IST cases, the department is directly involved before the court such that it qualifies as a **[*653]** person under [Code Civ. Proc., § 177.5](#). The trial court properly determined that the department lacked good cause, based in part on multiple prior sanctions for the same problem. (Opinion by Duarte, J., with Blease, Acting P. J., and Mauro, J., concurring.)

Headnotes

CALIFORNIA OFFICIAL REPORTS HEADNOTES

[CA\(1\)](#) (1)

Contempt § 6—Sanctions—Review.

The court reviews orders imposing sanctions for abuse of discretion. The trial court must exercise its discretion in a reasonable manner with one of the statutorily authorized purposes in mind and must be guided by existing legal standards. A mere difference of opinion between the appellate and trial courts is insufficient to warrant reversal. Questions of law, on the other hand, are subject to de novo review. When a trial court relies on a statute as authority to award sanctions, the court reviews the interpretation of the statute de novo.

[CA\(2\)](#) (2)

Statutes § 30—Construction—Legislative Intent—Plain Meaning—Context.

The rules of statutory construction require the court to ascertain the intent of the enacting legislative body so that the court may adopt the construction that best effectuates the purpose of the law. In determining such intent, a court must look first to the words of the statute themselves, giving to the language its usual, ordinary import and according significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose. A construction making some words surplusage is to be avoided. The words of the statute must be construed in context, keeping in mind the statutory purpose. The goal is to select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences.

[CA\(3\)](#) (3)

Statutes § 42—Construction—Aids—Legislative History.

A statute's plain meaning controls the court's interpretation unless its words are ambiguous. A statute is regarded as ambiguous if it is capable of two constructions, both of which are reasonable. When a statute is ambiguous, the court typically considers evidence of the Legislature's intent beyond the words of the statute. The court may examine a variety of extrinsic aids, including the statutory scheme of which the provision is a part, the history and background of the statute, the apparent purpose, and any considerations of constitutionality, in an attempt to ascertain the most reasonable interpretation of the measure. The court relies on the legislative history of an ambiguous statute as dispositive only when that history is itself unambiguous.

[*654] [CA\(4\)](#) (4)

Statutes § 35—Construction—Including.

The word “including” in a statute is ordinarily a term of enlargement rather than limitation. The word “includes,” for purposes of statutory construction, is not synonymous with means or constitutes. Where the word “include” is used to refer to specified items, it may be expanded to cover other items.

[CA\(5\)](#) (5)

Contempt § 6—Sanctions—Person.

It is reasonable to construe the word “person” in [Code Civ. Proc., § 177.5](#) (sanctions for violations of lawful orders), in terms of a nonexhaustive list of categories of persons the court may sanction under the statute.

[CA\(6\)](#) (6)

Statutes § 34—Construction—Ejusdem Generis.

According to the *ejusdem generis* rule of statutory

construction, where general words follow the enumeration of particular classes of persons or things, the general words will be construed as applicable only to persons or things of the same general nature or class as those enumerated. But the rule does not require that the general word is expressly limited to the enumerated list; rather, the rule only requires that any unenumerated person be of the same kind as the enumerated persons.

CA(7) (7)

Contempt § 6—Sanctions—State Department of State Hospitals—Defendants Found Incompetent to Stand Trial.

Monetary sanctions were properly imposed on the State Department of State Hospitals for failing to timely admit, pursuant to a trial court order, 31 of 37 defendants found incompetent to stand trial (IST). In IST cases, the department is directly involved in the proceeding before the court such that it qualifies as a person pursuant to [Code Civ. Proc., § 177.5](#).

[[Cal. Forms of Pleading and Practice \(2021\) ch. 135, Contempt, § 135.15.](#)]

CA(8) (8)

Statutes § 30—Construction—Language—Generally—Literal Interpretation; Plain Meaning Rule.

The court reviews orders imposing sanctions for violations of lawful orders for abuse of discretion. The trial court must exercise its discretion in a reasonable manner with one of the statutorily authorized purposes in mind and must be guided by existing legal standards. A mere difference of opinion between the appellate and trial courts is insufficient to warrant reversal. An appellate tribunal is not authorized to substitute its judgment for that of the trial judge. A trial court's exercise of discretion will not be disturbed unless it appears

that the resulting injury is sufficiently grave to manifest a miscarriage of justice. In other words, discretion is abused only if the court exceeds the bounds of reason, all of the circumstances being considered. The sanctioned person has the burden to establish an abuse of discretion.

Counsel: [*655] Xavier Becerra, Attorney General, Cheryl L. Feiner, Assistant Attorney General, Gregory D. Brown, Darrell W. Spence and Kevin L. Quade, Deputy Attorneys General, for Objector and Appellant.

No appearance for plaintiff.

Diane Nichols, under appointment by the Court of Appeal, for Defendants and Respondent.

Judges: Opinion by Duarte, J., with Blease, Acting P. J., and Mauro, J., concurring.

Opinion by: Duarte, J.

Opinion

[**130] **DUARTE, J.**—The State Department of State Hospitals (Department) oversees state hospitals that provide treatment to individuals facing criminal charges who are found incompetent to stand trial (IST). In separate criminal cases, the trial court found 37 defendants IST and ordered the Department to admit them within 60 days of the receipt of an informational packet. The Department failed to timely admit 31 of the 37 defendants. These defendants separately sought sanctions against the Department pursuant to [Code of Civil Procedure section 177.5](#), claiming violation of the court's order.¹ The trial court found the Department in violation of the order, and imposed monetary sanctions [***2] pursuant to [section 177.5](#), which provides in relevant part: “A judicial officer shall have the power to impose reasonable money sanctions ... for any violation of a lawful court

¹ Further undesignated statutory references are to the Code of Civil Procedure.

order by a person, done without good cause or substantial justification. ... For the purposes of this section, the term ‘person’ includes a witness, a party, a party's attorney, or both.”

The Department appeals. It contends the trial court was not authorized to impose sanctions against it under [section 177.5](#). Additionally, it claims good cause or substantial justification for violating the order even assuming the court could impose sanctions under [section 177.5](#). We disagree with the Department's arguments and affirm.

FACTS AND PROCEEDINGS

Statutory Background

A court may not try or sentence a defendant in a criminal proceeding while the defendant is incompetent. (*Pen. Code, § 1367, subd. (a).*) If there is a doubt as to the defendant's competency to stand trial, criminal proceedings are suspended, and the defendant's mental competence is determined in a [*656] hearing. (*Id., § 1368, subds. (a)–(c).*) The Department has no role in competency proceedings and does not receive prior notice of them. (*Id., §§ 1367–1370.*)

If the defendant is found IST, the court shall commit the defendant to the Department. (*Pen. Code, § 1370, subd. (a)(5).*) Prior to the [***3] defendant's admission, the court must provide the Department with a “1370 packet,” which includes copies of the commitment order, criminal history information, arrest reports, psychiatric examination reports, and medical records. (*Id., § 1370, subd. (a)(3).*) The Department uses the information in the packet to determine the appropriate placement for the defendant. (*Id., § 1370, subd. (a)(2)(A).*) The Department generally admits each individual according to the date the court committed the defendant to the Department. (*Cal. Code Regs., tit. 9, § 4710, subd. (a).*)

There is no statutory requirement setting a deadline

for admission of an IST defendant to the Department after issuance of a commitment order. However, the Department is required to report the defendant's progress toward recovery to the court within 90 days of commitment. (*Pen. Code, § 1370, subd. (b)(1).*) Until the court declares the defendant restored to competency, the underlying criminal proceeding is suspended. (*Id., § 1370, subd. (a)(1).*)

[**131] *Increase in IST Defendant Referrals*

Referral rates of IST defendants to the Department have substantially increased since 2013, and the Department's admissions have increased since 2010. Each state hospital overseen by the Department has reached its capacity, resulting in a waitlist for admission to a state [***4] hospital. As of August 13, 2018, the waitlist for admission to a state hospital, a jail-based competency treatment program, or the admission, evaluation, and stabilization center included 754 patients.

Between February 2014 and August 2018, the Department increased its total IST defendant capacity by 677 beds, and the Department has taken steps to improve the efficiency of the systems for placing and admitting IST defendants to maximize the utilization of available treatment beds. The 2018–2019 Governor's budget also included additional funding for pretrial diversion programs aimed toward decreasing IST defendant referrals to the Department.

Procedural Background

Between September 2016 and May 2018, 37 defendants facing charges in unrelated criminal cases were found IST by the Superior Court of San [*657] Joaquin County under *Penal Code section 1370*. Each defendant was referred to the community program director, San Joaquin County mental health, for a placement report and recommendations. The trial court ordered each defendant committed to the Department within approximately 60 days of receipt of the

commitment packet from the court and the San Joaquin County Sheriff, and it ordered the sheriff to deliver each defendant [***5] to the Department.² The court also ordered the Department to provide its 90-day report on specific dates, typically approximately 90 days from the date of the order. The court's order did not mention or account for the waitlist for admission to state hospitals. The Department was not a party to the competency proceedings, and the record does not reflect that the Department was aware of the proceedings before receiving the subject commitment orders.

From January to June 2018, each defendant filed a request for [section 177.5](#) sanctions against the Department. The requests alleged the Department failed to comply with the trial court's order to admit each defendant on a timely basis and requested that the court issue an order to show cause why sanctions should not be imposed. The court issued the order to show cause.

The Department filed a motion to dismiss the orders to show cause; it argued the court had no authority to issue sanctions against the Department under [section 177.5](#) because the statute only permits sanctions against a witness, a party, or a party's attorney, and the Department did not fall within any of those categories.

At the first hearing on the sanctions, the trial court heard argument as to all defendants [***6] and determined the Department could be sanctioned under [section 177.5](#). The court found that the Department's statutory obligation to provide information to the court following commitment made the Department a witness to the proceedings. The court also found the Department "borders on becoming a party" following the commitment proceedings due to the Department's statutory obligations. Even if the Department were neither a witness nor a party, the court found the Department [**132] was "intended to be included in [\[section\]](#)

[177.5](#)."

The trial court found the Department had violated its orders except as to four defendants who had been timely admitted, and set a second hearing. At the second hearing, the court imposed sanctions against the Department in the amount of \$500 for each defendant admitted from 61 to 75 days after the date of providing the *Penal Code* section 1370 packet, \$1,000 for each defendant admitted between 76 and 90 days after providing the packet, and \$1,500 for each defendant admitted more than 90 days after providing the packet.

[*658]

The trial court subsequently issued an omnibus order imposing sanctions. The total amount of sanctions was \$34,000 in 31 of the 37 matters. The court reiterated its conclusion that the Department could [***7] be sanctioned under [section 177.5](#) because the Department is "at least a real party in interest" and a witness within the meaning of [section 177.5](#).

The trial court rejected the Department's claims that lack of funding and bed space constituted good cause or substantial justification for its failure to comply with the court's orders. The court recognized the Department is an agency of the State of California, and any lack of funding is a conscious budgetary decision made by the State. The court also rejected the Department's argument its efforts to solve the problem of the delay in admission constitutes good cause or substantial justification for violating the court's order. The court noted the Department's ongoing efforts do not help the individuals whose due process rights the Department already violated, and despite the Department's ongoing efforts, admission delays are only slightly improved. Indeed, the court noted: "The Department touts improvements but the fact remains that as of the date of this order most defendants are waiting well beyond the 60 day order (from the providing of the packet); and do not have a meaningful report within the time period mandated by *Penal Code* [s]ection 1370. The

² The trial court ordered that the defendant be admitted by a specific date in each case, which varied slightly.

Department continues to violate nearly [***8] every 60-day admit-by order set by the Court, and *Penal Code* [s]ection 1370, by a considerable margin.”

The Department timely appeals from the court's order.

DISCUSSION

I

Sanctions Against the Department

The Department asserts the trial court was not authorized to impose sanctions against it under [section 177.5](#), because it was not a “person” within the meaning of the statute and, alternatively, that there was good cause for its failure to obey the order.

The Department emphasizes that the statute defines the “person” who may be sanctioned as “includ[ing] a witness, a party, a party's attorney, or both” and contends the plain language and legislative history of [section 177.5](#) demonstrate the statute was therefore intended to authorize sanctions *only* against witnesses, parties, and parties' attorneys. The Department contends it played none of these roles in this case.

[*659]

The Department raised almost identical arguments in two recent cases, which were rejected by the Court of Appeal, First Appellate District, Division Four, in [People v. Hooper \(2019\) 40 Cal.App.5th 685 \[253 Cal. Rptr. 3d 369\]](#) (*Hooper*) and by the Court of Appeal, Second Appellate District, Division One, in [People v. Kareem A. \(2020\) 46 Cal.App.5th 58 \[259 Cal. Rptr. 3d 545\]](#) (*Kareem A.*). As we will explain, we agree with the conclusions reached in those cases.

[**133] *A. Standard of Review*

[CA\(1\)](#) (1) [HN1](#) “We review orders imposing sanctions [***9] for abuse of discretion. [Citation.] The trial court must exercise its discretion in a ‘reasonable manner with one of the statutorily authorized purposes in mind and must be guided by existing legal standards.’ [Citation.] A mere difference of opinion between the appellate and trial courts is insufficient to warrant reversal. [Citation.] Questions of law, on the other hand, are subject to de novo review. [Citation.] When a trial court relies on a statute as authority to award sanctions, we review the interpretation of the statute de novo. [Citation.]” ([Hooper, supra, 40 Cal.App.5th at pp. 691–692.](#))

B. Principles of Statutory Construction

[CA\(2\)](#) (2) “In analyzing the scope of ... [section 177.5](#), [HN2](#) ‘[w]ell-established rules of statutory construction require us to ascertain the intent of the enacting legislative body so that we may adopt the construction that best effectuates the purpose of the law.’ [Citation.] “In determining such intent, a court must look first to the words of the statute themselves, giving to the language its usual, ordinary import and according significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose. A construction making some words surplusage is to be avoided. The words of the statute [***10] must be construed in context, keeping in mind the statutory purpose” [Citation.] Our goal is to “‘select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences.’”” ([Kareem A., supra, 46 Cal.App.5th at p. 71.](#))

[CA\(3\)](#) (3) [HN3](#) “‘The statute's plain meaning controls the court's interpretation unless its words are ambiguous.’ [Citations.]” ([Imperial Merchant Services, Inc. v. Hunt \(2009\) 47 Cal.4th 381, 387–388 \[97 Cal. Rptr. 3d 464, 212 P.3d 736\].](#)) “A statute is regarded as ambiguous if it is capable of two constructions, both of which are reasonable.

[Citations.]” (*Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 776 [72 Cal. Rptr. 2d 624, 952 P.2d 641].) “When ... a statute is ambiguous, we typically consider [*660] evidence of the Legislature’s intent beyond the words of the statute. The court may examine a variety of extrinsic aids, including the statutory scheme of which the provision is a part, the history and background of the statute, the apparent purpose, and any considerations of constitutionality, ‘in an attempt to ascertain the most reasonable interpretation of the measure.’ [Citations.]” (*Ibid.*)

“[I]t is the language of the statute itself that has successfully braved the legislative gauntlet. It is that language which has been lobbied [***11] for, lobbied against, studied, proposed, drafted, restudied, redrafted, voted on in committee, amended, reamended, analyzed, reanalyzed, voted on by two houses of the Legislature, sent to a conference committee, and, after perhaps more lobbying, debate and analysis, finally signed “into law” by the Governor. The same care and scrutiny does not befall the committee reports, caucus analyses, authors’ statements, legislative counsel digests and other documents which make up a statute’s “legislative history.” [Citations.] Even assuming statutory ambiguity has been identified, *HN4* ‘[w]e rely on the legislative history of an ambiguous statute as dispositive only when that history is itself unambiguous.’ [Citations.]” (*Siskiyou County Farm Bureau v. Department of Fish & Wildlife* (2015) 237 Cal.App.4th 411, 439–440 [188 Cal. Rptr. 3d 141], [*134] reh’g. den. June 26, 2015.)

C. Plain Language of [Section 177.5](#)

As it did in *Hooper* and *Kareem A.*, the Department relies on *Vidrio v. Hernandez* (2009) 172 Cal.App.4th 1443 [92 Cal. Rptr. 3d 178] to support its argument that the plain language of [section 177.5](#) limits the trial court’s authority to impose sanctions to witnesses, parties, and parties’ attorneys. *Vidrio* involved an underlying lawsuit between an insured and an injured third party. The

appellate court concluded the insured’s insurer—not a party to the lawsuit—could not be sanctioned [***12] under [section 177.5](#) for its purported failure to participate in good faith in a mandatory settlement conference. The court based its decision on three grounds. First, [section 177.5](#) empowers a court to impose monetary sanctions for violation of a lawful court order without good cause, and the insurer did not violate a court order in that case. (*Vidrio*, at p. 1455.) Second, the court quoted [section 177.5](#) and concluded without any analysis the nonparty insurer was not a “person” subject to sanctions under [section 177.5](#) because it was not “a witness, a party, a party’s attorney, or both.” (*Vidrio*, at p. 1455.) Third, the court concluded the trial court improperly imposed sanctions both as in excess of the maximum \$1,500 and by imposing a monetary sanction payable to plaintiff’s counsel. (*Ibid.*)

Both *Hooper*, *supra*, 40 Cal.App.5th 685, and *Kareem A.*, *supra*, 46 Cal.App.5th 58 disagreed with *Vidrio*. Each opinion first recognized that [*661] unlike the insurer in *Vidrio*, the Department violated court orders. (*Hooper*, at p. 692; *Kareem A.*, at p. 71.) Both opinions also disagreed with *Vidrio*’s conclusion that [section 177.5](#) only authorizes sanctions against the specific categories of “person[s]” listed in the statute, noting that *Vidrio* did not analyze the statute’s use of the word “includes” or its legislative history and purpose. (*Hooper*, at pp. 692–693; *Kareem A.*, at p. 72.) The Department contends *Vidrio*’s complete lack of analysis is a “feature, [***13] not a bug,” because it demonstrates the statute’s language is clear, unambiguous, and restrictive. But it is *not* clear to us that *Vidrio* concluded the statutory language unambiguously established an exhaustive list of persons allowed to be sanctioned under the statute. The *Vidrio* court did not explicitly reach this conclusion and did not support its conclusory explanation that the insurer was not a “person” with any analysis.

Even assuming *Vidrio* is properly read to reach and support such a conclusion, we disagree, for reasons

we now explain.

CA(4) (4) At the outset, we agree with *Kareem A.* and *Hooper* that the plain language of [section 177.5](#), that a person “includes a witness, a party, a party’s attorney, or both,” could be read to provide a nonexhaustive list of persons who may be sanctioned under the statute. Like *Kareem A.*, we begin “by noting that our Supreme Court has held that [HN5](#) ‘the word “including” in a statute is “ordinarily a term of enlargement rather than limitation.”’” (*Kareem A., supra*, [46 Cal.App.5th at p. 72](#); see *Hooper, supra*, [40 Cal.App.5th at p. 692](#) [“[\[§\] 177.5](#) merely states that the term ‘includes’ a witness, a party, a party’s attorney, or both, indicating that the subsequent examples provide guidance as to who may be considered ‘a person’”].) “The word ‘includes’” for purposes [\[***14\]](#) of statutory construction “is not synonymous with ‘means’ or ‘constitutes.’” (*Persky v. Bushey* (2018) [21 Cal.App.5th 810, 825 \[230 Cal. Rptr. 3d 658\]](#).) [\[**135\]](#) “[W]here the word ‘include’ is used to refer to specified items, it may be expanded to cover other items. [Citation.]” (*Rea v. Blue Shield of California* (2014) [226 Cal.App.4th 1209, 1227 \[172 Cal. Rptr. 3d 823\]](#) (*Rea*), reh. den. July 9, 2014.)³

CA(5) (5) Not only are the terms “including” or “includes” typically words of enlargement (see *Rea, supra*, [226 Cal.App.4th at p. 1228](#) [“Both ‘includes’ and ‘including’ are words of enlargement”]), but “[b]y its terms, the statute does not purport to exclude any entity not specifically listed—as it would, for [\[*662\]](#) example, if it stated that the term ‘person’ is ‘defined as,’ ‘means,’ or ‘includes only’ a witness, a party, a party’s attorney,

or both.” (*Hooper, supra*, [40 Cal.App.5th at pp. 692–693](#).) Additionally, had the Legislature intended to establish an exhaustive list of “person[s]” the court may sanction under the statute, it could have easily dispensed with the word “person” altogether and drafted the first sentence of the statute to read: “A judicial officer shall have the power to impose reasonable money sanctions ... for any violation of a lawful court order by a person *witness, a party, a party’s attorney, or both*, done without good cause or substantial justification.” ([§ 177.5](#), italics added.) Accordingly, we agree with *Hooper* and *Kareem A.* that [\[***15\]](#) [HN6](#) it is reasonable to construe the word “person” in [section 177.5](#) in terms of a nonexhaustive list of categories of persons the court may sanction under the statute.

However, we recognize that the term “includes” is not necessarily a term of enlargement in all instances. Whether the term “includes” encompasses things not specified in the statute is a question of legislative intent. (*Hassan v. Mercy American River Hospital* (2003) [31 Cal.4th 709, 717 \[3 Cal. Rptr. 3d 623, 74 P.3d 726\]](#).) Accordingly, we analyze the statute’s legislative history to determine its intent and purpose.⁴

⁴ **CA(6) (6)** The Department contends the rule of construction known as *ejusdem generis* supports its position that the list of persons subject to sanctions is presumed to be exhaustive. It does not. [HN7](#) According to that rule, “‘where general words follow the enumeration of particular classes of persons or things, the general words will be construed as applicable only to persons or things of the same general nature or class as those enumerated. The rule is based on the obvious reason that if the Legislature had intended the general words to be used in their unrestricted sense, it would not have mentioned the particular things or classes of things which would in that event become mere surplusage.’ [Citations.]” (*Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters* (1979) [25 Cal.3d 317, 331, fn. 10 \[158 Cal. Rptr. 370, 599 P.2d 676\]](#).) But the rule does not require that the general word is expressly limited to the enumerated list; rather, the rule only requires that any unenumerated person be “‘of the same kind’” as the enumerated persons. (*People v. Arias* (2008) [45 Cal.4th 169, 180 \[85 Cal. Rptr. 3d 1, 195 P.3d 103\]](#).) Accordingly, the doctrine of *ejusdem generis* supports only the position that “persons” in [section 177.5](#) is limited to the “same kind” of persons listed in the statute.

³ We observe that [section 17, subdivision \(b\)](#) provides: “As used in this code, the following words have the following meanings, unless otherwise apparent from the context: [¶] ... [¶] (6) ‘Person’ includes a corporation as well as a natural person.” The term “includes” in [section 17](#) is ordinarily a term of enlargement and has been interpreted broadly. (See *People v. Western Air Lines, Inc.* (1954) [42 Cal.2d 621, 639 \[268 P.2d 723\]](#); *Oil Workers Intl. Union v. Superior Court* (1951) [103 Cal.App.2d 512, 570–571 \[230 P.2d 71\]](#) [unincorporated association in a person].)

D. Legislative History

At the Department's request, we have taken judicial notice of numerous documents of [section 177.5](#)'s legislative history. **[**136]** The original draft of Assembly Bill No. 3573 (1981–1982 Reg. Sess.) amended [section 177](#) to include what would later become [section 177.5](#) (added by Stats. 1982, ch. 1564, § 1, p. 6173). When it was introduced, the bill was described in part as follows: “This bill would expressly authorize judges to impose money sanctions payable to the county for specified acts which unreasonably or unlawfully interfere with the proceedings or processes of the court.” (Legis. Counsel's Dig., Assem. Bill No. 3573 (1981–1982 Reg. Sess.) 6 Stats. 1982, Summary Dig., p. 583 **[*663]**.) The bill as introduced read in part: “To impose money sanctions, notwithstanding **[***16]** any other provision of law, payable to the county in which the judicial officer is located or to a party for acts by a person involved in any proceeding which unreasonably or unlawfully interferes with the proceedings or processes of the court. Person includes, *but is not limited to*, a party, a party's attorney, or both.” (Assem. Bill No. 3573 (1981–1982 Reg. Sess.) § 1, *italics added*.)

The Legislature amended the bill's definition of “person” to read: “For the purposes of this section, the term ‘person’ includes a witness, a party, a party's attorney, or both.” (Assem. Bill No. 3573 (1981–1982 Reg. Sess.) as amended May 3, 1982.) The change appeared to result from the Legislature's concern that the definition of “person” as defined by the bill “could include people not directly involved in a specific action (e.g. reporters, demonstrators or courtroom observers).” (Assem. Com. on Judiciary, Analysis of Assem. Bill No. 3573 (1981–1982 Reg. Sess.) as amended Apr. 21, 1982, p. 3.) The Legislature suggested that the bill “be limited to people directly involved in a proceeding before the court (e.g., parties, attorney's *[sic]*, witnesses, jurors).” (*Ibid.*)

The bill's purpose was stated in various documents

throughout the legislative **[***17]** process. The Assembly Committee on the Judiciary described the bill's intent as “to broaden the authority of judges to impose money sanctions against persons whose acts interfere with court proceedings and processes.” (Assem. Com. on Judiciary, Analysis of Assem. Bill No. 3573 (1981–1982 Reg. Sess.) as amended Apr. 21, 1982, p. 1.)

The Assembly Committee on the Judiciary described the bill: “This bill would add to the statutorily recognized powers of judicial officers by authorizing judges to impose money sanctions not to exceed \$1,500 against a party, a party's attorney or a witness for violation of a lawful court order. The money would be payable to the county or a party. Sanctions would not be imposed if good cause for the violation was shown. A notice and hearing would be required prior to the sanctions being imposed.” (Assem. Com. on Judiciary, Analysis of Assem. Bill No. 3573 (1981–1982 Reg. Sess.) as amended Apr. 21, 1982, p. 1.) Staff comments provided the purpose of the bill according to the Los Angeles Superior Court, the source of the bill: “existing law is inadequate in affording judges the authority to ensure the orderly and efficient operation of the courts. The source **[***18]** suggests that contempt proceedings are often too cumbersome, costly and time consuming to prevent parties and their attorneys from using unreasonable tactics aimed at delay. Further, the source argues that without the specific statutory authority to impose the money sanctions provided by this bill, judges will continue to be at a loss to implement innovative methods (e.g., structured pre-trial conference) designed to reduce delay and reduce backlogs.” (Assem. **[*664]** Com. on Judiciary, Analysis of Assem. Bill No. 3573 (1981–1982 Reg. Sess.) as amended Apr. 21, 1982, p. 1.)

The Senate Committee on the Judiciary described the purpose of the bill in part: “The purpose of the bill is to broaden the **[**137]** types of misbehavior that a court may punish, increase the amount of the sanction that may be imposed, and provide for

limited indemnification of parties for losses due to the misbehavior of their opponents.” (Sen. Com. on Judiciary, Analysis on Assem. Bill No. 3573 (1981–1982 Reg. Sess.) as amended May 3, 1982, p. 2.) A comment in the committee’s analysis described the scope of the sanctions in part: “The bill would authorize judges in both criminal and civil cases, to fine a party, his attorney, or [***19] a witness up to \$1,500 for violating a lawful court order whether or not the violation occurred in or out of court.” (Sen. Com. on Judiciary, com. on Assem. Bill No. 3573 (1981–1982 Reg. Sess.) as amended May 3, 1982, p. 2.) A similar description in the enrolled bill report to the Governor described the bill as allowing the court to impose sanctions “for any violation of a lawful order by a witness, party, or party’s attorney.” (Dept. of Finance, Enrolled Bill Rep. on Assem. Bill No. 3573 (1981–1982 Reg. Sess.) as amended Aug. 11, 1982.)

The Legislative Digest summarized the bill: “Existing statutory law authorizes trial courts to order a party or the party’s attorney to pay any reasonable expenses incurred by another party as a result of tactics or actions not based on good faith which are frivolous or which cause unnecessary delay. [¶] This bill, in addition, would authorize a judicial officer to impose money sanctions, not exceeding \$1,500 and upon notice and an opportunity to be heard, for any violation of a lawful court order by a witness, a party, or a party’s attorney.” (Legis. Counsel’s Dig., Assem. Bill No. 3573 (1981–1982 Reg. Sess.) Stats. 1982, Summary Dig., p. 583.)

E. [***20] Analysis

The Department contends the Legislature’s decision to amend the definition of “person” by deleting “but not limited to” after “including” and adding “witness” to the definition of “person” conclusively demonstrates the Legislature’s intent to create an exhaustive, rather than exemplary, list of persons subject to sanctions under [section 177.5](#). This argument was rejected in [Hooper, supra, 40 Cal.App.5th at page 693](#), and [Kareem A., supra, 46 Cal.App.5th at page 73](#). In *Hooper* the court

characterized the deleted “but is not limited to” language as “seemingly redundant” and noted the Legislature did not specify the reason for deleting those words. ([Hooper, supra, 40 Cal.App.5th at p. 693](#).) The court observed the Legislature was concerned that such a broadly worded statute would allow sanctions against “‘people not directly involved’ in an action, such as ‘reporters, demonstrators, or [*665] courtroom observers.’” (*Ibid.*, quoting Assem. Com. on Judiciary, Rep. on Assem. Bill No. 3573 (1981–1982 Reg. Sess.) as amended Apr. 29, 1982.) The court concluded, “[I]n light of [the Department’s] statutory obligation in the criminal justice process relating to IST defendants, [the Department] resembles a party far more than it resembles one ‘not directly involved’ in an action, such as a reporter, demonstrator, or courtroom observer. [***21] Indeed, because [Penal Code section 1367](#) bars courts from trying and sentencing IST defendants, [the Department’s] provision of timely treatment plays an essential auxiliary role in the proper functioning of the criminal justice system.” (*Ibid.*)

The court in *Kareem A.* similarly recognized the amendments to the definition of “person” reflected the Legislature’s concern that the bill as written would allow the court to sanction courtroom attendees not involved in the proceedings, as opposed to courtroom participants directly [***138] involved in the proceedings before the court. ([Kareem A., supra, 46 Cal.App.5th at p. 73](#), citing Assem. Com. on Judiciary, Rep. on Assem. Bill No. 3573 (1981–1982 Reg. Sess.) as introduced Mar. 15, 1982.) The court concluded: “The Legislature’s intent was accordingly to allow judicial officers the ability to sanction ‘people directly involved in a proceeding before the court.’ (Assem. Com. on Judiciary, Rep. on Assem. Bill No. 3573 (1981–1982 Reg. Sess.) as introduced Mar. 15, 1982.) The fact that a person before the court does not fit squarely into the definition of a party, a party’s attorney, or a witness does not exclude them from being a person directly involved in a proceeding. Had the Legislature wanted to limit ‘person’ [***22] to only those three

categories, it would have omitted the word ‘includes’ altogether.” ([Kareem A., at p. 73](#))

The Department contends we should not credit these authorities because they were wrongly decided. It contends *Hooper* failed to sufficiently articulate its reasoning, incorrectly expanded the scope of the court's ability to impose sanctions without establishing the limits to that authority, and incorrectly concluded “but is not limited to” is redundant to “includes.” Similarly, the Department asserts the court in *Kareem A.* failed to meaningfully analyze the legislative purpose of deleting “but is not limited to” and adding “witness” to the definition of “person”; it contends the amendment conclusively demonstrated the Legislature's intent to create an exhaustive list.

At the outset, we agree with *Hooper* and *Kareem A.* that the Legislature's purpose was to allow judicial officers to sanction persons directly involved in a proceeding before the court for purposes of reducing delays and backlogs. ([Hooper, supra, 40 Cal.App.5th at p. 693](#); [Kareem A., supra, 46 Cal.App.5th at p. 73](#).) Citing concerns that the bill as initially introduced would broadly allow courts to impose sanctions on persons not directly involved in the proceedings—specifically reporters, demonstrators, and [***23] courtroom observers—the Legislature suggested limiting the scope of the bill “to people [*666] directly involved in a proceeding before the court (e.g., parties, attorney's [sic], witnesses, jurors).” (Assem. Com. on Judiciary, Analysis of Assem. Bill No. 3573 (1981–1982 Reg. Sess.) as amended Apr. 21, 1982, p. 3.)

We do not agree with the Department that the Legislature's decision to delete “but not limited to” and to add “witness” unambiguously establish a clear intent to create an exhaustive list of persons subject to sanctions including only parties, parties' attorneys, and witnesses. First and as evidenced here, limiting the categories of persons subject to sanctions to only parties, parties' attorneys, and witnesses runs counter to the intent of the bill, which was to allow the court to impose sanctions

on those persons directly involved in, and a necessary component of, the proceeding. *Penal Code* section 1370 requires the Department to produce a 90-day report designed to keep IST cases moving toward resolution. Recurring delays in admitting IST defendants resulting in the Department's repeated failure to timely produce 90-day reports results in the very delays and backlogs that led to the need for the ability [***24] conferred by [section 177.5](#) for the trial court to impose sanctions and thereby encourage compliance with its orders as necessary for the orderly administration of justice. An interpretation of the statute excluding categories of persons whose involvement in the court proceeding is mandated by statute—such as a government agency with the statutory responsibility [**139] to receive the defendant and produce a report as to the defendant's mental health within a statutorily required timeframe—runs counter to the purpose of the statute.

Second, the concern raised by the Legislature, which led to the amendment to the bill, does not demonstrate a legislative intent to create an exhaustive list. Rather, the Legislature's stated concern suggested narrowing the scope of the bill to “people directly involved in a proceeding before the court (e.g., parties, attorney's [sic], witnesses, jurors).” (Assem. Com. on Judiciary, Analysis of Assem. Bill No. 3573 (1981–1982 Reg. Sess.) as amended Apr. 21, 1982, p. 3.) The list of persons listed by the Legislature—parties, parties' attorneys, witnesses, and jurors—was provided as examples of the types of persons directly involved in a proceeding before the court, rather than [***25] as an exhaustive list of those persons. (See, e.g., [Aljabban v. Fontana Indoor Swap Meet, Inc. \(2020\) 54 Cal.App.5th 482, 499 \[268 Cal. Rptr. 3d 25\]](#) [“e.g.” means “For example,” while “i.e.” “commonly indicates a clarification of a preceding term, not an example”].) The Legislature could have suggested narrowing the scope of the bill to an exhaustive list, but it did not do so.

Third, the amendment to the bill does not

conclusively demonstrate an intent to narrow the scope of the bill to only those categories of persons listed. As recognized by *Kareem A.*, had the Legislature intended to create an exhaustive list, it could have easily done so with greater clarity in one of [*667] several ways, including (but not limited to): (1) specifying that “person” “includes only witnesses, parties, parties’ attorneys, or both”; (2) dispensing with “includes” in the sentence describing “person” and instead defining “person” as “witnesses, parties, or parties’ attorneys”; or (3) replacing “person” in the statute with “witnesses, parties, or parties’ attorneys.” (See *Kareem A., supra*, 46 Cal.App.5th at p. 73.) Any of those actions would have clarified that the list of persons constituted an exhaustive list. In the absence of language clarifying that the list is exhaustive, we do not construe the amendments as creating an exhaustive list that [***26] would exclude entities seemingly falling well within the overarching purpose of the statute, such as the Department in this case.

Finally, we disagree with the Department’s contention that adding “witness” to the list of persons would have been unnecessary if the list were simply intended to include all those “directly involved in a proceeding.” As we have discussed, the Legislature sought to distinguish between those persons who were necessarily part of the actual proceedings ongoing before the court, such as witnesses, parties, and parties’ attorneys, and those not involved or ancillary to the actual proceeding, including demonstrators, reporters, and courtroom observers. Had the statute only listed parties and parties’ attorneys, the rule of construction *ejusdem generis* may have led courts to construe the statute as only extending to litigants. By including “witness” in the list, the Legislature clarified that the list extended to all persons directly before the court, whose presence, and participation, and cooperation was necessary to conduct the proceedings in the case before it.

CA(7) (7) The Department argues the *Hooper* court did not fully define the scope of persons subject to

sanctions [***27] under the statute. But it did not need to do so; nor do we. “We need not define how broadly ... [section 177.5](#) sweeps beyond witnesses, parties, and parties’ counsel in other factual contexts or statutory regimes not before us, and decline to do so.” (*Kareem A., supra*, 46 Cal.App.5th at p. 74.) [**140] We agree with *Hooper* and *Kareem A.* that the Department is more like a party than an observer in the IST proceedings at issue here; its necessary role in evaluating referred defendants and ensuring their cases resolve in a timely fashion is not at all comparable to the roles of reporters, demonstrators, or courtroom observers. (*Hooper, supra*, 40 Cal.App.5th at p. 693; *Kareem A., supra*, 46 Cal.App.5th at p. 74.) The Department has a *statutory* duty to admit IST defendants, administer treatment, and report to the trial court on the results of that treatment *before those cases can proceed*. (Pen. Code, § 1370, subd. (a)(B)(i); *Kareem A., at p. 74.*) As an entity subject to a court order with such a critical set of statutory obligations, we agree that HN8 in IST cases the Department is directly involved in the IST proceeding before the court such that it qualifies as a “person” pursuant to [section 177.5](#).

[*668]

Moreover, the sanctions here were imposed consistent with the purposes of the statute, which include punishing and deterring violations of lawful court orders (*In re Woodham (2001) 95 Cal.App.4th 438, 443–444 [115 Cal. Rptr. 2d 431]*) and compensating the judicial system [***28] for the cost of unnecessary hearings (*Moyal v. Lanphear (1989) 208 Cal.App.3d 491, 499 [256 Cal. Rptr. 296]*). Systematic delays in criminal cases of IST defendants resulting from the Department’s failure to timely admit, treat, and report on those defendants is the type of delay contributing to backlogs of criminal calendars. We disagree with the Department that it is exempt from sanctions under [section 177.5](#) simply because it is not a party, a party’s attorney, or a witness.⁵

⁵Given this conclusion, we do not address the Department’s argument that it is not a witness, a party, or a party’s attorney. Also,

II

Department's Good Cause Showing

“[Section 177.5 HN9](#) requires only that a court find the person violated the order ‘without good cause or substantial justification.’ This does not require ‘a willful violation, but merely one committed ... without a valid excuse.’ [Citations.]” ([Kareem A., supra, 46 Cal.App.5th at p. 78.](#)) The Department contends the trial court abused its discretion in imposing sanctions because there was good cause or substantial justification for its failure to comply with the court's admission deadlines. It raises two arguments: (1) it could not have complied with the admission deadlines without harm to IST defendants from other counties; and (2) it has been working diligently with other stakeholders to attempt to resolve the waitlist problem but has been unable to do so. We do not agree that the trial court abused its discretion. [***29]

[CA\(8\) \(8\)](#) “[HN10](#) We review orders imposing sanctions for abuse of discretion. [Citation.] The trial court must exercise its discretion in a ‘reasonable manner with one of the statutorily authorized purposes in mind and must be guided by existing legal standards.’ [Citation.] A mere difference of opinion between the appellate and trial courts is insufficient to warrant reversal. [Citation.]” ([Hooper, supra, 40 Cal.App.5th at pp. 691–692.](#)) “‘An appellate tribunal is not authorized to substitute its judgment for that of the trial judge. [Citation.] A trial court's exercise of discretion will not be disturbed unless it appears that the resulting injury is sufficiently grave to manifest a miscarriage of justice. [Citation.] In other words, discretion [**141] is abused only if the court exceeds the bounds of reason, all of the circumstances being considered.’ [Citation.]” ([In re Woodham, supra, 95 Cal.App.4th at p. 443.](#)) The Department has the burden to establish an abuse of discretion. ([Trailmobile, Inc. v. Superior Court](#)

([1989](#)) [210 Cal.App.3d 1451, 1455 \[259 Cal. Rptr. 100\].](#))

[*669]

The trial court rejected each of the Department's arguments in its omnibus order imposing sanctions. The court explained in the introduction to the order: “Lengthy wait times are not new. The Court has previously found the Department in contempt on multiple occasions and sanctioned the Department for failing to timely [***30] admit defendants to a state hospital for competency restoration treatment. The responsibility to fix the problem falls squarely on the shoulders of the Department. The Court is convinced that none of the collaborative efforts over the past several years have given the Department sufficient incentive to carry out that responsibility, and the problem has not been fixed. The Department continues to violate the Court's orders in a large number of cases each year.”⁶

The trial court recognized that the Department is an agency of the State of California, not an isolated entity, and any lack of resources is due to a deliberate budgetary decision by the State. The court “reject[ed] the notion that the State can repeatedly violate the due process rights of the mentally ill by denying the responsible agency adequate resources necessary to comply with *Penal Code [s]ection 1370*; and to then subsequently claim that the agency's inability to meet the need constitutes good cause.”

The trial court also rejected the Department's argument that its efforts to solve the waitlist problem constituted good cause or substantial justification. The court found: “It goes without saying that the ongoing efforts by the Department do not help [***31] the individuals whose due process rights have already been violated. The Court further notes that after five years of holding

because our review is de novo, we need not and do not address the Department's arguments regarding the trial court's reasoning.

⁶ We note that our colleagues observed in [Kareem A., supra, 46 Cal.App.5th at page 79](#), that the Department “has had over a decade to evolve in order to meet the rising demand of IST beds, and yet the IST waitlist has continued to grow.”

hearings on the issue the delays in admission are only slightly better today than they were when this Court started hearings. In no way has any improvement been sufficient to indicate that the need for the orders, or their enforcement, has been eliminated. The Department touts improvements but the fact remains that as of the date of this order most defendants are waiting well beyond the 60 day order (from the providing of the packet); and do not have a meaningful report within the time period mandated by *Penal Code [s]ection 1370*. The Department continues to violate nearly every 60-day admit-by order set by the Court, and *Penal Code [s]ection 1370*, by a considerable margin.”

The Department does not contend the trial court failed to consider its arguments, that it considered improper evidence, that its findings do not reflect the evidence presented, or that it applied an incorrect legal standard (aside from the court's conclusion it could impose sanctions against the Department under [§ 177.5](#), as discussed *ante*). Rather, the Department raises the same arguments on appeal that it did at the trial court, and it simply **[***32]** asks us to disagree with the trial court. But as we have explained, even if we were to disagree with the trial court's findings, which the Department provides no **[*670]** reason for us to do, a mere difference of opinion is not enough to warrant reversal. (*Hooper, supra*, 40 Cal.App.5th at p. 692.) **[**142]** We conclude the trial court's decision was not an abuse of discretion.

The Department makes two final arguments, which we reject. First, the Department contends the sanctions order raises a separation of powers concern because the order directs an executive agency to transfer funds to the judicial branch in a manner the Legislature has not authorized. As we have discussed, we disagree the sanctions order was not authorized by the Legislature. Additionally, the authority cited by the Department, *California School Bds. Assn. v. State of California* (2011) 192 Cal.App.4th 770 [121 Cal. Rptr. 3d 696], is inapposite. That case held separation of powers “forbids the judiciary from issuing writs that direct

the Legislature to take specific action, including to appropriate funds.” (*Id. at p. 799*.) That is not what occurred here. Moreover, courts have held that a public agency may be sanctioned under [section 177.5](#) (see, e.g., *People v. Tabb* (1991) 228 Cal.App.3d 1300, 1312 [279 Cal. Rptr. 480] [deputy public defender could be sanctioned under [§ 177.5](#)]), which undermines the Department's argument.

Second, the Department contends (without citing any **[***33]** authority) the trial court's order is counterproductive because the funds used to pay the sanctions order could instead be directed towards providing care and services to individuals with mental illness. That may be so, but given the unchallenged findings of the trial court concerning the longstanding nature of this issue, the absence of substantial reduction in wait times during the years the trial court has been presiding over litigation concerning this issue, and the importance of the rights at stake, the trial court did not abuse its discretion in determining that the Department's insufficient efforts to address the waitlist problem did not constitute good cause or substantial justification for its repeated violation of a court order.

DISPOSITION

The sanctions orders are affirmed. Costs on appeal are awarded to the respondents. (Cal. Rules of Court, rule 8.278(a), (b).)

Blease, Acting P. J., and Mauro, J., concurred.



People v. Belous

Supreme Court of California

September 5, 1969

Crim. 12739

Reporter

71 Cal. 2d 954 *; 458 P.2d 194 **; 80 Cal. Rptr. 354 ***; 1969 Cal. LEXIS 299 ****

THE PEOPLE, Plaintiff and Respondent, v. LEON PHILLIP BELOUS, Defendant and Appellant

Subsequent History: [****1] Respondent's Petition for a Rehearing was Denied October 1, 1969. Pierce, J. Pro Tem., * Sat in Place of Mosk, J., who Deemed Himself Disqualified. McComb, J., Burke, J., and Sullivan, J., were of the Opinion that the Petition Should be Granted.

Prior History: APPEAL from a judgment (order granting probation) of the Superior Court of Los Angeles County. John G. Barnes, Judge.

Prosecution for abortion and conspiracy to commit abortion.

Disposition: Reversed with directions. Judgment of conviction reversed with directions.

Core Terms

abortion, woman, necessary to preserve, save, vague, childbirth, patient, pregnant, constitutional right, therapeutic abortion, destruct, bear a child, pregnancy, medicine, invalid, embryo, phone, legislative intent, hundred years, criminal law, unborn child, licensed, procure, fetus, peril, criminal abortion, illegal abortion, relative safety, imprisonment, intelligence

Case Summary

Procedural Posture

Defendant sought review of an order from the Superior Court of Los Angeles County (California) sentencing him to two years probation after he was convicted of abortion and conspiracy to commit an abortion.

Overview

Defendant, a physician, was convicted of abortion, in violation of [Cal. Penal Code § 274](#), and conspiracy to commit an abortion, in violation of [Cal. Penal Code § 182](#). The trial court imposed a \$ 5000 fine and placed defendant on probation for two years. On appeal, defendant challenged the order imposing probation. The court found that the validity of [§ 274](#) could not be sustained. The court explained that the pressures on a physician to decide not to perform an absolutely necessary abortion were, under [§ 274](#), enormous, and because [§ 274](#) authorized and required a doctor to decide, at his peril, whether an abortion was necessary, a woman whose life was at stake could be as effectively condemned to death as if the law flatly prohibited all abortions. Because [§ 274](#) was invalid, defendant was wrongfully convicted.

Outcome

The order convicting defendant of abortion and conspiracy to commit an abortion was reversed and the indictment against him was dismissed.

LexisNexis® Headnotes

* Assigned by the Chairman of the Judicial Council.

years imprisonment.

Criminal Law &
Procedure > ... > Reviewability > Preservation
for Review > Exceptions to Failure to Object

Healthcare Law > ... > Reproductive
Services > Reproductive Technology > General
Overview

Criminal Law & Procedure > ... > Controlled
Substances > Delivery, Distribution &
Sale > Penalties

HN1 Preservation for Review, Exceptions to Failure to Object

See [Cal. Penal Code § 274](#).

Criminal Law & Procedure > ... > Homicide,
Manslaughter & Murder > Criminal
Abortion > Exceptions

Criminal Law & Procedure > ... > Homicide,
Manslaughter & Murder > Criminal
Abortion > General Overview

Criminal Law & Procedure > ... > Homicide,
Manslaughter & Murder > Criminal
Abortion > Penalties

Criminal Law & Procedure > ... > Inchoate
Crimes > Solicitation > Penalties

Healthcare Law > ... > Reproductive
Services > Reproductive Technology > General
Overview

HN2 Criminal Abortion, Exceptions

Under [Cal. Penal Code § 275](#), a woman who solicits or submits to an abortion is punishable by up to five years imprisonment. Under [Cal. Penal Code § 276](#), any person who solicits a woman to submit to an abortion is punishable by up to five

Constitutional Law > ... > Fundamental
Rights > Procedural Due Process > Scope of
Protection

Governments > Legislation > Overbreadth

Governments > Legislation > Types of Statutes

HN3 Procedural Due Process, Scope of Protection

The requirement of a reasonable degree of certainty in legislation, especially in the criminal law, is a well established element of the guarantee of due process of law. No one may be required at peril of life, liberty, or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the state commands or forbids. A statute that 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. The required meaning, certainty, and lack of ambiguity may appear on the face of a questioned statute or from any demonstrably established technical or common law meaning of the language in question. The requirement of certainty in legislation is greater where a criminal statute is a limitation on constitutional rights. On the other hand, mathematical certainty is not required; some matter of degree is involved in most penal statutes.

Constitutional Law > Substantive Due
Process > Privacy > Personal Decisions

Criminal Law & Procedure > ... > Illegal
Consensual Relations > Interracial
Relations > General Overview

Constitutional Law > Substantive Due
Process > Privacy > General Overview

HN4 Privacy, Personal Decisions

The fundamental right of a woman to choose whether to bear children follows from the Supreme Court's repeated acknowledgment of a "right of privacy" or "liberty" in matters related to marriage, family, and sex. That such a right is not enumerated in either the United States or California Constitutions is no impediment to the existence of the right.

Headnotes/Summary

Headnotes

CALIFORNIA OFFICIAL REPORTS HEADNOTES

CA(1a) (1a) CA(1b) (1b)

Abortion—Statutes: Criminal Law—Validity of Enactments—Certainty.

--The validity of [Pen. Code, § 274](#), prior to its amendment in 1967, under which defendant doctor was convicted of abortion, could not be sustained, and reversal of the doctor's conviction was therefore required, where the term "necessary to preserve" used in the statute with reference to the life of the mother was not susceptible of a construction that did not violate legislative intent and that was sufficiently certain to satisfy due process requirements without improperly infringing on fundamental constitutional rights.

CA(2) (2)

Criminal Law—Validity of Enactments—Certainty.

--The requirement of a reasonable degree of certainty in legislation, especially in the criminal law, is a well-established element of the guarantee of due process of law.

CA(3) (3)

Id.—Validity of Enactments—Certainty.

--No one may be required at peril of life, liberty, or property to speculate as to the meaning of penal statutes; all are entitled to be informed as to what the state commands or forbids, and 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.

CA(4) (4)

Id.—Validity of Enactments—Certainty.

--The required meaning, certainty, and lack of ambiguity necessary to satisfy the requirement of due process of law may appear on the face of a questioned statute or from any demonstrably established technical or common law meaning of the language in question.

CA(5) (5)

Id.—Validity of Enactments—Certainty.

--The requirement of certainty in legislation is greater where a criminal statute is a limitation on constitutional rights, but mathematical certainty is not required; some matter of degree is involved in most penal statutes.

CA(6) (6)

Abortion—Statutes: Criminal Law—Validity of Enactments—Certainty.

--There is no standard definition of the term "necessary to preserve" used in former [Pen. Code, § 274](#) (abortion); taking the words "necessary" and "preserve" separately, no clear meaning emerges; and, since abortion before quickening was not a

crime at common law, common law meanings or common law referents cannot be relied upon.

CA(7a) (7a) CA(7b) (7b)

Id.—Statutes: Criminal Law—Validity of Enactments—Certainty.

--On appeal from a conviction of abortion under former [Pen. Code, § 274](#), the validity of the statute could not be upheld against a claim of vagueness by interpreting the words "necessary to preserve" used therein so as to require certainty or immediacy of death to the patient unless the abortion was performed, where such interpretation had been rejected by the courts of California and other jurisdictions, where no showing was made of strong public policy or legislative intent requiring adoption of such rejected construction, where a definition requiring certainty of death would work an invalid abridgment of the woman's constitutional rights to life and to choose whether to bear children, where the abortion was sought during the first trimester of pregnancy so that consideration of the woman's health could not justify the great and direct infringement of such rights, and where any interest the state might have in the protection of the embryo and fetus was not sufficient to justify limiting abortion to cases where death was otherwise certain.

CA(8) (8)

Id.—Statutes: Constitutional Law—Police Power—Public Health.

--While it may be assumed that former [Pen. Code, § 274](#), forbidding abortion unless necessary to preserve the patient's life, was valid when first enacted in 1850, and while the Legislature may have intended that the law be interpreted so as to require that death be certain unless the abortion were performed, such great and direct infringement of a woman's constitutional rights to life and to choose whether to bear children imposed by such a

construction cannot, in the light of modern medical surgical practice, be justified, where abortion is sought in the first trimester of pregnancy.

CA(9) (9)

Id.—Statutes: Criminal Law—Validity of Enactments—Certainty.

--Former [Pen. Code, § 274](#), forbidding abortion unless necessary to preserve the life of the mother, could not be made sufficiently certain to satisfy due process requirements by reading it as though it said "substantially or reasonably" necessary; such terms are not sufficiently precise and would be subject to such different interpretations as to add little or nothing to "necessary."

CA(10) (10)

Id.—Statutes: Criminal Law—Validity of Enactments—Certainty.

--On appeal from a conviction of abortion under former [Pen. Code, § 274](#), the statute could not be upheld against a claim of vagueness by construing it as permitting abortion when the risk of death due to the abortion was less than the risk of death in childbirth and denying it otherwise, where the language of the statute "unless the same is necessary to preserve her life," did not suggest a relative safety test, and where no case interpreting the statute suggested that it be so construed.

CA(11) (11)

Id.—Statutes: Constitutional Law—Delegation of Power—To Persons Directly Involved.

--Under former [Pen. Code, § 274](#), forbidding abortion unless necessary to preserve the life of the mother, the doctor involved in a particular case was, in effect, delegated the duty to determine whether the pregnant woman had the right to an abortion; he was required to decide at peril of

prosecution for a felony and of deprivation of his right to practice medicine ([Bus. & Prof. Code, § 2377](#)) whether an abortion was necessary; such delegation of decision-making power to a directly involved individual violated the Fourteenth Amendment.

Counsel: A. L. Wirin, Fred Okrand, Zad Leavy and Beilenson & Leavy for Defendant and Appellant.

McCutchen, Doyle, Brown & Enersen, Burnham Enersen, Robert A. Blum, Terry J. Houlihan, Norma G. Zarky, Howard H. Jewel, Paul N. Halvonik, William Kelly, Barbara N. Armstrong, Charles E. Beardsley, George A. Blackstone, A. Stevens Halsted, Jr., Roderick M. Hills, Leonard S. Janofsky, Herma Hill Kay, Frederick R. McBrien, Charles T. Munger, Stuart T. Peeler, Samuel O. Pruitt, Jr., Charles E. Rickershauser, Jr., Graham L. Sterling, Charles E. Stimson, Jr., and Francis M. Wheat as Amici Curiae on behalf of Defendant and Appellant.

[****2] Thomas C. Lynch, Attorney General, William E. James, Assistant Attorney General, and Phillip G. Samovar, Deputy Attorney General, for Plaintiff and Respondent.

Charles H. Clifford, Walter R. Trinkaus, J. J. Brandlin, Thomas J. Arata, Richard D. Andrews, Cyril A. Coyle, Mazzer, Snyder & De Martini, John F. Duff, William R. Kennedy, Richard G. Logan and Curran, Golden, McDevitt & Martin as Amici Curiae on behalf of Plaintiff and Respondent.

Judges: In Bank. Peters, J. Traynor, C. J., Tobriner, J., and Pierce, J. pro term., * concurred. Burke, J., dissents. McComb, J., and Sullivan, J., concurred. Sullivan, J., dissenting. McComb, J., concurred.

Opinion by: PETERS

Opinion

[*957] [**195] [***355] Dr. Leon Phillip Belous was convicted in January 1967, after a jury trial, of abortion, in violation of [section 274 of the Penal Code](#), and conspiracy to commit an abortion, in violation of [section 182 of the Penal Code](#), both felonies. The court suspended proceedings, imposed a fine of \$ 5,000, and placed Dr. Belous on probation for two years. He appeals from the order granting probation.

Dr. Belous is a physician and surgeon, [****3] licensed since 1931 to practice medicine in the State of California, and specializing in obstetrics and gynecology. He has been on the attending staff of the gynecology department of Cedars of Lebanon Hospital in Los Angeles since 1931, is a fellow of the Los Angeles Gynecology and Obstetrical Society, the American College of Obstetrics and Gynecology, and the Abdominal Surgical Society, and the Geriatric Society, and a member of the American Board of Obstetrics and Gynecology. He is on the Board of Directors of the California Committee on Therapeutic Abortion, an organization which seeks to liberalize abortion laws. He is considered by his associates to be an eminent physician in his field.

The prosecution's witnesses, a young woman and her husband, Cheryl and Clifton, testified to the following:

In 1966, Cheryl, then unmarried, believed she was pregnant. A family physician had [**196] [***356] given her pills which would induce menstruation if she were not pregnant, but the pills did not work. She and Clifton had sometime earlier seen Dr. Belous on television, advocating a change in the California abortion laws. They had never heard of Dr. Belous before. Clifton obtained [****4] the doctor's phone number from the television station and phoned Dr. Belous; he explained the problem and that they both were "pretty disturbed," and at their "wits' end" and

* Assigned by the Chairman of the Judicial Council.

asked for Dr. Belous' help. Dr. Belous told him there was nothing he could do, but Clifton "continued pleading," and threatened that Cheryl would go to Tijuana for an abortion. Finally the doctor agreed to see them at his office.

Dr. Belous examined Cheryl at his Beverly Hills office and confirmed that she was possibly pregnant. Cheryl was otherwise in good health. The visit lasted about 45 minutes and was very emotional. Both Clifton and Cheryl pleaded for help, cried, insisted they were going to have an abortion "one way [***958**] or another." The doctor lectured them on the dangers of criminal abortions, and Tijuana abortions in particular, and suggested that they get married. He insisted he did not perform abortions. He refused to recommend anyone in Tijuana. Finally, in response to their pleadings, Dr. Belous gave them a piece of paper with a Chula Vista phone number. He told them an abortion would cost about \$ 500. He gave Cheryl a prescription for some antibiotics and instructed her to return [******5**] for an examination.

Dr. Belous testified that he was very familiar with the abortion business in Tijuana. He had visited the clinics there to learn about conditions and knew that women who went to Tijuana were taking their lives in their hands. He met Karl Laitus while in Tijuana and knew from personal observation that Laitus, licensed to practice in Mexico but not in California, was performing skilled and safe abortions in Mexico. Laitus wanted to obtain a California license, and sought out Belous' help on a number of occasions. When Laitus moved from Mexico to Chula Vista, he gave Dr. Belous his address and phone number. When Laitus moved to Los Angeles, he gave the doctor a Hollywood address, and made it known to the doctor that he was performing abortions. It was Laitus' number that Belous gave to Cheryl and Clifton. Although he had given out Laitus' number before, in similar situations, where distraught pregnant women insisted they would do anything, Dr. Belous had no idea how many women actually went to Laitus.

Cheryl and Clifton made arrangements with Laitus, and went to the address which Laitus gave them on the phone. After the abortion was performed, while [******6**] Cheryl was resting, the police, having been advised by another woman that Laitus was performing abortions at that address, came to his apartment, followed another couple into the apartment and arrested Laitus. They found two notebooks, containing women's names, ages, dates of last menstruation, and physician's names, including Dr. Belous' name, which the police interpreted as the referring doctor with whom Laitus was to split his fees. On the basis of this information, Dr. Belous was arrested at his office. Laitus pleaded guilty. At Dr. Belous' trial, he testified that, although not solicited, he sent Dr. Belous about \$ 100 as a professional courtesy in about half the cases that he had performed abortions on Dr. Belous' patients. Dr. Belous denied receiving any money from Laitus.

[***959**] The substance of Dr. Belous' defense was that he gave Laitus' phone number to Cheryl and Clifton only because he believed that they would, in fact, do anything to terminate the pregnancy, which might involve butchery in Tijuana or self-mutilation; that in face of their pleading and tears, he gave out the phone number of someone whom he knew to be a competent doctor, although unlicensed [******7**] in this state. The doctor believed that if the young couple carried out their threats, Cheryl's very life was in danger.

[****197**] [******357**] [*Section 274 of the Penal Code*](#), when the conduct herein involved occurred, read: [*HN1*](#) "Every person who provides, supplies, or administers to any woman, or procures any woman to take any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is punishable by imprisonment in the State prison not less than two nor more than five years."

The statute was substantially unchanged since it

was originally enacted in 1850.¹ In 1967, the statute was amended and [sections 25950 through 25954](#) ("Therapeutic Abortion Act") added to the Health and Safety Code. The act extends the lawful grounds for obtaining an abortion.² [Section 274](#) is directed towards the abortionist. [HN2](#) Under [section 275 of the \[*960\] Penal Code](#) (also amended by the Therapeutic Abortion Act), a woman who solicits or submits to an abortion is punishable by up to five years' imprisonment; similarly, under [section 276](#), any person who solicits [****8] a woman to submit to an abortion is punishable by up to five years' imprisonment.

[****9] [CA\(1a\) \(1a\)](#) We have concluded that the term "necessary to preserve" in [section 274 of the Penal Code](#) is not susceptible of a construction that does not violate legislative intent and that is sufficiently certain to satisfy due process requirements without improperly infringing on fundamental constitutional rights.

¹ Stats. 1850, ch. 99, § 45, at p. 233: "[Every] person who shall administer or cause to be administered or taken, any medicinal substances, or shall use or cause to be used any instruments whatever, with the intention to procure the miscarriage of any woman then being with child, and shall be thereof duly convicted, shall be punished by imprisonment in the State Prison for a term not less than two years, nor more than five years: *Provided*, that no physician shall be affected by the last clause of this section, who, in the discharge of his professional duties, deems it necessary to produce the miscarriage of any woman in order to save her life."

² [Penal Code, section 274](#), as amended reads: "Every person who provides, supplies, or administers to any woman, or procures any woman to take any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, *except as provided in the Therapeutic Abortion Act . . . of the Health and Safety Code*, is punishable by imprisonment in the state prison . . ." (Stats. 1967, ch. 327, § 3, at p. 1523; italics added.)

The Therapeutic Abortion Act ([Health & Saf. Code, §§ 25950-25954](#)) authorizes abortions "only" if the abortion takes place in an accredited hospital ([§ 25951, subd. \(a\)](#)); the abortion is approved by a hospital staff committee consisting of at least three licensed physicians and surgeons ([§ 25951, subd. \(b\)](#)); and there is "substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother" ([§ 25951, subd. \(c\)\(1\)](#)); the pregnancy resulted from rape or incest ([§ 25951, subd. \(c\)\(2\)](#)); or the woman is under 15 years of age ([§ 25952, subd. \(c\)](#)).

[CA\(2\) \(2\) HN3](#) "The requirement of a reasonable degree of certainty in legislation, especially in the criminal law, is a well established element of the guarantee of due process of law. [CA\(3\) \(3\)](#) 'No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids . . . "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.'" ([Lanzetta v. New Jersey, 306 U.S. 451, 453 \[83 L.Ed. 888, 890 59 S.Ct. 618\]](#); see also [Connally v. General Constr. Co., 269 U.S. 385, 391 \[70 L.Ed. 322, 328, 46 S.Ct. 126\]](#).) Such also is the law of the State of California. ([People v. McCaughan, 49 Cal.2d 409, 414 \[****10\] \[317 P.2d 974\]](#).)

[CA\(4\) \(4\)](#) "The required meaning, certainty and lack of ambiguity may appear on the face of the questioned statute or from any demonstrably established technical or common law meaning of the language in question. [**198] [***358] ([People v. McCaughan, supra, 49 Cal.2d 409, 414; Lorenson v. Superior Court, 35 Cal.2d 49, 60 \[216 P.2d 859\]](#).)" ([In re Newbern, 53 Cal.2d 786, 792 \[3 Cal.Rptr. 364, 350 P.2d 116\]](#).) [CA\(5\) \(5\)](#) The requirement of certainty in legislation is greater where the criminal statute is a limitation on constitutional rights. (See [Smith v. California \(1959\) 361 U.S. 147, 151 \[4 L.Ed.2d 205, 210, 80 S.Ct. 215\]](#).) On the other hand, mathematical certainty is not required; "some matter of degree" is involved in most penal statutes. ([Nash v. United States \(1913\) 229 U.S. 373, 377 \[57 L.Ed. 1232, 1235, 33 S.Ct. 471\]](#).)

[CA\(6\) \(6\)](#) Dictionary definitions and judicial interpretations fail to provide a clear meaning for the words, "necessary" or "preserve." There is, of course, no standard definition of "necessary to preserve," and taking the words separately, no [**961] clear meaning emerges. "Necessary" is defined as: "1. Essential [****11] to a desirable or

projected end or condition; not to be dispensed with without loss, damage, inefficiency, or the like; . . ." (Webster's New International Dictionary (2d ed.), unabridged.) The courts have recognized that "'necessary' has not a fixed meaning, but is flexible and relative." ([Westphal v. Westphal](#), 122 Cal.App. 379, 382 [10 P.2d 119]; see also, [City of Dayton v. Borchers](#) (1967) 13 Ohio Misc. 273 [232 N.E.2d 437, 441]; ["A necessary thing may supply a wide range of wants, from mere convenience to logical completeness."].)

The definition of "preserve" is even less enlightening. It is defined as: "1. To keep or save from injury or destruction; to guard or defend from evil; to protect; save. 2. To keep in existence or intact; . . . To save from decomposition, . . . 3. To maintain; to keep up; . . . (Webster's New International Dictionary, *supra*.) The meanings for "preserve" range from the concept of maintaining the status quo -- that is, the woman's condition of life at the time of pregnancy -- to maintaining the biological or medical definition of "life" -- that is, as opposed to the biological or medical definition of "death."

Since abortion [****12] before quickening was not a crime at common law (Perkins, Criminal Law (1967) 101; Means, *The Law of New York Concerning Abortion and the Status of the Foetus*, 1664-1968: A Case of Cessation of Constitutionality (1968) 14 N.Y.L.F. 411, 419-422; Stern, *Abortion: Reform and the Law* (1968) 59 J.Crim.L.C. & P.S. 84, 85) we cannot rely on common law meanings or common law referents (see [Lorenson v. Superior Court](#), *supra*, 35 Cal.2d 49, 60; [People v. Agnello](#), 259 Cal.App.2d 785, 790-791 [66 Cal.Rptr. 571]).³

Various possible meanings of "necessary to

preserve . . . life" have been suggested. However, none [****13] of the proposed definitions will sustain the statute.

CA(7a) (7a) Respondent asserts: "If medical science feels the abortion should be performed as it is necessary to preserve her life, then it may be performed; that is, unless it is performed the patient will die."

Our courts, however, have rejected an interpretation of [*962] "necessary to preserve" which requires certainty or immediacy of death. ([People v. Abarbanel](#), 239 Cal.App.2d 31, 32, 35 [48 Cal.Rptr. 336]; [People v. Ballard](#), 218 Cal.App.2d 295, 298 [32 Cal.Rptr. 233]; [People v. Ballard](#), 167 Cal.App.2d 803, 807 [335 P.2d 204].) Justice Fourt, in [People v. Ballard](#), *supra*, 167 Cal.App.2d 803, 814, stated: "Surely, the abortion statute ([Pen. Code, § 274](#)) does not mean by the words 'unless the same is necessary to preserve her life' that the peril to life be imminent. It ought to be enough that the dangerous condition 'be potentially present, even though its full [**199] [***359] development might be delayed to a greater or less extent. Nor was it essential that the doctor should believe that the death of the patient would be otherwise *certain* in order to justify him in affording [****14] present relief.' [Citations.]" The above language was quoted in [People v. Abarbanel](#), *supra*, 239 Cal.App.2d 31, 34.

In [People v. Ballard](#), *supra*, 167 Cal.App.2d 803, 813-814, the evidence established that the woman was "extremely nervous . . . upset, had headaches, was unable to sleep, and thought that she was pregnant. She was agitated, disturbed and had many problems." (Italics omitted.) In [People v. Ballard](#), *supra*, 218 Cal.App.2d 295, 307, it was established that at the time each of the women went to the defendant doctor she was in a "bad state of health" because of self-imposed abortive practices. And in [People v. Abarbanel](#), *supra*, 239 Cal.App.2d 31, the obstetrician performed the abortion after receiving letters from two psychiatrists to the effect that abortion was indicated as necessary to save the

³ Compare [United States v. Harriss](#) (1954) 347 U.S. 612, 634 [98 L.Ed. 989, 1005, 74 S.Ct. 808] (dissenting opinion): "Whoever kidnaps, steals, kills, or commits similar acts of violence upon another is bound to know that he is inviting retribution by society, and many of the statutes which define these long-established crimes are traditionally and perhaps necessarily vague."

woman's life from the "possibility" of suicide. In each of the cases the conviction was reversed.

If the fact of ill health or the mere "possibility" of suicide is sufficient to meet the test of "necessary to preserve her life," it is clear that a showing of immediacy or certainty of death is not essential for a lawful abortion. Two other jurisdictions [****15] have also rejected an interpretation of "necessary to preserve" which would require certainty or immediacy of death. (*State v. Dunkleberger* (1928) 206 Iowa 971 [221 N.W. 592, 596]; *State v. Hatch* (1917) 138 Minn. 317 [164 N.W. 1017].)

After the decision in *Ballard*, the Legislature did not amend the statute to repudiate the rule suggested by that case and to establish a definition requiring certainty of death. ⁴

[*963] It would be anomalous to uphold a criminal statute against a charge of vagueness by adopting a construction of the statute rejected by the courts of this state as not reflecting legislative intent unless there was a clear showing of a strong public policy or legislative intent requiring adoption of the rejected construction. No such showing has been made with regard to the construction urged by respondent.

Moreover, a definition requiring certainty [****16] of death would work an invalid abridgment of the woman's constitutional rights. The rights involved in the instant case are the woman's rights to life and to choose whether to bear children. ⁵ The woman's right to life is involved because childbirth involves risks of death. ⁶

⁴The definitions suggested by the two *Ballard* cases and by *Abarbanel* will be discussed later in this opinion.

⁵Dr. Belous' standing to raise this right is unchallenged. (Cf. *Griswold v. Connecticut* (1965) 381 U.S. 479, 481 [14 L.Ed.2d 510, 512, 85 S.Ct. 1678]; *Barrows v. Jackson* (1953) 346 U.S. 249, 257 [97 L.Ed. 1586, 1595, 73 S.Ct. 1031]; *Parrish v. Civil Service Com.*, 66 Cal.2d 260, 264 [57 Cal.Rptr. 623, 425 P.2d 223].)

⁶E.g., The maternal death rate in 1966 was 0.5 per 100,000 population and 29.1 per 100,000 births. (Statistical Abstract of the

[****17] *HN4* The fundamental right of the woman to choose whether to bear children follows from the Supreme Court's and this court's repeated acknowledgment of a "right of privacy" or "liberty" in matters related to marriage, family, and sex. (See, e.g., *Griswold v. Connecticut*, *supra*, 381 U.S. 479, 485, 486, 500 [14 L.Ed.2d 510, 515, 516, 524, 85 S.Ct. 1678]; *Loving v. Virginia* (1967) 388 U.S. 1, 12 [18 L.Ed.2d 1010, 1018, 87 S.Ct. 1817] [statute prohibiting interracial marriages, violative of due process clause]; *Skinner v. Oklahoma* (1942) 316 U.S. 535, 536, 541 [86 L.Ed. 1655, 1657, 1660, 62 S.Ct. 1110] [sterilization laws; marriage and procreation involve a "basic liberty"]; *Pierce v. Society of Sisters* (1925) 268 U.S. 510, 534-535 [69 L.Ed. 1070, 1077-1078, 45 S.Ct. 571, 39 A.L.R. [**200] [***360] 468] [prohibition against nonpublic schools; same]; *Meyer v. Nebraska* (1923) 262 U.S. 390, 399-400 [67 L.Ed. 1042, 1045-1046, 43 S.Ct. 625, 29 A.L.R. 1446] [prohibition against teaching children German language; same]; *Perez v. Sharp*, 32 Cal.2d 711, 715 [198 P.2d 17]; see also *Custodio v. Bauer*, 251 Cal.App.2d 303, [****18] 317-318 [59 Cal.Rptr. 463].) That such a right is not enumerated in either the United States or California Constitutions is no impediment to the existence of the right. (See, e.g., *Carrington v. Rash* [*964] (1965) 380 U.S. 89, 96 [13 L.Ed.2d 675, 680, 85 S.Ct. 775] [fundamental but nonenumerated right to vote]; *Aptheker v. Secretary of State* (1964) 378 U.S. 500, 505-506 [12 L.Ed.2d 992, 996-997, 84 S.Ct. 1659], and *Kent v. Dulles* (1958) 357 U.S. 116, 125 [2 L.Ed.2d 1204, 1209, 78 S.Ct. 1113] [right to travel]; *Bolling v. Sharpe* (1954) 347 U.S. 497, 500 [98 L.Ed. 884, 887, 74 S.Ct. 693] [right to attend federal unsegregated schools]; *Otsuka v. Hite*, 64 Cal.2d 596, 602 [51 Cal.Rptr. 284, 414 P.2d 412] [right to vote]; cf. *Finot v. Pasadena City Board of Education*, 250 Cal.App.2d 189, 199 [58 Cal.Rptr.

United States (1968) table 73, at p. 58, table 68, at p. 55.) In California in 1966 the maternal death rate was 2.1 per 10,000 live births (California Statistical Abstract (1968) table E-3, at p. 67.) As to a particular pregnant woman the risk of death may be greater or lesser.

[5201](#).) It is not surprising that none of the parties who have filed briefs in this case have disputed the existence of this fundamental right.

The critical issue is not whether such rights exist, but whether the state has a compelling interest in the regulation of a subject which is within the police powers of [****19] the state ([Shapiro v. Thompson \(1969\) 394 U.S. 618, 634 \[22 L.Ed.2d 600, 615, 89 S.Ct. 1322\]](#); [Sherbert v. Verner \(1963\) 374 U.S. 398, 403 \[10 L.Ed.2d 965, 969, 83 S.Ct. 1790\]](#)), whether the regulation is "necessary . . . to the accomplishment of a permissible state policy" ([McLaughlin v. Florida \(1964\) 379 U.S. 184, 196 \[13 L.Ed.2d 222, 230, 85 S.Ct. 283\]](#); see also, [N.A.A.C.P. v. Button, 371 U.S. 415, 438 \[9 L.Ed.2d 405, 421, 83 S.Ct. 328\]](#); [Bates v. Little Rock \(1960\) 361 U.S. 516, 527 \[4 L.Ed.2d 480, 488, 80 S.Ct. 412\]](#); [Huntley v. Public Utilities Com., 69 Cal.2d 67, 74 \[69 Cal.Rptr. 605, 442 P.2d 685\]](#); [Vogel v. County of Los Angeles, 68 Cal.2d 18, 21 \[64 Cal.Rptr. 409, 434 P.2d 961\]](#); [People v. Woody, 61 Cal.2d 716, 718 \[40 Cal.Rptr. 69, 394 P.2d 813\]](#)), and whether legislation impinging on constitutionally protected areas is narrowly drawn and not of "unlimited and indiscriminate sweep" ([Shelton v. Tucker \(1960\) 364 U.S. 479, 490 \[5 L.Ed.2d 231, 238, 81 S.Ct. 247\]](#); see also, [Cantwell v. Connecticut \(1940\) 310 U.S. 296, 308 \[84 L.Ed. 1213, 1220, 60 S.Ct. 900, 128 A.L.R. 1352\]](#); *In re* [****20] [Berry, 68 Cal.2d 137, 151 \[65 Cal.Rptr. 273, 436 P.2d 273\]](#); *In re Hoffman, 67 Cal.2d 845, 853-854 [64 Cal.Rptr. 97, 434 P.2d 353]*).

CA(8) (8) It is possible that the definition suggested by respondent, requiring that death be certain, was that intended by the Legislature when the first abortion law was adopted in 1850 and that, in the light of the then existing medical and surgical science, the great and direct interference with a woman's constitutional rights was warranted by considerations of the woman's health. When California's first anti-abortion statute [*965] was enacted, any surgical procedure which entered a body cavity was extremely dangerous. Surgeons did not know how to control infection, and

mortality was high. (Haagensen & Lloyd, *A Hundred Years of Medicine* (1943) p. 19.) In 1867 Joseph Lister first published his findings on antiseptic surgery (*id.*, [at pp. 241-242](#)), but even in 1883 the techniques he developed were condemned (*id.*, [at p. 245](#)), and as late as 1895 were not well understood or properly applied by even leaders of the medical profession. (*Id.*, [at p. 246](#); see also, H. Robb (1895) *Aseptic Surgical Technique*.)

Although development was slow, [****21] techniques of antiseptics and asepsis became major general advances in surgery at and after the turn of the century. In due course safe procedures were developed for specific operations. Curettage, used for abortion in the first trimester, became a safe, accepted and routinely employed medical technique, especially after antibiotics were developed in the early 1940's. (Douglas, *Toxic Effects of the Welch Bacillus in Postabortal Infections* (1956) 56 N.Y.State J.Med. 3673.) It is now safer for a woman to have [**201] [***361] a hospital therapeutic abortion during the first trimester than to bear a child. ⁷

[****22] Although abortions early in pregnancy, and properly performed present minimal danger to

⁷C. Tietze & H. Lehfeldt, *Legal Abortion in Eastern Europe* (April 1961) 175 J.A.M.A. 1149, 1152; see also V. Kolblova, *Legal Abortion in Czechoslovakia* (April 1966) 196 J.A.M.A. 371; K.H. Mehland, *Combating Illegal Abortion in the Socialist Countries of Europe* (1966) 13 World Med.J. 84. There are, of course, no comparable data in the United States. However, in California from November 1967 through September 1968, 3,775 therapeutic abortions were reported without a maternal death. (See Annual Report on the Implementation of the Therapeutic Abortion Act, Department of Public Health, Bureau of Maternal and Child Health (January 1969), table 1.)

The only data contrary to the conclusions above is provided by the amicus for respondent, relying on Swedish data showing that maternal mortality from abortion is slightly higher than maternal mortality from giving birth. The Swedish figures are, however, explainable by the fact that abortions in Sweden are often performed during late pregnancy. (See Tietze & Lehfeldt, *supra*, 175 J.A.M.A. 1149, 1152 (e.g., in 1949, 35 percent of Swedish abortions were performed after the first trimester); Hoffmeyer, *Medical Aspects of the Danish Legislation on Abortions* (1965) 17 W.Res.L.Rev. 529, 544-545.)

the woman, criminal ⁸ abortions are "the most common single cause of maternal deaths in California." (Fox, *Abortion Deaths in California* (1967) [*966] 98 Am.J.Obst. & Gynec. 645, 650.) In California, it is estimated that 35,000 to 100,000 such abortions occur each year. (Fox, *supra*, at p. 645.)

The incidence of severe infection from criminal abortion is very much greater than the incidence of death. The Los Angeles County Hospital alone, for example, in 1961 admitted over 3,500 patients treated for such abortions. (Kistner, *Medical [****23] Indications for Contraception: Changing Viewpoints* (editorial) (1965) 25 Obst. & Gynec. 285, 286.) Possibly more significant than the mere incidence of infection caused by criminal abortions is the result of such infection. "Induced Illegal Abortion . . . is one of the important causes of subsequent infertility and pelvic disease." (Kleegman & Kaufman, *Infertility in Women* (1966) p. 301; see also Curtis & Huffman, *Gynecology* (6th ed. 1950) pp. 565, 566.)⁹

[****24] Amici for appellant, 178 deans of medical schools, including the deans of all

California medical schools, chairmen of medical school departments, and professors of medical schools state: "These recorded facts bring one face-to-face with the hard, shocking -- almost brutal -- reality that our statute designed in 1850 to protect women from serious risks to life and health has in modern times become a scourge." ¹⁰

[****25] [*967] [**202] [***362] Although we may assume that the law was valid when first enacted, the validity of the law in 1850 does not resolve the issue of whether the law is constitutionally valid today. (Compare, e.g., [Gray v. Sanders \(1963\) 372 U.S. 368, 381 \[9 L.Ed.2d 821, 830, 83 S.Ct. 801\]](#), with [South v. Peters \(1950\) 339 U.S. 276, 277 \[94 L.Ed. 834, 836, 70 S.Ct. 641\]](#); [Baker v. Carr \(1962\) 369 U.S. 186, 237 \[7 L.Ed.2d 663, 697, 82 S.Ct. 691\]](#), with [Colgrove v. Green \(1946\) 328 U.S. 549, 556 \[90 L.Ed. 1432, 1435, 66 S.Ct. 1198\]](#); [Brown v. Board of Education \(1954\) 347 U.S. 483, 495 \[98 L.Ed. 873, 881, 74 S.Ct. 686, 38 A.L.R.2d 1180\]](#), with [Plessy v. Ferguson \(1896\) 163 U.S. 537, 550-551 \[41 L.Ed. 256, 260-261, 16 S.Ct. 1138\]](#).)

Constitutional concepts are not static. Our United States Supreme Court said, regarding the equal protection clause of the Fourteenth Amendment: "We agree, of course, with Mr. Justice Holmes that the Due Process Clause of the Fourteenth

⁸ The phrases "criminal abortion" and "illegal abortion" are used by the medical profession -- and by legal commentators -- to encompass all abortions obtained other than from a physician in an accepted surgical environment. Any use of the phrase "criminal abortion" or "illegal abortion" in this opinion merely adopts the common phraseology; no legal conclusion is intended.

⁹ There is considerable literature describing the experience of various hospitals with infected abortion. Hospital experience, however, can be assumed to be only the tip of the iceberg. Many badly infected women will be treated at home or in a doctor's office. (Reid, *Assessment and Management of the Seriously Ill Patient Following Abortion* (March 1967) 199 J.A.M.A. p. 805.) See, for hospital data, Goodno, Cushner, Molumphey, *Management of Infected Abortion* (1963) 85 Am.J.Obst. & Gynec. 16 [Baltimore City Hospitals]; Knapp, Platt and Douglas, *Septic Abortion* (1960) 15 Obst. & Gynec. 344 [The New York Hospital]; Moritz & Thompson, *Septic Abortion* (1966) 95 Am.J.Obst. & Gynec. 46 [Miami Valley Hospital, Dayton, Ohio]; Stevenson & Yang, *Septic Abortion With Shock* (1962) 83 Am.J.Obst. & Gynec. 1229 [Detroit Receiving Hospital]; Studdiford & Douglas, *Placental Bacteremia: A Significant Finding in Septic Abortion Accompanied by Vascular Collapse* (1956) 71 Am.J.Obst. & Gynec. 842 [Bellevue Hospital, New York].)

¹⁰ One of the amici in support of respondent agrees: "There is a substantial risk that abortion performed by persons unauthorized to practice surgery, carried out in unregulated places, will bring injury or even death to the mother."

Authorities recognizing and discussing the tragic health problem created by illegal abortions are legion. (See, e.g., Bates, *The Abortion Mill: An Institutional Study* (1954) 45 J.Crim.L.C. & P.S. 157; Eastman, *Expectant Motherhood* (3d ed. 1957) 106 et seq.; Gold, Erhardt, Jacobziner & Nelson, *Therapeutic Abortions in New York City: A 20-Year Review* (1965) 55 Am.J.Pub.Health 964, 970-971; Guttmacher (ed. 1967) *The Case for Legalized Abortion Now*; Lader (1966) *Abortion*; Leavy & Kummer, *Criminal Abortion: Human Hardship and Unyielding Laws* (1962) 35 So.Cal.L.Rev. 123; Lucas, *Federal Constitutional Limitations on the Enforcement and Administration of State Abortion Statutes* (1968) 46 N.C.L.Rev. 730; Niswander, *Medical Abortion Practices in the United States* (1965) 17 W.Res.L.Rev. 403.)

Amendment 'does not enact Mr. Herbert Spencer's Social Statics.' [Citation.] Likewise, the Equal Protection Clause is not shackled to the political theory [****26] of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights. . . ." (*Harper v. Virginia Board of Elections* (1966) 383 U.S. 663, 669 [16 L.Ed.2d 169, 173, 86 S.Ct. 1079]; see also, *Perez v. Sharp*, *supra*, 32 Cal.2d 711, 727; *Galyon v. Municipal Court*, 229 Cal.App.2d 667, 671-672 [40 Cal.Rptr. 446], and cases cited therein ["[A] statute valid when enacted may become invalid by change in the conditions to which it is applied."]. See also, Means, *supra*, 14 N.Y.L.F. 411, 514-515.)

CA(7b) (7b) In the light of modern medical surgical practice, the great and direct infringement of constitutional rights which would result from a definition requiring certainty of death may not be justified on the basis of considerations of the woman's health where, as here, abortion is sought during the first trimester.

It is next urged that the state has a compelling interest in the protection of the embryo and fetus ¹¹ and that such interest [*968] [****27] warrants the limitation on the woman's constitutional rights. Reliance is placed upon several statutes and court rules which assertedly show that the embryo or fetus is equivalent to a born child. However, all of the statutes and rules relied upon require a live birth or reflect the interest of the parents. ¹²

¹¹It has been pointed out that "embryo" is more accurately descriptive than "fetus" in the instant case. *Webster's New International Dictionary*, *supra*, states: ". . . In mammals . . . embryo is applied only to early stages passed within the mother's body; later (in human embryology, usually after the third month of development) the young is called a fetus. . . ." (Italics in original.)

¹²Statutes classifying the unborn child as the same as the born child require that the child be born alive for the provisions to apply. (E.g., *Civ. Code*, § 29 ["A child conceived, but not yet born, is to be deemed an existing person, so far as may be necessary for its

[****28] [**203] [***363] In any event, there are major and decisive areas where the embryo and fetus are not treated as equivalent to the born child. Probably the most important is reflected by the statute [*969] before us. The intentional destruction of the born child is murder or

interests in the event of its subsequent birth; . . ."]; *Prob. Code*, § 250 ["A post-humous child is considered as living at the death of the parent."]; *Prob. Code*, § 255 [An illegitimate child is the heir of his mother, whether born or conceived."].)

Similarly, cases holding that a child can recover for injuries caused before his birth require that the child be born alive. The interest protected is that of the child; and the right attaches, not to the embryo or fetus, but to the living child. (*Scott v. McPheeters*, 33 Cal.App.2d 629, 637 [92 P.2d 678, 93 P.2d 562] [child injured at birth can bring action for injuries]; see also, *Carroll v. Skloff* (1964) 415 Pa. 47 [202 A.2d 9, 11]; *Tomlin v. Laws* (1922) 301 Ill. 616 [134 N.E. 24, 25]; Prosser, *Law of Torts* (3d ed. 1964) at p. 356 ["The child, provided that he is born alive, is permitted to maintain an action. . . ."])

Where the embryo or fetus is allowed to assert rights before birth it is the prospective mother or parents who are bringing the action; thus it is their interest that the law protects. (*Kyne v. Kyne*, 38 Cal.App.2d 122, 127-128 [100 P.2d 806] [action on behalf of unborn child for support and to establish paternity]; *People v. Sianes*, 134 Cal.App. 355, 357-358 [25 P.2d 487] [Criminal action for nonsupport against father of unborn child]; *People v. Yates*, 114 Cal.App.Supp. 782, 786 [298 P. 961] [same].) Similarly, in those jurisdictions which recognize a cause of action for the loss of an unborn child, it is the parents' "distressing wrong in the loss of a child" that the law has recognized. (Prosser, *supra*, § 56, at p. 357; *Torigian v. Watertown News Co.* (1967) 352 Mass. 446, 448 [225 N.E.2d 926].)

In a case involving a pregnant woman who refused a blood transfusion, in ordering the transfusion the court made clear that it was concerned with the woman, rather than the fetus: ". . . Mrs. Jones wanted to live." (*Application of President & Directors of Georgetown College, Inc.* (D.C. Cir. 1964) 331 F.2d 1000, 1009 [118 App.D.C. 80, 9 A.L.R.3d 1367], cert. denied, 377 U.S. 978 [12 L.Ed.2d 746, 84 S.Ct. 1887]; but see, *Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson* (1964) 42 N.J. 421 [201 A.2d 537, 538], cert. denied, 377 U.S. 985 [12 L.Ed.2d 1032, 84 S.Ct. 1894]; suggesting that an 8-month pregnant woman could be required to have blood transfusions to protect the unborn child.)

Although *sections 3705* and *3706 of the Penal Code*, which provide for suspending the execution of a pregnant woman, reflect an interest in the unborn child, the sections do not affect any other significant private interest and thus furnish no basis to evaluate the interest protected or to conclude that the embryo or fetus is equivalent to a born child.

manslaughter. The intentional destruction of the embryo or fetus is never treated as murder, and only rarely as manslaughter but rather as the lesser offense of abortion. (Perkins, Criminal Law, *supra*, p. 103; Means, *supra*, 14 N.Y.L.F. at p. 445.)¹³

Furthermore, the law has always recognized that the pregnant woman's right to life takes precedence over any interest the state may have in the unborn. The California abortion statutes, as do the abortion laws of all 51 United States [****29] jurisdictions, make an exception in favor of the life of the prospective mother. (See Stern, [Abortion: Reform and the Law](#), *supra*, 59 J.Crim.L.C. & P.S. 84, 86-87; George, *Current Abortion Laws: Proposals & Movements for Reform* (1965) 17 W.Res.L.Rev. 366, 375.) Although there may be doubts as to whether the state's interest may ever justify requiring a woman to risk death, it is clear that the state could not forbid a woman to procure an abortion where, to a medical certainty, the result of childbirth would be death. We are also satisfied that the state may not require that degree of risk involved in respondent's definition, which would prohibit an abortion, where death from childbirth although not medically certain, would be substantially certain or more likely than not. Accordingly, the definition of the statute suggested by respondent must be rejected as an invalid infringement upon the woman's constitutional rights.

[**204] [***364] Another definition of the term "necessary to preserve" is suggested by [People v. Abarbanel](#), *supra*, 239 Cal.App.2d 31, 32, 34, where the court held that an abortion was not unlawful where the obstetrician performed the abortion [****30] based on the "possibility" of suicide. *Abarbanel* might be understood as meaning that "necessary to preserve" refers to a possibility of death different from or greater than

the ordinary risk of childbirth. To so interpret "necessary to preserve" would mean that in nearly every case, if not all, a woman who wished an abortion could have one. A woman who is denied a desired lawful abortion and forced to continue an unwanted pregnancy would seem to face a greater risk of death, because of psychological factors, than the average woman, because the average includes all those women who wish to bear the child [*970] to term. The psychological factor alone, which under *Abarbanel* is a proper consideration, would seem to be decisive. Such a construction of the statute permitting voluntary abortions would render the statute virtually meaningless. Moreover to determine the right to an abortion solely on the basis of the dangers of childbirth without regard to the relative dangers of the abortion would be contrary to good medical practice.

[CA\(9\)](#) (9) Nor can the statute be made certain by reading it as "substantially or reasonably" necessary to preserve the life of the mother. In the [****31] present context those terms are not sufficiently precise and would be subject to such different interpretations as to add little or nothing to "necessary." Thus, many people may feel that an abortion is reasonably or substantially necessary to preserve life where the risk of death is double or triple the ordinary risk in childbirth. Others may believe that anything which increases the possibility of death is a substantial risk which is not to be undertaken in the absence of countervailing considerations, so that "reasonably necessary" or "substantially necessary" becomes as destructive of the statute as "possibility of death." On the other hand, there may be those who feel that there is no reasonable or substantial necessity until it is more likely than not that the pregnant woman will not survive childbirth. Although in other contexts the implication of words such as "reasonably" and "substantially" may add certainty and avoid other due process objections, in the instant situation the implication of such words would merely increase the uncertainty.

[CA\(10\)](#) (10) There is one suggested test which is

¹³One case has held that, for purposes of the manslaughter and murder statutes, human life may exist where childbirth has commenced but has not been fully completed. ([People v. Chavez](#), 77 Cal.App.2d 621, 624, 626 [176 P.2d 92].)

based on a policy underlying the statute and which would serve to make the statute certain. The [****32] test is probably in accord with the legislative intent at the time the statute was adopted. The Legislature may have intended in adopting the statute that abortion was permitted when the risk of death due to the abortion was less than the risk of death in childbirth and that otherwise abortion should be denied. As we have seen, at the time of the adoption of the statute abortion was a highly dangerous procedure, and under the relative safety test abortion would be permissible only where childbirth would be even more dangerous. In light of the test and the then existing medical practice, the question whether abortion should be limited to protect the embryo or fetus may have been immaterial because any such interest would be effectuated by limiting [*971] abortions to the rare cases where they were safer than childbirth.

The suggested test would involve an application of medical principles. Medical science may be able to tell us the proper method to treat a patient to minimize the risk of death, but without resort to matters outside medical competence, it cannot tell us the circumstances in which the safest treatment should be rejected and a more dangerous treatment followed [****33] in order to protect an embryo or fetus.

The new Therapeutic Abortion Act ([Health & Saf. Code, §§ 25950- 25954](#)), has adopted a test analogous to the suggested one. Under the new statute, abortion is permissible during the first 20 weeks of pregnancy by a licensed physician in an accredited hospital ([Health & Saf. Code, \[**205\] \[***365\] §§ 25951, 25953](#)) if it is determined under prescribed procedures either that "There is substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother" ([Health & Saf. Code, § 25951, subd. \(c\) \(1\)](#)), or that "The pregnancy resulted from rape or incest." ([Health & Saf. Code, § 25951, subd. \(c\) \(2\)](#).) Mental health includes mental illness to the extent that the woman would be dangerous to

herself. ([Health & Saf. Code, § 25954](#).) By limiting the abortion to the first 20 weeks, the Legislature has taken into account the danger to the mother of the later abortion and, by requiring the abortion to be performed by a licensed physician in an accredited hospital, has recognized the danger to the mother of other procedures. The further criteria for determining whether an abortion is permissible is the [****34] pregnant woman's physical and mental health. Thus, the test established is a medical one, whether the pregnant woman's physical and mental health will be furthered by abortion or by bearing the child to term, and the assessment does not involve considerations beyond medical competence. There is nothing to indicate that in adopting the Therapeutic Abortion Act the Legislature was asserting an interest in the embryo.

Although the suggested construction of former [section 274](#), making abortion lawful where it is safer than childbirth and unlawful where abortion is more dangerous, may have been in accord with legislative intent, the statute may not be upheld against a claim of vagueness on the basis of such a construction. The language of the statute, "unless the same is necessary to preserve her life," does not suggest a relative safety test, and no case interpreting the statute has suggested that [*972] the statute be so construed. None of the parties or numerous amici who have filed briefs in the instant case suggest that the statute applies a relative safety test; to the contrary, the position of the parties and amici, including numerous lawyers, doctors, educators, clergymen [****35] and laymen, implies that the statute does not apply that standard. Thus, those claiming the statute is invalid urge that the only valid standard would be a relative safety test and that the statute fails to adopt such a test, and those urging the validity of the statute either state or imply that the standard applied is more restrictive. In the circumstances, we are satisfied that the statute may not be construed to adopt the relative safety test as against a claim of vagueness, because the language does not suggest that test and because of the practical evidence before us that men of "common" intelligence, indeed of

uncommon intelligence, have not guessed at this meaning.¹⁴

[**36] [**206] [***366]** [CA\(11\)](#) (11) The problem caused by the vagueness of the statute is accentuated because under the statute the doctor is, in effect, delegated the duty to determine whether a pregnant woman has the right to an abortion and the physician acts at his peril if he determines that the woman is entitled to an abortion. He is subject to prosecution for a felony and to deprivation of his right to practice medicine ([Bus. & Prof. Code, § 2377](#)) if his decision is wrong. Rather than being impartial, the physician has a "direct, personal, substantial, pecuniary interest in reaching a conclusion" that the woman should not have an abortion. The delegation of decision-making power to a directly involved individual violates the **[*973]** Fourteenth Amendment. ([Tumey v. Ohio \(1927\) 273 U.S. 510, 523 \[71 L.Ed. 749, 754, 47 S.Ct. 437, 50 A.L.R. 1243\]](#); see also [State Board of Dry Cleaners v. Thrift-D-Lux Cleaners, Inc., 40 Cal.2d 436, 448 \[254 P.2d 29\]](#) ["[The] statute assumes to confer legislative authority upon those who are directly interested in the operation of the regulatory rule. . . ."]; [Blumenthal v. Board of Medical Examiners, 57 Cal.2d 228, 235 \[****37\] \[18 Cal.Rptr. 501, 368 P.2d 101\]](#).)

The inevitable effect of such delegation may be to deprive a woman of an abortion when under any definition of [section 274 of the Penal Code](#), she would be entitled to such an operation, because the state, in delegating the power to decide when an abortion is necessary, has skewed the penalties in one direction: *no* criminal penalties are imposed where the doctor refuses to perform a necessary

operation, even if the woman should in fact die because the operation was not performed.

The pressures on a physician to decide not to perform an absolutely necessary abortion are, under [section 274 of the Penal Code](#), enormous, and because [section 274](#) authorizes -- and requires -- the doctor to decide, at his peril, whether an abortion is necessary, a woman whose life is at stake may be as effectively condemned to death as if the law flatly prohibited all abortions.

To some extent the Therapeutic Abortion Act reduces these pressures. The act specifically authorizes an abortion by a licensed physician in an accredited hospital where the abortion is approved in advance by a committee of the medical staff of the hospital, applying medical standards. ([Health \[****38\] & Saf. Code, § 25951](#).) At least in cases where there has been adherence to the procedural requirements of the statute, physicians may not be held criminally responsible, and a jury may not subsequently determine that the abortion was not authorized by statute.

[CA\(1b\)](#) (1b) We conclude that the validity of [section 274 of the Penal Code](#) before amendment cannot be sustained.¹⁵

Since [section 274](#) is invalid, Dr. Belous' conviction for violation of [section 182 of the Penal Code](#), conspiracy to commit **[*974]** abortion, must likewise fall. The judgment is reversed with **[****39]** directions to the trial court to dismiss the indictment.

Dissent by: BURKE; SULLIVAN

Dissent

¹⁴The practical aspects of the need to guess at the meaning of the abortion statute is shown by Packer & Gampell, *Therapeutic Abortion: A Problem in Law and Medicine* (1959) 11 Stan.L.Rev. 417. A questionnaire survey directed to 29 San Francisco Bay Area and Los Angeles hospitals (*id.*, at p. 423) based on hypothetical cases involving pregnant women seeking abortions yielded the following results (*id.*, at p. 444):

¹⁵It has been urged that the Therapeutic Abortion Act is unconstitutional because it contains uncertainties similar to those in the repealed statute, because it infringes on the woman's right to choose whether to bear children, and because the act does not expressly permit an abortion where there is a likelihood that a deformed child will be born. Since the act was adopted after the abortion in the instant case, we do not reach the issue of its validity.

BURKE, J. I dissent.

The defendant was found guilty by jury trial of a wilful violation of the abortion statute as it existed at the time of the offense. That he violated the statute is all but conceded in the briefs filed in his behalf. Although he testified that he directed the young couple to a doctor, unlicensed in California, because he believed that if they **[**207]** **[***367]** carried out their threats of going to Tijuana to procure an abortion the young woman's life would be in danger, he acknowledged upon cross-examination that her life would not have been endangered if she were not aborted. His assertions that he acted in good faith and out of compassion are tainted somewhat by the evidence which showed that he had referred other women to the same unlicensed physician on a number of occasions and that he had participated on at least one-half of those occasions in the fee paid the abortionist.

Had the doctor truly believed that the young woman's life was in danger he could have done what was the common practice of taking the patient to one of the several hospitals in which therapeutic **[****40]** abortions were being performed. To my knowledge there is not one single instance of a decision of the appellate courts of this state in which a doctor or a hospital has been prosecuted for the performance of an abortion where an independent hospital committee deemed the abortion to be necessary to preserve the woman's life. The plain fact is, as the jury found it to be, that this doctor, whatever his motive, possessed the intent to assist in procuring the miscarriage of the woman for reasons other than to preserve her life. This is the specific intent which the law requires for conviction.

He supplied to the jury the answer an independent hospital committee undoubtedly would have given him had he seen fit to seek its approval for an abortion -- the patient could bear the child without endangering her life; therefore, to abort her would

violate the law.

The threatened danger to the woman's life arose only from the couple's assertions that they would seek an illegal abortion by an unlicensed person. To assist them in attaining this **[*975]** goal was to flaunt his profession's own standards and to aid in bringing about a direct violation of the law.

The majority would reverse **[****41]** the conviction by declaring the statute unconstitutional because of asserted uncertainty in the phrase, "necessary to preserve [the woman's] life." ¹ **[****42]** This phrase has been an integral part of the California law against illegal abortions from the time of its enactment in 1872 until the 1967 amendment to the section, and similar language was in the original statute adopted in 1850. ² Thus for over a hundred years in this state doctors, hospital committees, judges, lawyers and juries have been called upon to give the phrase the common sense interpretation which the words appear to me to suggest. For this court over a hundred years later to find the language unconstitutionally vague and uncertain is a "negation of experience and common sense." ([United States v. Ragen, 314 U.S. 513, 524 \[86 L.Ed. 383, 390, 62 S.Ct. 374\].](#))

Not only was the phrase long used in the California statute, it was also employed at common law (see, e.g., Perkins on Criminal Law (2d ed.) p. 145; Clark and Marshall, Crimes (6th ed.) pp. 688-689) and is or has been in the abortion statutes of many states (see, e.g., *Am.Jur.2d, Abortion*, § 9, p. 192;

¹ [Section 274](#) then read: "Every person who provides, supplies, or administers to any woman, or procures any woman to take any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is *necessary to preserve her life*, is punishable" (Italics added.)

² The 1850 statute (ch. 99, § 45, p. 233) provided that every person who did any of the enumerated acts with a specified intent shall be punishable "Provided, that no physician shall be affected . . . who, in the discharge of his professional duties, deems it necessary to produce the miscarriage of any woman in order to save her life."

153 A.L.R. 1218, 1266; Smith, Abortion and the Law (1967) p. 7). Implicit in the decisions of this court, as well as those of countless other courts, is the view that the phrase does not render such a statute invalid (see, e.g., [People v. Davis](#), 43 Cal.2d 661 [276 P.2d 801]; [People v. Gallardo](#), 41 Cal.2d 57 [257 P.2d 29]; [People v. Powell](#), 34 Cal.2d 196 [208 P.2d 974]; [People v. \[**208\] \[***368\] Wilson](#), 25 [****43] Cal.2d 341 [153 P.2d 720]; [People v. Rankin](#), 10 Cal.2d 198 [74 P.2d 71]). In [State v. Moretti](#) 52 N.J. 192 [244 A.2d 499, 504] (cert. den. 393 U.S. 952 [21 L.Ed.2d 363, 89 S.Ct. 376]) the court stated that when the phrase "lawful justification," as used in a statute prohibiting abortions done maliciously or without lawful justification, is confined "to the preservation of the mother's [*976] life," the statute is not subject to constitutional attack on the ground of vagueness. (See also [State v. Elliott](#), 234 Ore. 522 [383 P.2d 382, 384-385].)

The proper test as to certainty was stated by this court in [People v. Howard](#), 70 Cal.2d 618, 624 [75 Cal.Rptr. 761, 451 P.2d 401], to be: "A statute should be sufficiently certain so that a person may know what is prohibited thereby and what may be done without violating its provisions, but it cannot be held void for uncertainty if any reasonable and practical construction can be given to its language. As stated in [Pacific Coast Dairy v. Police Court](#), 214 Cal. 668, at page 676 . . . "Mere difficulty in ascertaining its meaning, or the fact that it is susceptible of different interpretations [****44] will not render it nugatory. Doubts as to its construction will not justify us in disregarding it." [Citations.]"

The meaning of the phrase "necessary to preserve [the woman's] life" was considered in [People v. Ballard](#), 167 Cal.App.2d 803, 814-815 [335 P.2d 204], wherein the court stated, "Surely, the abortion statute ([Pen. Code, § 274](#)) does not mean by [this phrase] that the peril to life be imminent. It ought to be enough that the dangerous condition 'be potentially present, even though its full development might be delayed to a greater or less

extent. Nor was it essential that the doctor should believe that the death of the patient would be otherwise *certain* in order to justify him in affording present relief.' ([State v. Dunklebarger](#), 206 Iowa 971 [221 N.W. 592, 596]; see also [Rex v. Bourne](#), 1 K.B. 687 . . . ; [Commonwealth v. Wheeler](#), 315 Mass. 294 [53 N.E.2d 4]; 23 So.Cal.L.Rev. 523.) In [State v. Powers](#) . . . 155 Wash. 63, 67 [283 P. 439, 440], the court satisfied itself with an interpretation of 'necessity to save life' by stating, '*If the appellant in performing the operation did something which was recognized and [****45] approved by those reasonably skilled in his profession practicing in the same community . . . then it cannot be said that the operation was not necessary to preserve the life of the patient.*'" (Italics added.) (See also [People v. Abarbanel](#), 239 Cal.App.2d 31, 34 [48 Cal.Rptr. 336]; [People v. Ballard](#), 218 Cal.App.2d 295, 307 [32 Cal.Rptr. 233].)

Amici for appellant, 178 deans of medical schools, state that the italicized sentence quoted from [People v. Ballard, supra](#), 167 Cal.App.2d 803, 814-815, is in error because "the medical profession has 'approved' abortions in cases [in which the objective was not to preserve the life of the woman and therefore] clearly outside of [Penal Code section 274](#). Packer & [*977] Gampell, Therapeutic Abortion: A Problem in Law and Medicine, 11 Stan.L.Rev. 417, 447. . . ." However, that sentence must be understood to mean recognized and approved by such persons as being required to preserve the life of the patient.

The word "preserve" is defined in the dictionary as "1. To keep or save from injury or destruction; . . . to protect; save. 2. To keep in existence or intact; . . . To save from decomposition. . . ." (See [****46] Webster's New Internat. Dict. (3d ed. 1961).) As used in [section 274](#), the word "preserve" has been regarded as synonymous with "save" (see, e.g., [People v. Kutz](#), 187 Cal.App.2d 431, 436 [9 Cal.Rptr. 626]; [People v. Malone](#), 82 Cal.App.2d 54, 59 [185 P.2d 870]; [Stern v. Superior Court](#), 78 Cal.App.2d 9, 18 [177 P.2d 308]), and to save a life

ordinarily is understood as meaning to save from destruction, i.e. dying -- not merely from injury. Thus the precipitation of a psychosis in the absence of a genuine threat of suicide is not a threat to life under [section 274](#). (See Packer and Gampell, *Therapeutic Abortion: A Problem in Law and Medicine*, 11 Stan.L.Rev. 417, 433, 436.)

That the Legislature used the word "preserve" in the sense of save from destruction also appears from the purpose of the section. The law historically in various contexts has regarded the unborn child as a human being. (See Louisell, *Abortion, The Practice of Medicine, and the Due Process of Law*, [16 U.C.L.A. L.Rev. 233, 234-244](#).) Louisell (at p. 244) quotes from Prosser on Torts (3d ed. 1964) that "[Medical] authority has recognized long since that [****47] the child is in existence from the moment of conception, and for many purposes its existence is recognized by the law. The criminal law regards it as a separate entity, and the law of property considers it in being for all purposes which are to its benefit, such as taking by will or descent. . . . All writers who have discussed the problem have joined . . . in maintaining that the unborn child in the path of an automobile is as much a person in the street as the mother." In [Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson](#), [42 N.J. 421 \[201 A.2d 537, 538\]](#) (cert. den. [377 U.S. 985 \[12 L.Ed.2d 1032, 84 S.Ct. 1894\]](#)) it was held that an unborn child of a woman who did not wish blood transfusions because they were contrary to her religious convictions was entitled to the law's protection and that an order would be made to insure such transfusions to the mother in the event they are necessary in the opinion of the attending physician.

Several statutes show that the California law has been in [*978] accord in regarding the unborn child as a human being for various purposes. (See e.g., [Pen. Code, §§ 3706 and 270](#); [Civ. Code, § 29](#).)

³ In [Scott v. McPheeters \[****48\]](#), [33 Cal.App.2d 629, 634 \[92 P.2d 678, 93 P.2d 562\]](#), the court declared: "The respondent asserts that the provisions of [section 29 of the Civil Code](#) are based on a fiction of law to the effect that an unborn child is a human being separate and distinct from its mother. We think that assumption of our statute is not a fiction, but upon the contrary that it is an established and recognized fact by science and by everyone of understanding."

[****49] It is reasonable to believe that [section 274](#), as it read at the time in question, was not an exception to the law's attitude respecting the unborn child as a human being and that it was designed to protect not only the mother's life but also that of the child. In view of that purpose it would appear that the Legislature intended that the child would be deprived of his right to life only if in the absence of an abortion there was a danger of the mother's death -- not merely of injury to her.

"[The] Constitution does not require impossible standards'; all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. . . .' [United States v. Petrillo](#), [332 U.S. 1, 7-8 \[91 L.Ed. 1877, 67 S.Ct. 1538\]](#)." ([Roth v. United States](#), [354 U.S. 476, 491 \[1 L.Ed.2d 1498, 1510, 77 S.Ct. 1304\]](#).) The phrase in question, when applied according to the standard heretofore stated (namely, whether persons reasonably skilled in their profession practicing in the same community recognized and approved the act as being required to save the patient from

³ [Penal Code section 3706](#) requires that the execution of a death penalty be suspended if the defendant is pregnant and without regard to the stage of pregnancy.

[Penal Code section 270](#) makes punishable a father's wilful failure to provide a minor child with necessary items and provides that "A child conceived but not yet born is to be deemed an existing person in so far as this section is concerned."

[Civil Code section 29](#) provides in part that "A child conceived, but not yet born, is to be deemed an existing person, so far as may be necessary for its interests in the event of its subsequent birth . . ."

dying) clearly gives such warning. [****50]

Furthermore, [section 274](#) punishes only those who act with "... the intent to commit a criminal abortion, that is, an abortion for a purpose other than to preserve [i.e. save from destruction] the life of the mother." ([People v. Abarbanel](#), [**210] [***370] *supra*, 239 Cal.App.2d 31, 34-35; [People v. Ballard](#), *supra*, 167 Cal.App.2d 803, 817.) The requirement of such an intent eviscerates much of the majority's claim that the section is [*979] impermissibly vague. (See generally [Mishkin v. New York](#), 383 U.S. 502, 507, *fn. 5* [16 L.Ed.2d 56, 61, 86 S.Ct. 958]; [Boyce Motor Lines, Inc. v. United States](#), 342 U.S. 337, 342 [96 L.Ed. 367, 372, 72 S.Ct. 329].) A person who performs an abortion with such an intent has fair warning that his conduct may violate the law even though he may not be certain where the jury will draw the line on the matter of necessity.

The principal cases relied upon by the majority, in which statutes have been declared unconstitutionally vague, do not support such a finding when applied to the abortion statute. In [People v. McCaughan](#), 49 Cal.2d 409 [317 P.2d 974], the statute prohibited, among other [****51] conduct, "harsh" or "unkind" treatment of a mentally ill person. These words were held not to have an established meaning either at common law or as a result of adjudication. They were held unconstitutionally vague. On the other hand, the phrase "neglect of duty" and the word "cruel" were upheld because they did have such well established meanings, just as do the words utilized in the phrase under attack here.

[Lanzetta v. New Jersey](#), 306 U.S. 451, 453 [83 L.Ed. 888, 890, 59 S.Ct. 618], construed a statute defining "gangster" and making it a crime for anyone to be such a person. The phrase "consisting of two or more persons" was all that purported to define "gang," and the word "gang" was held so vague and uncertain as to violate the Fourteenth Amendment.

[Connally v. General Constr. Co.](#), 269 U.S. 385, 395 [70 L.Ed. 322, 329, 46 S.Ct. 126], involved a statute requiring a contractor to pay his employees "not less than the *current rate of . . . wages* in the *locality* where the work is performed," and the court held the italicized words unconstitutionally vague. Unlike the statute involved here, the statute in question was a new statute and the court noted [****52] that its application "depends not upon a word of fixed meaning in itself, or one made definite by statutory or judicial definition. . . ."

In contrast to these cases, here the challenged statute has a fixed meaning, frequently applied and impliedly interpreted by the courts in the more than one hundred years of its existence. In addition, the statute requires proof of the specific intent to commit a criminal abortion before a person may be successfully prosecuted under it.

There is, of course, a presumption in favor of constitutionality, and the invalidity of a legislative act must be clear [*980] before it can be declared unconstitutional. ([In re Anderson](#), 69 Cal.2d 613, 628 [73 Cal.Rptr. 21, 447 P.2d 117].)

The majority cite no authority holding that the term "necessary to preserve [the woman's] life" is impermissibly vague, and I agree with the conclusion as to the constitutionality of the section that is implicit in the multitude of past decisions affirming convictions for illegal abortion, and for murder where death was the result of such an act.

I would affirm the judgment.

SULLIVAN, J., Dissenting. I concur in the views of Justice Burke. Reading the majority's [****53] attack on [Penal Code section 274](#), one would think that the English language which has been the sensitive instrument of our system of law for over 500 years, has lost, by the mere passage of time, all capacity for clarity of expression. The majority strike down the statute solely because they find so vague and uncertain as to offend constitutional standards of due process, a single brief clause of nine words of long and common usage: "unless the

same is necessary to preserve her life." There is no mystique enveloping the statute and, as Justice Burke points **[**211]** **[***371]** out, the clause now challenged has stood the test of over a hundred years, and presumably of countless human incidents falling within its scope, apparently without evoking a single whimpering cry against it.

The mandate of the section is plain and clear, and simply means this: no one shall intentionally procure the miscarriage of a woman unless it is necessary to save her life. "The criminal intent necessary to support a conviction of illegal abortion must show that it was performed for a purpose other than to save the abortee's life." ([People v. Abarbanel \(1965\) 239 Cal.App.2d 31, 34 \[48 Cal.Rptr. \[****54\] 336\]](#).) I dare say that the average man in the street, confronted with this law, would have little trouble in extracting its sense (we hold him accountable to much more complicated enactments); and the doctor, with his professional training and expertise would have even less. We have said that "[it] is a cardinal rule to be applied to the interpretation of particular words, phrases, or clauses in a statute or a constitution that the entire substance of the instrument or of that portion thereof which has relation to the subject under review should be looked to in order to determine the scope and purpose of the particular **[*981]** provision therein of which such words, phrases, or clauses form a part; and in order also to determine the particular intent of the framers of the instrument in that portion thereof wherein such words, phrases, or clauses appear." ([Wallace v. Payne \(1925\) 197 Cal. 539, 544 \[241 P. 879\]](#).) In the case before us, the challenged clause when so examined, is clear in meaning.

Yet the majority, by engaging in a process of elaborate and lavish analysis, transform that which is simple and lucid into something complex and arcane. Actually the analysis **[****55]** is focused on only three words: "necessary to preserve." Their fair equivalent is "necessary to save" (see [People v. Abarbanel, supra, 239 Cal.App.2d 31, 34](#); [People v. Ballard \(1959\) 167 Cal.App.2d 803, 814, 817 \[335](#)

[P.2d 204\]](#)). Rather than evaluate these words in the light of "the entire substance" (see [Wallace v. Payne, supra, 197 Cal. 539, 544](#)), the majority resort to a dissection: "There is, of course, no standard definition of 'necessary to preserve' and taking the words separately, no clear meaning emerges." (*Ante*, pp. 960-961.) In support of this thesis, it is asserted that the word "necessary" does not have a "fixed meaning." In general, few words do. ¹ It is further insisted that the definition of "preserve" is "even less enlightening." Accordingly, the majority discard its obvious meaning, that is, "save," as used in the context "to save a life." From such analysis, the opinion concludes "that the term 'necessary to preserve' in [section 274 of the Penal Code](#) is not susceptible of a construction that does not violate legislative intent and that is sufficiently certain to satisfy due process requirements without **[**212]** **[***372]** improperly **[****56]** infringing on fundamental constitutional rights." (*Ante*, p. **[*982]** 960.) Actually the gist of this is that the three words "necessary to preserve" are so shrouded in darkness that the average man cannot detect what they mean although average men and men above average have had no trouble with them for a hundred years.

¹"Words, however, do not have absolute and constant referents. 'A word is a symbol of thought but has no arbitrary and fixed meaning like a symbol of algebra or chemistry, . . . ' ([Pearson v. State Social Welfare Board \(1960\) 54 Cal.2d 184, 195 \[5 Cal.Rptr. 553, 353 P.2d 331\]](#).) The meaning of particular words or groups of words varies with the ' . . . verbal context and surrounding circumstances and purposes in view of the linguistic education and experience of their users and their hearers or readers (not excluding judges). . . . A word has no meaning apart from these factors; much less does it have an objective meaning, one true meaning.' (Corbin, *The Interpretation of Words and the Parole Evidence Rule* (1965) 50 Cornell L.Q. 161, 187.)" ([Pacific Gas & Elec. Co. v. G. W. Thomas Drayage Etc. Co. \(1968\) 69 Cal.2d 33, 38 \[69 Cal.Rptr. 561, 442 P.2d 641\]](#).)

"Words are used in an endless variety of contexts. Their meaning is not subsequently attached to them by the reader but is formulated by the writer and can only be found by interpretation in the light of all the circumstances that reveal the sense in which the writer used the words." ([Universal Sales Corp. v. California etc. Mfg. Co. \(1942\) 20 Cal.2d 751, 776 \[128 P.2d 665\]](#). Traynor, J., concurring.)

[****57] I cannot accept so tortured a conclusion, wrenched from a statute which has had its roots in the law's historic solicitude for the priceless gift of life. The statute plainly prohibits an abortion unless it is necessary to save the mother's life. It strains reason to say that this crystal-clear exception to the law is "so vague that men of common intelligence must necessarily guess at its meaning. . . ." ([*Lanzetta v. New Jersey* \(1939\) 306 U.S. 451, 453 \[83 L.Ed. 888, 890, 59 S.Ct. 618\]](#), see *ante*, p. 960.) And it strains credulity to assume that this defendant, who under the evidence wilfully violated the statute, had to engage in any such guesswork with respect to the law governing his conduct.

I would affirm the judgment.

Table1 ([Return to related document text](#))

Case No.	of Legality of Abortion	Hospital Would Perform Abortion	
		Yes	No
1	Yes	21	1
2	No	10	12
3	No	6	16
4	No	15	7
5	No	8	13
6	No	8	14
7	Yes	17	4
8	No	5	17
9	Prob. Yes	10	11
10	Maybe	17	4
11	No	1	20

Table1 ([Return to related document text](#))



Neutral

As of: October 18, 2026 7:14 AM Z

[People v. Cannon](#)

Supreme Court of California

August 18, 2025, Opinion Filed

S277995

Reporter

18 Cal. 5th 497 *; 573 P.3d 991 **; 335 Cal. Rptr. 3d 588 ***; 2025 Cal. LEXIS 5340 ****; 2025 LX 342274; 2025 WL 2383643

THE PEOPLE, Plaintiff and Respondent, v.
WILLIAM JOSEPH CANNON, Defendant and
Appellant.

Subsequent History: Reported at [People v. Cannon, 2025 Cal. LEXIS 6204 \(Cal., Aug. 18, 2025\)](#)

Prior History: [****1] Superior Court of Mendocino County, No. SCU-K-CRCR-2010-14869-2, Ann C. Moorman, Judge. First Appellate District, Division Five, No. A163083.

[People v. Cannon, 85 Cal. App. 5th 786, 301 Cal. Rptr. 3d 712, 2022 Cal. App. LEXIS 977, 2022 WL 17258378 \(Nov. 29, 2022\)](#)

Core Terms

jury trial, cannon, fundamental rights, equal protection, right to a jury trial, due process, waive, civil commitment, fundamental interest, strict scrutiny, candidate, personal waiver, trial court, classification, the, fundamental liberty interest, disparate, civil commitment proceeding, heightened, bench trial, jury waiver, differential, involuntary, disorder, offender, sexually violent predator, equal protection claim, rational basis review, deprive, confinement

Case Summary

Overview

HOLDINGS: [1]-An equal protection claim in a *Sexually Violent Predator Act (SVPA)*, *Welf. & Inst. Code*, § 6600 *et seq.*, commitment proceeding, which arose from counsel's waiver of a jury trial under *Welf. & Inst. Code*, § 6603, in defendant's absence, was subject to rational basis review because the SVPA's lack of statutory jury advisement and personal waiver procedures, made available in the civil commitment schemes for defendants pleading not guilty by reason of insanity and offenders with mental health disorders, did not significantly burden the fundamental liberty interest protected by the jury trial right, which was based in civil commitment cases on procedural due process to the extent not provided by statute; [2]-Because the equal protection challenge was not raised in the trial court, a remand was appropriate for the trial court to conduct a rational basis analysis.

Outcome

Order affirmed.

LexisNexis® Headnotes

Criminal Law & Procedure > Postconviction Proceedings > Sex Offenders > Civil Commitments

Public Health & Welfare Law > ... > Mental Health Services > Commitment > Involuntary

Commitment of Adults

HN1 Sex Offenders, Civil Commitments

The *Sexually Violent Predator Act, Welf. & Inst. Code, § 6600 et seq.*, authorizes the involuntary civil commitment of convicted sex offenders after they have served their prison sentences if they are found beyond a reasonable doubt to be a sexually violent predator (SVP). An SVP candidate and the People both have the right to demand a jury trial on the allegations. [*Welf. & Inst. Code, § 6603, subds. \(a\), \(b\).*](#) Absent a demand, the trial is conducted before the court without a jury. [*§ 6603, subd. \(f\).*](#)

Civil Procedure > Trials > Jury Trials > Right to Jury Trial

Constitutional Law > State Constitutional Operation

Constitutional Law > Bill of Rights > Fundamental Rights > Trial by Jury in Civil Actions

HN2 Jury Trials, Right to Jury Trial

While the California Constitution specifically speaks to criminal jury waivers, it empowers the Legislature to address the requirements for civil jury waivers by statute. [*Cal. Const., art. I, § 16*](#), was intended to preserve the right to a civil jury as it existed at common law in 1850 when the jury trial provision was first incorporated into the California Constitution. The rules under which the parties to a civil lawsuit may waive a jury trial must be prescribed by the Legislature, which is without power to delegate to the courts the responsibility of determining the circumstances under which such a waiver may be permitted. [*Code Civ. Proc., § 631*](#), embodies the exclusive legislatively selected means by which the constitutional right to a civil jury may be waived in California.

Civil Procedure > Trials > Jury Trials > Right to Jury Trial

Governments > Courts > Clerks of Court

HN3 Jury Trials, Right to Jury Trial

By statute, the constitutional right to a civil jury may be waived in one of six ways: (1) by failing to appear at the trial; (2) by written consent filed with the clerk or judge; (3) by oral consent, in open court, entered in the minutes; (4) by failing to announce that a jury is required, at the time the cause is first set for trial, if it is set upon notice or stipulation, or within five days after notice of setting if it is set without notice or stipulation; (5) by failing to timely pay the fee described in subdivision (b), unless another party on the same side of the case has paid the fee; (6) by failing to deposit with the clerk or judge, at the beginning of the second and each succeeding day's session, the sum provided in [*Code Civ. Proc., § 631, subd. \(c\).*](#) [*§ 631, subd. \(f\).*](#)

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Public Health & Welfare Law > ... > Mental Health Services > Commitment > Involuntary Commitment of Adults

HN4 Procedural Due Process, Scope of Protection

The adjudication of a civil commitment petition is not a criminal proceeding. Nevertheless, as a matter of procedural due process, several protections afforded criminal defendants must be extended to those facing possible civil commitment. While those procedural protections include the right to a civil jury on demand, the full panoply of rights applicable in criminal matters does not apply in civil commitment cases. The legislative provision of procedural protections similar to those afforded

criminal defendants does not transform a civil commitment proceeding into a criminal prosecution.

Constitutional Law > Bill of

Rights > Fundamental Rights > Trial by Jury in Civil Actions

Public Health & Welfare Law > ... > Mental Health Services > Commitment > Involuntary Commitment of Adults

HN5 Fundamental Rights, Trial by Jury in Civil Actions

Civil commitment adjudications are in the nature of special civil proceedings that were unknown to the common law. Because these commitments place a substantial burden on the freedom of those committed, the circumstances permitting such treatment are subject to both legislative determinations and judicial review. Lower courts, applying California Supreme Court precedents, have repeatedly held that the jury trial provisions of [Cal. Const., art. I, § 16](#), do not apply to these special civil cases. That is not to say, however, that a person facing civil commitment is bereft of constitutional protection. Instead, those protections are provided under a different constitutional rubric.

Constitutional Law > Equal Protection > Nature & Scope of Protection

Public Health & Welfare Law > ... > Mental Health Services > Commitment > Involuntary Commitment of Adults

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

HN6 Equal Protection, Nature & Scope of Protection

Any civil commitment constitutes a significant

deprivation of liberty and can engender adverse social consequences to the individual. As a result, a jury trial must be made available to civil commitment candidates as a matter of procedural due process when the statutory scheme fails to provide one. Further, as a matter of equal protection, the state cannot arbitrarily withhold jury trial availability from one group of defendants while statutorily granting it to another. Some statutory schemes vary in terms of procedure.

Criminal Law & Procedure > Postconviction Proceedings > Sex Offenders > Civil Commitments

Public Health & Welfare Law > ... > Mental Health Services > Commitment > Involuntary Commitment of Adults

Criminal Law & Procedure > ... > Entry of Pleas > Types of Pleas > Not Guilty by Reason of Mental Defect

Criminal Law & Procedure > Sentencing > Mental Incapacity

HN7 Sex Offenders, Civil Commitments

Comparing the commitment schemes for defendants who have pled not guilty by reason of insanity (NGI), offenders with mental health disorders (OMHD), and sexually violent predators (SVPs), the Legislature has provided for a jury trial in two different ways. Under the NGI and OMHD statutes, a jury is available as a general matter, unless waived. [Pen. Code, §§ 1026.5, subd. \(b\)\(4\)](#), 2972, subd. (a)(2). The *Sexually Violent Predator Act (SVPA)*, [Welf. & Inst. Code, § 6600 et seq.](#), by contrast, provides for a jury trial when either an SVP candidate, or the People, requests one. [Welf. & Inst. Code, § 6603, subd. \(f\)](#). Additionally, the statutes relating to NGI and OMHD defendants call for the court to advise them of their right to a jury trial and secure a personal waiver of that right before proceeding by bench trial. The SVPA,

however, does not contain those requirements. If neither the alleged SVP, their counsel, nor the prosecutor demand a jury trial, the statute provides for a court trial, which includes all the attendant due process rights, including assistance of counsel, presentation of a defense, and proof beyond a reasonable doubt. [Welf. & Inst. Code, §§ 6603, subs. \(a\), \(e\), 6604.](#)

Constitutional Law > Equal Protection > Nature & Scope of Protection

[HN8](#) Equal Protection, Nature & Scope of Protection

The right to equal protection under both the federal and California Constitutions is intended to ensure that the government does not treat a group of people unequally without some justification. Equal protection does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which the classification is made. Unlike other provisions of the Constitution, the Equal Protection Clause confers no substantive rights and creates no substantive liberties. The function of the Equal Protection Clause, rather, is simply to measure the validity of classifications created by state laws.

Constitutional Law > Equal Protection > Nature & Scope of Protection

Evidence > Burdens of Proof > Allocation

Constitutional Law > Equal Protection > Judicial Review > Standards of Review

[HN9](#) Equal Protection, Nature & Scope of Protection

The degree of justification required to satisfy equal protection depends on the type of unequal treatment

at issue. Strict scrutiny is the most exacting level of constitutional review, in which the state bears the burden of establishing not only that it has a compelling interest which justifies the law but that the distinctions drawn by the law are necessary to further its purpose. Any unequal treatment that is based on suspect classifications or that significantly burdens a fundamental right or interest is subject to strict scrutiny analysis. If the statutory classification, however, does not differentiate based on a protected class or significantly burden a fundamental right or interest, the legislation is presumed valid unless the challenger can establish there is no rational relationship between a disparity in treatment and some legitimate government purpose.

Constitutional Law > Substantive Due Process > Scope

Public Health & Welfare Law > ... > Mental Health Services > Commitment > Involuntary Commitment of Adults

Constitutional Law > Equal Protection > Judicial Review > Standards of Review

[HN10](#) Constitutional Law, Substantive Due Process

Although a fundamental interest may be involved, both the United States Supreme Court and the California Supreme Court have recognized that not every limitation or incidental burden on a fundamental right is subject to the strict scrutiny standard. When the regulation merely has an incidental effect on exercise of protected rights, strict scrutiny is not applied. It is only when there exists a real and appreciable impact on, or a significant interference with the exercise of the fundamental right that the strict scrutiny doctrine will be applied. Furthermore, despite the liberty interests involved, not every detail of every civil commitment program is subject to strict scrutiny.

Constitutional Law > Equal
Protection > Judicial Review > Standards of
Review

HN11 Judicial Review, Standards of Review

The burden of persuasion under a rational basis analysis is on the challenger: The underlying rationale for a statutory classification need not have been ever actually articulated by lawmakers, nor be empirically substantiated. Evaluating potential justifications for disparate treatment, a court reviewing a statute under this standard must treat the statute's potential logic and assumptions far more permissively than with other standards of constitutional or regulatory review. If a plausible basis exists for the disparity, courts may not second-guess its wisdom, fairness, or logic. The logic behind a potential justification need not be persuasive or sensible — rather than simply rational.

Constitutional Law > Equal
Protection > Judicial Review > Standards of
Review

Evidence > Burdens of Proof > Allocation

HN12 Judicial Review, Standards of Review

Although normally any rational connection between distinctions drawn by a statute and the legitimate purpose thereof will suffice to uphold the statute's constitutionality, closer scrutiny is afforded a statute which affects fundamental interests or employs a suspect classification. In such cases the state bears the burden of establishing both that the state has a compelling interest which justifies the law and that the distinction is necessary to further that purpose. A variety of interests have been held to be so fundamental as to impose this burden on the state.

Constitutional Law > ... > Fundamental
Rights > Procedural Due Process > Scope of
Protection

Public Health & Welfare Law > ... > Mental
Health Services > Commitment > Involuntary
Commitment of Adults

HN13 Procedural Due Process, Scope of Protection

The right to a jury trial in an action which may lead to the involuntary confinement of the defendant, even if such confinement is for the purpose of treatment, is fundamental. Its fundamental nature is reflected by the absolute right to jury trial accorded by [U.S. Const., 6th Amend.](#) (criminal cases) and [U.S. Const., 7th Amend.](#) (civil cases) and by [Cal. Const., art. I, § 16](#), in all criminal trials and in those civil actions in which such a right was available at common law. Its fundamental nature was further emphasized by the United States Supreme Court in holding that due process requires that the right to jury trial be extended to defendants in state criminal prosecutions of a serious nature. To the person who is threatened with involuntary confinement, these considerations are equally important whether the threat of confinement originates in a civil action or a criminal prosecution. An involuntary commitment, whether as a result of civil or criminal adjudication, impinges on the committed person's liberty interest. It is the liberty interest that is fundamental, whether confinement is imposed in the criminal or civil context.

Public Health & Welfare Law > ... > Mental
Health Services > Commitment > Involuntary
Commitment of Adults

HN14 Commitment, Involuntary Commitment of Adults

In extending the right to trial by jury to classes of persons subject to civil commitment proceedings, the California Legislature has recognized that the

interests involved in civil commitment proceedings are no less fundamental than those in criminal proceedings and that liberty is no less precious because forfeited in a civil proceeding than when taken as a consequence of a criminal conviction.

Constitutional Law > Equal Protection > Nature & Scope of Protection

Constitutional Law > Equal Protection > Judicial Review > Standards of Review

Constitutional Law > Substantive Due Process > Scope

HN15 Equal Protection, Nature & Scope of Protection

In the equal protection context, the United States Supreme Court has described a fundamental right or interest triggering strict scrutiny as one explicitly or implicitly guaranteed by the Constitution. California's equal protection clause is possessed of an independent vitality which, in a given case, may demand an analysis different from that which would obtain if only the federal standard were applicable. Thus, strict scrutiny applies to legislative classifications which, because of their impact on those individual rights and liberties which lie at the core of a free and representative form of government, are properly considered fundamental. It may be that under California's inquiry, considerations of substantive due process could also inform a determination of fundamental rights. In that context, both the California Supreme Court and the United States Supreme Court have employed a two-step methodology. First, the court must make a careful description of the asserted fundamental liberty interest. This careful description is concrete and particularized, rather than abstract and general. Second, the court must determine whether the asserted interest, as carefully described, is one of the fundamental rights and liberties; central to this determination is whether

the asserted interest finds support in history, traditions, and the conscience of the people.

Civil Procedure > Trials > Jury Trials > Right to Jury Trial

Criminal Law & Procedure > ... > Waiver of Jury Trial > Requirements for Waiver > Compliance

Public Health & Welfare Law > ... > Mental Health Services > Commitment > Involuntary Commitment of Adults

HN16 Jury Trials, Right to Jury Trial

Before moving forward without a jury, a court must be able to conclude that a civil commitment candidate was aware of the right to demand a jury and made the decision to forego doing so. This judicial obligation supports the essential jury trial right. Yet, even in a criminal context, no state or federal court has ever held that a particular kind of judicial advisement is constitutionally mandated. Before a criminal jury waiver may be accepted, the court must be satisfied that a defendant has been made aware of his or her right to a jury trial, which can be accomplished through judicial explanation or consultation with counsel. The court must also be satisfied that the defendant understands the right and personally announces in court a decision to waive it.

Business & Corporate Law > Agency Relationships > Types > Attorney & Client

Civil Procedure > Trials > Jury Trials > Right to Jury Trial

HN17 Types, Attorney & Client

In the civil context, California's constitutional right to a jury may be waived either expressly, impliedly based on conduct, or by failing to announce that a jury is required ([*Code Civ. Proc.*, § 631, subd.](#)

(f)(4)). The client's choice to demand or waive a jury in all matters is expected to be made in consultation with legal counsel, and particularly in civil matters, the decision is traditionally communicated to the court through the attorney.

Business & Corporate Law > Agency
Relationships > Types > Attorney & Client

HN18 Types, Attorney & Client

Barring issues related to a client's mental competency, an attorney does not exercise absolute control over the jury right decision in either the civil or criminal context. As a general rule, in both civil and criminal matters, a party's attorney has general authority to control the procedural aspects of the litigation and, indeed, to bind the client in these matters. An attorney is not authorized, however, merely by virtue of retention in litigation, to impair the client's substantial rights or the cause of action itself. Thus, in the criminal context, it is for the defendant to decide such fundamental matters as whether to waive the right to trial by jury.

Legal Ethics > Client Relations > Duties to
Client > Effective Representation

Public Health & Welfare Law > ... > Mental
Health Services > Commitment > Involuntary
Commitment of Adults

HN19 Duties to Client, Effective Representation

California's Rules of Professional Conduct speak to the allocation of authority between attorneys and their clients. *Rules Prof. Conduct, rule 1.2(a)*, states in part that except as otherwise provided by law in a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, whether to waive jury trial. A lawyer is also ethically obligated to: reasonably consult with the client about the means by which to accomplish the

client's objectives in the representation; keep the client reasonably informed about significant developments relating to the representation; and explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. *Rules Prof. Conduct, rule 1.4(a)(2), (3), (b)*. These ethical obligations apply when representing those facing civil commitment.

Business & Corporate Law > Agency
Relationships > Types > Attorney & Client

Criminal Law & Procedure > Postconviction
Proceedings > Sex Offenders > Civil
Commitments

Public Health & Welfare Law > ... > Mental
Health Services > Commitment > Involuntary
Commitment of Adults

HN20 Types, Attorney & Client

The *Sexually Violent Predator (SVP) Act (Welf. & Inst. Code, § 6600 et seq.)* honors the traditional allocation of responsibility between attorney and client by vesting in the SVP candidate the authority to decide whether to waive or demand a jury trial. But it does not follow from this conclusion that an attorney, who remains obligated to inform and confer with their client regarding the waiver decision, lacks the ability to properly advise them, or convey their waiver decision to the court. In the absence of any contrary indication, the superior court may assume that an attorney is competent and fully communicates with the proposed commitment candidate about the entire proceeding.

Constitutional Law > Equal
Protection > Judicial Review > Standards of
Review

HN21 Judicial Review, Standards of Review

The California Supreme Court has altered the traditional analytical framework for conducting rational basis review. In cases in which the statutes themselves draw distinctions between identifiable groups, the court no longer asks at the outset whether the groups are similarly situated for purposes of the law in question.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Public Health & Welfare Law > ... > Mental Health Services > Commitment > Involuntary Commitment of Adults

HN22 Procedural Due Process, Scope of Protection

Civil commitment for any purpose can affect liberty and other vital interests. Hence, due process safeguards apply. The procedural safeguards required in this context are flexible, and the quantum and quality of the process due depend upon the nature and purpose of the challenged commitment. In making this determination, the courts weigh, assess, and consider various factors affected by the disputed procedure. Distilled, these considerations involve (1) the various private interests at stake, (2) any competing state or public concerns, and (3) the potential risk of an erroneous or unreliable outcome. The due process interests involved have been deemed sufficiently fundamental to implicate certain constitutional jury trial concerns in commitment cases, at least in those relatively few instances in which a right to trial by jury has not been legislatively prescribed. It does not follow, however, that the jury trial option implied by the courts is illusory unless accompanied by specific ancillary procedures for judicial advisement and personal waiver. Nor do such procedures necessarily amount to independent constitutional rights applicable in every case. Instead, their due process availability depends, in a particular instance, on a careful balancing of the

public and private interests described above.

Constitutional Law > Equal Protection > Nature & Scope of Protection

Public Health & Welfare Law > ... > Mental Health Services > Commitment > Involuntary Commitment of Adults

HN23 Equal Protection, Nature & Scope of Protection

An equal protection violation does not occur merely because different statutory procedures have been included in different civil commitment schemes. Nothing compels the state to choose between attacking every aspect of a problem or not attacking the problem at all. Far from having to solve all related ills at once, the Legislature has broad discretion to proceed in an incremental and uneven manner without necessarily engaging in arbitrary and unlawful discrimination.

Constitutional Law > Equal Protection > Nature & Scope of Protection

HN24 Equal Protection, Nature & Scope of Protection

In cases involving challenges to statutes that facially distinguish between identifiable groups or classes of individuals, to ask whether two groups are similarly situated in this context is essentially the same as asking whether the distinction between them can be justified under the appropriate test of equal protection.

Criminal Law & Procedure > ... > Waiver of Jury Trial > Requirements for Waiver > Compliance

Criminal Law & Procedure > ... > Waiver of Jury Trial > Appellate Review > Standards of

Review

Criminal Law & Procedure > ... > Waiver of
Jury Trial > Requirements for
Waiver > Knowing & Voluntary Waivers

HN25 Requirements for Waiver, Compliance

When trial courts fail to follow explicit statutory requirements for jury advisement and waiver, the reviewing court should treat that failure as tantamount to the denial of a jury trial right and deem it reversible under [Cal. Const., art. VI, § 13](#), unless: (1) the totality of circumstances in the record affirmatively shows the defendant's personal waiver was knowing and voluntary despite the court's failure to provide a statutorily required advisement, or (2) there was substantial evidence the defendant lacked the capacity to make a knowing and voluntary waiver at the time the court accepted defense counsel's waiver. In both scenarios, the requirement of an affirmative showing means that no valid waiver may be presumed from a silent record. Under the latter two sets of circumstances, the court's failure to comply with the statutorily required jury advisement and waiver is subject to harmless error analysis under [Cal. Const., art. VI, § 13](#). There is a difference between the deprivation of an advisement and personal waiver, on the one hand, and the deprivation of jury trial, on the other; one is not tantamount to the other.

Business & Corporate Law > Agency
Relationships > Types > Attorney & Client

Constitutional Law > ... > Fundamental
Rights > Procedural Due Process > Scope of
Protection

Civil Procedure > Trials > Jury Trials > Right
to Jury Trial

HN26 Types, Attorney & Client

Generally, counsel is captain of the ship and has

authority to bind the client in procedural aspects of litigation. However, this captaincy generally does not extend to the decision to waive jury. Thus, given the possibility of a significant deprivation of liberty, the court trains its attention on the text and purpose of the particular statutes that govern the proceeding to determine whether the decision to waive a jury trial must be made by the defendant or may be made by counsel notwithstanding the defendant's wishes.

Criminal Law & Procedure > Postconviction
Proceedings > Sex Offenders > Civil
Commitments

Public Health & Welfare Law > ... > Mental
Health Services > Commitment > Involuntary
Commitment of Adults

Criminal Law & Procedure > ... > Entry of
Pleas > Types of Pleas > Not Guilty by Reason
of Mental Defect

Criminal Law &
Procedure > Sentencing > Mental Incapacity

Criminal Law & Procedure > Postconviction
Proceedings > Sex Offenders > Classification

HN27 Sex Offenders, Civil Commitments

The statutory text of the *Sexually Violent Predator (SVP) Act*, *Welf. & Inst. Code, § 6600 et seq.*, indicates the Legislature intended an alleged SVP to maintain control over the jury trial decision itself, assuming they are mentally competent to do so. The term "person subject to this article" in [Welf. & Inst. Code, § 6603](#), refers to the defendant, rather than his or her attorney. Thus, based on the plain statutory language and consistent with the application of the not guilty by reason of insanity (NGI) and offenders with mental health disorders (OMHD) statutes, the alleged SVP, rather than counsel, has final say over whether to demand a jury trial.

Criminal Law & Procedure > Postconviction
Proceedings > Sex Offenders > Civil
Commitments

Public Health & Welfare Law > ... > Mental
Health Services > Commitment > Involuntary
Commitment of Adults

HN28 Sex Offenders, Civil Commitments

The purpose of an advisement is to inform the defendant of a particular right so that he or she can make an informed choice about whether to waive that right. By what procedure do trial and appellate courts ensure that a commitment candidate made their own informed decision as to a jury trial? The absence of jury advisement and personal waiver procedures from the *Sexually Violent Predator (SVP) Act, Welf. & Inst. Code, § 6600 et seq.*, leads to the conclusion that the Legislature chose to protect an alleged SVP's right to make an informed choice of factfinder through the statutory right to and advice of counsel. Counsel is presumed competent and informed as to applicable constitutional and statutory law. This presumption necessarily includes the defense right to seek a jury trial in a civil commitment proceeding, regardless of any court advisement. Because the decision as to a jury trial is significant, the record must support a judicial conclusion, through the express representations of counsel or otherwise, that counsel has explained the jury trial right and obtained the client's permission to demand or waive a jury.

Criminal Law & Procedure > Postconviction
Proceedings > Sex Offenders > Civil
Commitments

Public Health & Welfare Law > ... > Mental
Health Services > Commitment > Involuntary
Commitment of Adults

Criminal Law & Procedure > ... > Entry of

Pleas > Types of Pleas > Not Guilty by Reason
of Mental Defect

Criminal Law &
Procedure > Sentencing > Mental Incapacity

HN29 Sex Offenders, Civil Commitments

A comparison of the *Sexually Violent Predator Act, Welf. & Inst. Code, § 6600 et seq.*, with the not guilty by reason of insanity (NGI) and offenders with mental health disorders (OMHD) commitment schemes reveals that all three make a civil jury trial available to a commitment candidate, but they differ in the procedures for doing so. In the former, a jury trial is available on demand. The statute permits counsel to explain the right to the defendant and convey the client's choice of jury trial or waiver to the court. In the latter, before proceeding to a bench trial, the court must provide the admonition and obtain a waiver from the defendant.

Constitutional Law > Equal Protection > Nature
& Scope of Protection

HN30 Equal Protection, Nature & Scope of Protection

The state has a duty not to illegitimately place conditions on a fundamental right or interest. That assertion states the guarantee protected by the Equal Protection Clause.

Constitutional Law > Equal
Protection > Judicial Review > Standards of
Review

HN31 Judicial Review, Standards of Review

Strict scrutiny is called for when a state-chosen difference in treatment violates or improperly burdens rights and interests recognized as fundamental, or when it discriminates based on membership in a protected class. Rational basis review applies if differential treatment does not

impinge upon fundamental rights and interests or protected status but is allegedly irrational in the distinctions it makes. The terms "rights" and "interests" are often used interchangeably in the case law and are often used in conjunction to ensure that protections are not interpreted too narrowly.

Constitutional Law > Equal Protection > Nature & Scope of Protection

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

HN32 Equal Protection, Nature & Scope of Protection

The concepts of due process and equal protection are complementary and sometimes interrelated. Equal protection is not a source of substantive rights or liberties. Instead, it serves separately to ensure any differential legislative treatment is adequately justified under the appropriate level of scrutiny. The right to demand a jury trial in civil commitments is based not on [Cal. Const., art. I, § 16](#), but on principles of procedural due process protecting the fundamental liberty interest. Equal protection is also implicated when the Legislature grants a jury right to one group of civil commitment candidates, but not to others.

Constitutional Law > Equal Protection > Nature & Scope of Protection

HN33 Equal Protection, Nature & Scope of Protection

An equal protection challenge may lie even when the involved interest has not been recognized as fundamental. But it is the nature of the right or interest that is significant to selecting the standard of review applicable to such a challenge.

Constitutional Law > Equal Protection > Nature & Scope of Protection

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

HN34 Equal Protection, Nature & Scope of Protection

An interest does not need to derive from due process principles to rank as fundamental for equal protection purposes, but it must find its footing on some fundamental ground rather than simply asserting it is a right or benefit granted to some but not others.

Headnotes/Summary

Summary

[*497] CALIFORNIA OFFICIAL REPORTS SUMMARY

The People filed a commitment petition under the *Sexually Violent Predator Act (SVPA)* (*Welf. & Inst. Code, § 6600 et seq.*) near the end of defendant's sentence for assault with intent to commit rape. During two pretrial hearings, neither of which defendant attended, his attorney waived his jury trial right (*Welf. & Inst. Code, § 6603*). The trial court neither advised defendant of his jury trial right nor sought his personal waiver. Following a bench trial, the trial court determined defendant was a sexually violent predator (SVP) and ordered him committed. (Superior Court of Mendocino County, No. SCUK-CRCR-2010-14869-2, Ann C. Moorman, Judge.) The Court of Appeal, First Dist., Div. Five, No. A163083, considered an unpreserved equal protection claim (*U.S. Const., 14th Amend.*; *Cal. Const., art. I, § 7*) and remanded for the trial court to conduct a rational basis analysis.

The Supreme Court affirmed the Court of Appeal's order and conditionally affirmed the order of commitment pending the outcome of the

proceedings on remand. The court held rational basis review was the appropriate standard for defendant's equal protection claim, which challenged the absence in SVPA proceedings of the statutory jury advisement and personal waiver procedures that are provided in the civil commitment schemes for defendants pleading not guilty by reason of insanity and offenders with mental health disorders, because the SVPA's jury trial procedures do not significantly burden the fundamental liberty interest that is protected by the jury trial right. The court noted that the jury trial right in civil commitment proceedings is based on principles of procedural due process (*U.S. Const., 14th Amend.*; *Cal. Const., art. I, § 7*) to the extent not provided by statute and does not derive from the constitutional jury trial right for civil cases (*Cal. Const., art. I, § 16*) as implemented by statute (*Code Civ. Proc., § 631*) because commitments are special civil proceedings that were unknown to the common law. Because the equal protection challenge was not raised in the trial court, a remand was appropriate for the trial court to conduct a rational basis analysis. (Opinion by Corrigan, J., with Guerrero, C. J., Kruger, Groban, and Jenkins, JJ., concurring. Dissenting opinion by Liu, J. (see p. 537). Dissenting opinion by Evans, J. (see p. 550).)

Headnotes

CALIFORNIA OFFICIAL REPORTS HEADNOTES

CA(1) (1)

Criminal Law § 195—Sexually Violent Predators—Hearing—Jury Trial—Right to Demand.

The *Sexually Violent Predator Act* (*Welf. & Inst. Code, § 6600 et seq.*) authorizes the involuntary civil commitment of convicted sex offenders after they have served their prison sentences if they are found beyond a reasonable doubt to be a sexually violent predator (SVP). An SVP candidate and the People both have the right to demand a jury trial on

the allegations (*Welf. & Inst. Code, § 6603, subds. (a), (b)*). Absent a demand, the trial is conducted before the court without a jury (*§ 6603, subd. (f)*).

CA(2) (2)

Jury § 12—Right to Jury Trial—Waiver in Civil Cases—Mode of Waiver—Exclusively Statutory.

While the California Constitution specifically speaks to criminal jury waivers, it empowers the Legislature to address the requirements for civil jury waivers by statute. *Cal. Const., art. I, § 16*, was intended to preserve the right to a civil jury as it existed at common law in 1850 when the jury trial provision was first incorporated into the California Constitution. The rules under which the parties to a civil lawsuit may waive a jury trial must be prescribed by the Legislature, which is without power to delegate to the courts the responsibility of determining the circumstances under which such a waiver may be permitted. *Code Civ. Proc., § 631*, embodies the exclusive legislatively selected means by which the constitutional right to a civil jury may be waived in California.

CA(3) (3)

Jury § 12—Right to Jury Trial—Waiver in Civil Cases—Mode of Waiver—Methods Set Forth in Statute.

By statute, the constitutional right to a civil jury may be waived in one of six ways: (1) by failing to appear at the trial; (2) by written consent filed with the clerk or judge; (3) by oral consent, in open court, entered in the minutes; (4) by failing to announce that a jury is required, at the time the cause is first set for trial, if it is set upon notice or stipulation, or within five days after notice of setting if it is set without notice or stipulation; (5) by failing to timely pay the fee described in *Code Civ. Proc., § 631, subd. (b)*, unless another party on the same side of the case has paid the fee; (6) by failing to deposit with the clerk or judge, at the

beginning of the second and each succeeding day's session, the sum provided in [§ 631, subd. \(c\)](#) ([§ 631, subd. \(f\)](#)).

[CA\(4\)](#) (4)

Constitutional Law § 109—Due Process—Procedural—Hearing—Civil Commitment Proceedings—Jury Trial on Demand.

The adjudication of a civil commitment petition is not a criminal proceeding. Nevertheless, as a matter of procedural due process, several protections [***499**] afforded criminal defendants must be extended to those facing possible civil commitment. While those procedural protections include the right to a civil jury on demand, the full panoply of rights applicable in criminal matters does not apply in civil commitment cases. The legislative provision of procedural protections similar to those afforded criminal defendants does not transform a civil commitment proceeding into a criminal prosecution.

[CA\(5\)](#) (5)

Jury § 7—Right to Jury Trial—Civil Cases—Applicability—Civil Commitment Proceedings.

Civil commitment adjudications are in the nature of special civil proceedings that were unknown to the common law. Because these commitments place a substantial burden on the freedom of those committed, the circumstances permitting such treatment are subject to both legislative determinations and judicial review. Lower courts, applying California Supreme Court precedents, have repeatedly held that the jury trial provisions of [Cal. Const., art. I, § 16](#), do not apply to these special civil cases. That is not to say, however, that a person facing civil commitment is bereft of constitutional protection. Instead, those protections are provided under a different constitutional rubric.

[CA\(6\)](#) (6)

Jury § 7—Right to Jury Trial—Civil Cases—Applicability—Civil Commitment Proceedings.

Any civil commitment constitutes a significant deprivation of liberty and can engender adverse social consequences to the individual. As a result, a jury trial must be made available to civil commitment candidates as a matter of procedural due process when the statutory scheme fails to provide one. Further, as a matter of equal protection, the state cannot arbitrarily withhold jury trial availability from one group of defendants while statutorily granting it to another. Some statutory schemes vary in terms of procedure.

[CA\(7\)](#) (7)

Criminal Law § 195—Sexually Violent Predators—Hearing—Jury Trial—Availability as Contrasted with Other Commitment Schemes.

Comparing the commitment schemes for defendants who have pled not guilty by reason of insanity (NGI), offenders with mental health disorders (OMHD), and sexually violent predators (SVPs), the Legislature has provided for a jury trial in two different ways. Under the NGI and OMHD statutes, a jury is available as a general matter, unless waived ([Pen. Code, §§ 1026.5, subd. \(b\)\(4\), 2972, subd. \(a\)\(2\)](#)). The *Sexually Violent Predator Act (SVPA)* ([Welf. & Inst. Code, § 6600 et seq.](#)), by contrast, provides for a jury trial when either an SVP candidate, or the People, requests one ([Welf. & Inst. Code, § 6603, subd. \(f\)](#)). Additionally, the statutes relating to NGI and OMHD defendants call for the court to advise them of their right to a jury trial and secure a personal waiver of that right before proceeding by bench trial. The SVPA, [***500**] however, does not contain those requirements. If neither the alleged SVP, their counsel, nor the prosecutor demand a jury trial, the statute provides for a court trial, which includes all the attendant due process rights, including assistance of counsel, presentation of a defense, and

proof beyond a reasonable doubt ([Welf. & Inst. Code, §§ 6603, subds. \(a\), \(e\), 6604](#)).

[CA\(8\)](#) (8)

Constitutional Law § 76—Equal Protection— Nature and Scope—Measuring Validity of Classifications.

The right to equal protection under both the federal and California Constitutions is intended to ensure that the government does not treat a group of people unequally without some justification. Equal protection does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which the classification is made. Unlike other provisions of the Constitution, the [equal protection clause](#) confers no substantive rights and creates no substantive liberties. The function of the [equal protection clause](#), rather, is simply to measure the validity of classifications created by state laws.

[CA\(9\)](#) (9)

Constitutional Law § 87—Equal Protection— Classification—Judicial Review—Strict Scrutiny—Contrasted with Rational Basis Analysis.

The degree of justification required to satisfy equal protection depends on the type of unequal treatment at issue. Strict scrutiny is the most exacting level of constitutional review, in which the state bears the burden of establishing not only that it has a compelling interest that justifies the law but that the distinctions drawn by the law are necessary to further its purpose. Any unequal treatment that is based on suspect classifications or that significantly burdens a fundamental right or interest is subject to strict scrutiny analysis. If the statutory classification, however, does not differentiate based on a protected class or significantly burden a fundamental right or interest, the legislation is

presumed valid unless the challenger can establish there is no rational relationship between a disparity in treatment and some legitimate government purpose.

[CA\(10\)](#) (10)

Constitutional Law § 87.2—Equal Protection— Classification—Judicial Review—Strict Scrutiny—Civil Commitment Proceedings.

Although a fundamental interest may be involved, both the United States Supreme Court and the California Supreme Court have recognized that not every limitation or incidental burden on a fundamental right is subject to the strict scrutiny standard. When the regulation merely has an incidental effect on exercise of protected rights, strict scrutiny is not applied. It is only when there exists a real and appreciable impact on, or a significant interference with the exercise of the fundamental right that the strict scrutiny doctrine will be applied. Furthermore, despite the [*501] liberty interests involved, not every detail of every civil commitment program is subject to strict scrutiny.

[CA\(11\)](#) (11)

Constitutional Law § 84—Equal Protection— Classification—Judicial Review—Rational Basis Analysis—Burden of Persuasion.

The burden of persuasion under a rational basis analysis is on the challenger: The underlying rationale for a statutory classification need not have been ever actually articulated by lawmakers, nor be empirically substantiated. Evaluating potential justifications for disparate treatment, a court reviewing a statute under this standard must treat the statute's potential logic and assumptions far more permissively than with other standards of constitutional or regulatory review. If a plausible basis exists for the disparity, courts may not second-guess its wisdom, fairness, or logic. The

logic behind a potential justification need not be persuasive or sensible—rather than simply rational.

[CA\(12\)](#) (12)

Constitutional Law § 87—Equal Protection— Classification—Judicial Review—Strict Scrutiny—Fundamental Interests.

Although normally any rational connection between distinctions drawn by a statute and the legitimate purpose thereof will suffice to uphold the statute's constitutionality, closer scrutiny is afforded a statute that affects fundamental interests or employs a suspect classification. In such cases the state bears the burden of establishing both that the state has a compelling interest that justifies the law and that the distinction is necessary to further that purpose. A variety of interests have been held to be so fundamental as to impose this burden on the state.

[CA\(13\)](#) (13)

Constitutional Law § 87.2—Equal Protection— Classification—Judicial Review—Strict Scrutiny—Civil Commitment Proceedings—Right to Jury Trial.

The right to a jury trial in an action that may lead to the involuntary confinement of the defendant, even if such confinement is for the purpose of treatment, is fundamental. Its fundamental nature is reflected by the absolute right to jury trial accorded by [U.S. Const., 6th Amend.](#) (criminal cases) and [U.S. Const., 7th Amend.](#) (civil cases) and by [Cal. Const., art. I, § 16](#), in all criminal trials and in those civil actions in which such a right was available at common law. Its fundamental nature was further emphasized by the United States Supreme Court in holding that due process requires that the right to jury trial be extended to defendants in state criminal prosecutions of a serious nature. To the person who is threatened with involuntary confinement, these considerations are equally important whether the

threat of confinement originates in a civil action or a criminal prosecution. An involuntary commitment, whether as a result of civil or criminal adjudication, [***502**] impinges on the committed person's liberty interest. It is the liberty interest that is fundamental, whether confinement is imposed in the criminal or civil context.

[CA\(14\)](#) (14)

Jury § 7—Right to Jury Trial—Civil Cases— Applicability—Civil Commitment Proceedings.

In extending the right to trial by jury to classes of persons subject to civil commitment proceedings, the California Legislature has recognized that the interests involved in civil commitment proceedings are no less fundamental than those in criminal proceedings and that liberty is no less precious because forfeited in a civil proceeding than when taken as a consequence of a criminal conviction.

[CA\(15\)](#) (15)

Constitutional Law § 87—Equal Protection— Classification—Judicial Review—Strict Scrutiny—Fundamental Interests— Determinations.

In the equal protection context, the United States Supreme Court has described a fundamental right or interest triggering strict scrutiny as one explicitly or implicitly guaranteed by the Constitution. [California's equal protection clause](#) is possessed of an independent vitality that, in a given case, may demand an analysis different from that which would obtain if only the federal standard were applicable. Thus, strict scrutiny applies to legislative classifications that, because of their impact on those individual rights and liberties that lie at the core of a free and representative form of government, are properly considered fundamental. It may be that under California's inquiry, considerations of substantive due process could also inform a determination of fundamental rights.

In that context, both the California Supreme Court and the United States Supreme Court have employed a two-step methodology. First, the court must make a careful description of the asserted fundamental liberty interest. This careful description is concrete and particularized, rather than abstract and general. Second, the court must determine whether the asserted interest, as carefully described, is one of the fundamental rights and liberties; central to this determination is whether the asserted interest finds support in history, traditions, and the conscience of the people.

CA(16) (16)

Jury § 11—Right to Jury Trial—Waiver in Civil Cases—Civil Commitment Proceedings—Judicial Advisement or Consultation with Counsel.

Before moving forward without a jury, a court must be able to conclude that a civil commitment candidate was aware of the right to demand a jury and made the decision to forgo doing so. This judicial obligation supports the essential jury trial right. Yet, even in a criminal context, no state or federal court has ever held that a particular kind of judicial advisement is constitutionally mandated. Before a criminal jury waiver may be accepted, the court must be satisfied that a defendant has [*503] been made aware of his or her right to a jury trial, which can be accomplished through judicial explanation or consultation with counsel. The court must also be satisfied that the defendant understands the right and personally announces in court a decision to waive it.

CA(17) (17)

Jury § 11—Right to Jury Trial—Waiver in Civil Cases—Role of Counsel.

In the civil context, California’s constitutional right to a jury may be waived either expressly, impliedly based on conduct, or by failing to announce that a jury is required (Code Civ. Proc., § 631, subd.

(f)(4)). The client’s choice to demand or waive a jury in all matters is expected to be made in consultation with legal counsel, and particularly in civil matters, the decision is traditionally communicated to the court through the attorney.

CA(18) (18)

Jury § 11—Right to Jury Trial—Waiver in Civil Cases—Role of Counsel.

Barring issues related to a client’s mental competency, an attorney does not exercise absolute control over the jury right decision in either the civil or criminal context. As a general rule, in both civil and criminal matters, a party’s attorney has general authority to control the procedural aspects of the litigation and, indeed, to bind the client in these matters. An attorney is not authorized, however, merely by virtue of retention in litigation, to impair the client’s substantial rights or the cause of action itself. Thus, in the criminal context, it is for the defendant to decide such fundamental matters as whether to waive the right to trial by jury.

CA(19) (19)

Attorneys at Law § 19—Attorney-client Relationship—Authority of Attorneys—Attorney’s Control of Litigation—Consulting with Client—Jury Trial—Civil Commitment Proceedings.

California’s Rules of Professional Conduct speak to the allocation of authority between attorneys and their clients. *Rules Prof. Conduct*, rule 1.2(a), states in part that except as otherwise provided by law in a criminal case, the lawyer shall abide by the client’s decision, after consultation with the lawyer, whether to waive jury trial. A lawyer is also ethically obligated to: reasonably consult with the client about the means by which to accomplish the client’s objectives in the representation; keep the client reasonably informed about significant developments relating to the representation; and

explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation (*Rules Prof. Conduct, rule 1.4(a)(2), (3), (b)*). These ethical obligations apply when representing those facing civil commitment.

[CA\(20\) \(20\)](#)

Criminal Law § 195—Sexually Violent Predators—Hearing—Jury Trial—Waiver—Role of Counsel.

The *Sexually Violent Predator Act (Welf. & Inst. Code, § 6600 et seq.)* honors the traditional allocation of [*504] responsibility between attorney and client by vesting in the sexually violent predator candidate the authority to decide whether to waive or demand a jury trial. But it does not follow from this conclusion that an attorney, who remains obligated to inform and confer with their client regarding the waiver decision, lacks the ability to properly advise them, or convey their waiver decision to the court. In the absence of any contrary indication, the superior court may assume that an attorney is competent and fully communicates with the proposed commitment candidate about the entire proceeding.

[CA\(21\) \(21\)](#)

Constitutional Law § 84—Equal Protection—Classification—Judicial Review—Rational Basis Analysis.

The California Supreme Court has altered the traditional analytical framework for conducting rational basis review. In cases in which the statutes themselves draw distinctions between identifiable groups, the court no longer asks at the outset whether the groups are similarly situated for purposes of the law in question.

[CA\(22\) \(22\)](#)

Constitutional Law § 109—Due Process—Procedural—Hearing—Civil Commitment Proceedings—Determinations—Jury Trial Procedures.

Civil commitment for any purpose can affect liberty and other vital interests. Hence, due process safeguards apply. The procedural safeguards required in this context are flexible, and the quantum and quality of the process due depend upon the nature and purpose of the challenged commitment. In making this determination, the courts weigh, assess, and consider various factors affected by the disputed procedure. Distilled, these considerations involve (1) the various private interests at stake, (2) any competing state or public concerns, and (3) the potential risk of an erroneous or unreliable outcome. The due process interests involved have been deemed sufficiently fundamental to implicate certain constitutional jury trial concerns in commitment cases, at least in those relatively few instances in which a right to trial by jury has not been legislatively prescribed. It does not follow, however, that the jury trial option implied by the courts is illusory unless accompanied by specific ancillary procedures for judicial advisement and personal waiver. Nor do such procedures necessarily amount to independent constitutional rights applicable in every case. Instead, their due process availability depends, in a particular instance, on a careful balancing of the public and private interests described above.

[CA\(23\) \(23\)](#)

Constitutional Law § 93—Equal Protection—Classification—Characteristics—Completeness of Regulation—Civil Commitment Proceedings.

An equal protection violation does not occur merely because [*505] different statutory procedures have been included in different civil commitment schemes. Nothing compels the state to choose between attacking every aspect of a problem or not attacking the problem at all. Far from having to solve all related ills at once, the

Legislature has broad discretion to proceed in an incremental and uneven manner without necessarily engaging in arbitrary and unlawful discrimination.

CA(24) (24)

Constitutional Law § 83—Equal Protection— Classification—Judicial Review—Statutory Distinctions Between Identifiable Groups.

In cases involving challenges to statutes that facially distinguish between identifiable groups or classes of individuals, to ask whether two groups are similarly situated in this context is essentially the same as asking whether the distinction between them can be justified under the appropriate test of equal protection.

CA(25) (25)

Jury § 15—Right to Jury Trial—Waiver in Civil Cases—Operation and Effect—Trial Court’s Failure to Follow Statutory Requirements— Applicability of Harmless Error Analysis.

When trial courts fail to follow explicit statutory requirements for jury advisement and waiver, the reviewing court should treat that failure as tantamount to the denial of a jury trial right and deem it reversible under [Cal. Const., art. VI, § 13](#), unless: (1) the totality of circumstances in the record affirmatively shows the defendant’s personal waiver was knowing and voluntary despite the court’s failure to provide a statutorily required advisement, or (2) there was substantial evidence the defendant lacked the capacity to make a knowing and voluntary waiver at the time the court accepted defense counsel’s waiver. In both scenarios, the requirement of an affirmative showing means that no valid waiver may be presumed from a silent record. Under the latter two sets of circumstances, the court’s failure to comply with the statutorily required jury advisement and waiver is subject to harmless error analysis under [Cal. Const., art. VI, § 13](#). There is a difference

between the deprivation of an advisement and personal waiver, on the one hand, and the deprivation of jury trial, on the other; one is not tantamount to the other.

CA(26) (26)

Jury § 11—Right to Jury Trial—Waiver in Civil Cases—Role of Counsel.

Generally, counsel is captain of the ship and has authority to bind the client in procedural aspects of litigation. However, this captaincy generally does not extend to the decision to waive jury. Thus, given the possibility of a significant deprivation of liberty, the court trains its attention on the text and purpose of the particular statutes that govern the proceeding to determine whether the decision to waive a jury trial must be made by the defendant or may be made by counsel notwithstanding the defendant’s wishes.

[*506] CA(27) (27)

Criminal Law § 195—Sexually Violent Predators—Hearing—Jury Trial—Waiver—Role of Counsel.

The statutory text of the *Sexually Violent Predator (SVP) Act* (*Welf. & Inst. Code, § 6600 et seq.*) indicates the Legislature intended an alleged SVP to maintain control over the jury trial decision itself, assuming they are mentally competent to do so. The term “person subject to this article” in [Welf. & Inst. Code, § 6603](#), refers to the defendant, rather than his or her attorney. Thus, based on the plain statutory language and consistent with the application of the not guilty by reason of insanity and offenders with mental health disorders statutes, the alleged SVP, rather than counsel, has final say over whether to demand a jury trial.

CA(28) (28)

**Criminal Law § 195—Sexually Violent
Predators—Hearing—Jury Trial—Waiver—Role
of Counsel.**

The purpose of an advisement is to inform the defendant of a particular right so that he or she can make an informed choice about whether to waive that right. By what procedure do trial and appellate courts ensure that a commitment candidate made their own informed decision as to a jury trial? The absence of jury advisement and personal waiver procedures from the *Sexually Violent Predator (SVP) Act (Welf. & Inst. Code, § 6600 et seq.)* leads to the conclusion that the Legislature chose to protect an alleged SVP's right to make an informed choice of fact finder through the statutory right to and advice of counsel. Counsel is presumed competent and informed as to applicable constitutional and statutory law. This presumption necessarily includes the defense right to seek a jury trial in a civil commitment proceeding, regardless of any court advisement. Because the decision as to a jury trial is significant, the record must support a judicial conclusion, through the express representations of counsel or otherwise, that counsel has explained the jury trial right and obtained the client's permission to demand or waive a jury.

CA(29) (29)

**Criminal Law § 195—Sexually Violent
Predators—Hearing—Jury Trial—Waiver—Role
of Counsel.**

A comparison of the *Sexually Violent Predator Act (Welf. & Inst. Code, § 6600 et seq.)* with the not guilty by reason of insanity and offenders with mental health disorders commitment schemes reveals that all three make a civil jury trial available to a commitment candidate, but they differ in the procedures for doing so. In the former, a jury trial is available on demand. The statute permits counsel to explain the right to the defendant and convey the client's choice of jury trial or waiver to the court. In the latter, before proceeding to a bench trial, the

court must provide the admonition and obtain a waiver from the defendant.

[*507] CA(30) (30)

**Criminal Law § 195—Sexually Violent
Predators—Hearing—Jury Trial—Waiver—Role
of Counsel.**

The trial court, on remand, would have to determine whether the People, in a commitment proceeding under the *Sexually Violent Predator Act (SVPA) (Welf. & Inst. Code, § 6600 et seq.)*, put forward a justification for the Legislature's choice of differing procedures for jury trial availability under different civil commitment schemes and whether the defense could establish that those proffered reasons failed to demonstrate a rational basis for the legislative choice to permit counsel to explain the jury trial right under the SVPA and to inform the court of the client's choice of jury trial or waiver. The court also had to determine whether the facts presented demonstrated by a preponderance of the evidence that defendant was aware of his right to demand a jury trial and chose to waive it. Because the equal protection challenge was not raised in the trial court, the Court of Appeal correctly ordered the case remanded to give the People a meaningful opportunity to demonstrate a valid constitutional justification for the SVPA's differential legislative treatment.

[Erwin et al., Cal. Criminal Defense Practice (2025) ch. 104, § 104.06.]

CA(31) (31)

**Constitutional Law § 76—Equal Protection—
Nature and Scope—Fundamental Interest—Duty
of State.**

The state has a duty not to illegitimately place conditions on a fundamental right or interest. That assertion states the guarantee protected by the equal protection clause.

[CA\(32\)](#) (32)

Constitutional Law § 75—Equal Protection— Definitions—Rights and Interests—Standards of Review.

Strict scrutiny is called for when a state-chosen difference in treatment violates or improperly burdens rights and interests recognized as fundamental, or when it discriminates based on membership in a protected class. Rational basis review applies if differential treatment does not impinge upon fundamental rights and interests or protected status but is allegedly irrational in the distinctions it makes. The terms “rights” and “interests” are often used interchangeably in the case law and are often used in conjunction to ensure that protections are not interpreted too narrowly.

[CA\(33\)](#) (33)

Jury § 7—Right to Jury Trial—Civil Cases— Constitutional Protections in Civil Commitment Proceedings—Due Process and Equal Protection.

The concepts of due process and equal protection are complementary and sometimes interrelated. Equal protection is not a source of substantive rights or liberties. Instead, it serves separately to ensure any differential legislative treatment is adequately justified under the appropriate level of scrutiny. The right to demand a jury trial in civil commitments is based not on [Cal. Const., art. I, § 16](#), but on principles of procedural due process protecting the fundamental liberty interest. Equal [*508] protection is also implicated when the Legislature grants a jury right to one group of civil commitment candidates, but not to others.

[CA\(34\)](#) (34)

Constitutional Law § 83—Equal Protection— Classification—Judicial Review—Determining

Standard of Review—Nature of Right or Interest.

An equal protection challenge may lie even when the involved interest has not been recognized as fundamental. But it is the nature of the right or interest that is significant to selecting the standard of review applicable to such a challenge.

[CA\(35\)](#) (35)

Constitutional Law § 75—Equal Protection— Definitions—Fundamental Interest.

An interest does not need to derive from due process principles to rank as fundamental for equal protection purposes, but it must find its footing on some fundamental ground rather than simply asserting it is a right or benefit granted to some but not others.

Counsel: Jeremy Price, under appointment by the Supreme Court, and Rachel Belden, under appointment by the Court of Appeal, for Defendant and Appellant.

Rob Bonta, Attorney General, Michael J. Mongan, State Solicitor General, Lance E. Winters, Chief Assistant Attorney General, Janill L. Richards, Principal Deputy State Solicitor General, Mica Moore and Aaron D. Pennekamp, Deputy State Solicitors General, Charles C. Ragland, Assistant Attorney General, Arlene A. Sevidal and James H. Flaherty III, Deputy Attorneys General, for Plaintiff and Respondent.

Judges: Opinion by Corrigan, J., with Guerrero, C. J., Kruger, Groban, and Jenkins, JJ., concurring. Dissenting opinion by Liu, J. Dissenting opinion by Evans, J.

Opinion by: Corrigan, J.

[Opinion](#)

[***594] [**996] **CORRIGAN, J.**—In the context of civil commitment proceedings, a

defendant's fundamental liberty interests are protected by the constitutional guarantees of due process and equal protection. (*U.S. Const., 14th Amend.*; *Cal. Const., art. I, § 7*; see also *In re Gary W. (1971) 5 Cal.3d 296 [96 Cal.Rptr. 1, 486 P.2d 1201] (Gary W.)*.) It is undisputed here that defendant William Joseph Cannon has a constitutional and statutory right to demand a jury trial on a petition to commit him under the Sexually Violent Predator [****2] Act. (SVPA or the Act; *Welf. & Inst Code, § 6600 et seq.*)¹ Cannon has argued for the first time on appeal that the Act denies him equal protection because it [*509] provides jury demand and waiver procedures that differ from the procedures provided in other commitment schemes.

HN1 CA(1) (1) The SVPA authorizes the involuntary civil commitment of convicted sex offenders after they have served their prison sentences if they are found beyond a reasonable doubt to be a “sexually violent predator” (SVP). An SVP candidate and the People both have the right to demand a jury trial on the allegations. (§ 6603, *subds. (a), (b)*.) Absent a demand, the trial is conducted “before the court without a jury.” (*Id., subd. (f)*.) Near the end of Cannon’s sentence for assault with intent to commit rape, the People petitioned to commit him under the SVPA. During two pretrial hearings, neither of which Cannon attended, his attorney waived his jury trial right. The trial court itself had not advised Cannon of his jury trial rights or sought his personal waiver, neither of which the Act requires. Following a bench trial, the court determined Cannon is an SVP and ordered him committed.

On appeal, Cannon asserted the SVPA commitment scheme violates his state and federal equal

protection [****3] rights because it does not employ the same advisement and waiver procedures included in the commitment schemes for defendants who have pled not guilty by reason of insanity (NGI; *Pen. Code, § 1026.5*) [**997] or who are facing confinement under the offenders with mental health disorders (OMHD) law (*Pen. Code, § 2960 et seq.*).² We leave the ultimate adjudication of that claim to the trial court on remand. Here we hold, consistent with our decision in *People v. Barrett (2012) 54 Cal.4th 1081, 1107 [144 Cal.Rptr.3d 661, 281 P.3d 753] (Barrett)*, [***595] that the proper standard of scrutiny for such an equal protection challenge is rational basis review. We affirm the Court of Appeal’s order remanding this matter to the trial court to allow the parties to create a more complete record and to litigate the question in the trial court in the first instance.

I. BACKGROUND

In December 2010, Cannon pled no contest to assault with intent to commit rape (*Pen. Code, § 220, subd. (a)*) and dissuading a witness (*id., § 136.1, subd. (c)(1)*). Cannon admitted that in October 2010, while wearing a mask, he attacked a 16-year-old victim and tried to drag her off the street to rape her. When she struggled, he threatened to kill her. Two passersby came [*510] to her aid, and Cannon fled. After his arrest, he confessed that he had also tried to break into his neighbor’s house to rape her 15-year-old daughter and that [****4] he had been out “hunting females to sexually assault them.” Convicted, he was sentenced to a total term of seven years in prison.

In August 2016, the Mendocino County District Attorney filed an SVPA petition to commit Cannon after the completion of his term. On October 3,

¹ All subsequent section references are to the Welfare and Institutions Code unless otherwise specified.

An SVP petition seeks commitment of a person designated as a “defendant.” As we have in other cases, we sometimes refer to the person named in the petition as a defendant, a potential or alleged SVP, or an SVP candidate.

² Before January 1, 2020, these latter defendants were described as mentally disordered offenders or MDO’s. (See *Conservatorship of Eric B. (2022) 12 Cal.5th 1085, 1095, fn. 3 [293 Cal.Rptr.3d 93, 508 P.3d 1099] (Eric B.)*.)

2016, the trial court found probable cause supported the petition and ordered Cannon to stand trial. Cannon, who was present, waived his right to have a trial within 60 days. His public defender, Linda Thompson, stated she would request Cannon be transferred to Coalinga State Hospital upon his prison release. The court set a trial date of February 27, 2017, with a pretrial conference on December 5, 2016. After conferring with Thompson, Cannon waived his presence at the pretrial conference. There was no mention of Cannon's right to a jury trial.

At the December 5th conference, which Cannon did not attend, Thompson reported that the Board of Parole Hearings (BPH) had filed a concurrent MDO [now known as OMHD; see fn. 2, *ante*] petition. As a result, the State Department of State Hospitals (SDSH) had moved Cannon to Atascadero State Hospital rather than Coalinga. The court scheduled a new pretrial conference so the parties [****5] could sort through the issue. Between that conference and May 22, 2017, the court vacated the original trial date and held five more pretrial conferences, none of which Cannon attended. During this time, Cannon remained housed at the Atascadero hospital. There were no discussions at any of these conferences of Cannon's right to a jury trial or whether he preferred to proceed with a bench or jury trial.

On May 12, 2017, again in Cannon's absence, Thompson relayed that the BPH rescinded the MDO petition and Cannon was to be transferred to Coalinga State Hospital. Cannon did not attend the next hearing on May 22, 2017, but Thompson appeared on his behalf and noted he had been moved to Coalinga. The court clerk announced that a "jury trial" was set for October 16, 2017. Between July 7 and October 6, 2017, the court held four more pretrial conferences in Cannon's absence. Throughout this period, it is evident the parties planned for a jury trial. At the August 4, 2017, conference, Thompson stated, "I'm going to confirm the jury trial for the October date." She also indicated that she was not "going to transport

[Cannon] until he needs to show for trial." The court then asked, "Waive his [****6] appearance for the pretrial?" Thompson responded, "Yes." The court eventually set a new trial date for January 8, 2018. Thompson noted that jury selection would begin on that date and experts would be available to testify two days later.

[***596] On December 6, 2017, at Thompson's request, the court continued the trial date to April 9, 2018. On February 7, 2018, in Cannon's [**998] absence, the trial [*511] court asked Thompson whether she was waiving a jury trial on behalf of her client. She responded, "Yes." Again, on March 22, 2018, Thompson told the court that Cannon was not present "by choice" and reported, "We did confirm it is a court trial, not a jury trial. My client is kind of wavering if he even wants to come at this point." On March 28, 2018, the defense requested a new trial date, which was set for October 1, 2018. Thompson again confirmed the date was for "a court trial."³

On July 17, 2018, public defender Eric Rennert took over Cannon's defense following Thompson's retirement. Rennert said he had not yet met with Cannon but had conferred with Thompson. He could not recall whether or not there had been a waiver of a jury trial and did not see a file notation to that effect. A different judge, [****7] who was presiding at the hearing, replied, "I don't believe there has been. And I think the best practice is to do that in person. I know your office has been getting them in writing." At an August 22, 2018, conference, Rennert reported that he had spoken with Cannon but did not indicate whether they had discussed the jury trial right, or whether Cannon had chosen to waive it. However, at one point, the

³Review of the pertinent clerk's minutes in the record reveals the following. The minutes dated February 7, 2018, note: "JT prev. waived. PD and DDA waive JT for the record." In several subsequent minutes, the clerk repeatedly noted that the matter was designated as a court trial. Additionally, the removal orders for Cannon's return to Mendocino County for trial dated March 9, 2020, June 23, 2020, and September 22, 2020, all confirm Cannon was to be transported in for a "Court Trial."

court asked, “[W]e are still pending the trial which is now a court trial; is that right?” The prosecutor responded, “That’s my understanding, your Honor from speaking with counsel who handled the case previously.” The court set a new date of February 26, 2019, for a two-day court trial. At no time did Rennert indicate his client wished to proceed with a jury trial. No other hearing occurred in 2018.

Over the course of 2019 into early January 2020, the court held nine more hearings, none of which Cannon attended. During these hearings, the court reset the trial date four more times. At nearly every hearing, the court and/or Rennert confirmed the defense had waived a jury and planned to proceed with a bench trial. On March 17, 2020, early in the COVID-19 pandemic, Cannon appeared by video. [****8] The court began by telling him: “Today was the date set for a court trial on a petition that was filed by the district attorney that alleges that you fall within the SVP Act.” However, based on the recent shelter-in-place orders, the court found good cause to continue the trial date so Cannon could be present in person. The court indicated the parties would meet three days later to pick a new trial date. It told Cannon, “You’re not going to be present that date. Your attorney will appear for you and he will tell when you [sic] that date is and when you’ll be brought back. Do you [*512] understand?” Cannon answered, “I do, your Honor.” The court asked if Cannon had any other questions; he voiced none.

Between Cannon’s appearance in March 2020 and the eventual bench trial, the court held eight more pretrial conferences, and the trial date was reset three more times. On October 5, 2020, Cannon was present, and the SVP trial began with the court stating, “So we’re here for a court trial on the petition filed by the People” At no time did a judge directly advise Cannon of his right to demand a [***597] jury trial or elicit his personal waiver of that right. At no time did defendant or his counsel [****9] object to the procedure or request a jury trial. Following a four-day bench trial, the trial court found Cannon to be an SVP and ordered

him committed for an indeterminate term. A more complete account of the evidence presented at the trial can be found in the Court of Appeal opinion. (*People v. Cannon* (2022) 85 Cal.App.5th 786, 791–793 [301 Cal.Rptr.3d 712] (*Cannon*).)

On appeal, Cannon argued for the first time that the trial court failed to directly advise him of his jury trial right or elicit his personal waiver, thus violating his federal and state constitutional rights to equal protection. He urged that alleged SVP’s are similarly situated to OMHD’s and NGI’s, and that those commitment schemes require a judicial advisement and personal waiver [**999] while the SVPA does not. (*Pen. Code*, §§ 2966, subd. (a), 2972, subd. (b), 1026.5, subd. (b)(3), (4); see also *People v. Blackburn* (2015) 61 Cal.4th 1113, 1124–1125 [191 Cal.Rptr.3d 458, 354 P.3d 268] (*Blackburn*); *People v. Tran* (2015) 61 Cal.4th 1160, 1167 [191 Cal.Rptr.3d 251, 354 P.3d 148] (*Tran*).) He argued there was no constitutional justification for this differential treatment.

The Court of Appeal rejected the Attorney General’s argument that Cannon had forfeited his equal protection claim by failing to raise the question in the trial court. It exercised its discretion to consider the pure question of law raised by his constitutional challenge. (*Cannon, supra*, 85 Cal.App.5th at pp. 794–795.) The People conceded SVP’s are similarly situated to OMHD’s and NGI’s for the purposes of comparing the advisement and [****10] waiver procedures at issue. They disagreed, however, with Cannon’s assertion that strict scrutiny review was called for to evaluate the state’s proffered justifications made in its briefing before the Court of Appeal. Relying on *Barrett, supra*, 54 Cal.4th 1081, the court agreed with the People that rational basis review was the appropriate standard. (*Cannon, at pp. 797–798*.)

The court concluded the two rationales offered in the People’s briefing failed to provide a rational basis for the differential treatment, but nevertheless, the court agreed with Cannon’s counsel that remand was necessary. (*Cannon, supra*, 85

[Cal.App.5th at pp. 799–800](#).) It ruled that remand was [*513] appropriate because Cannon’s delay in raising his equal protection argument below denied the People a “meaningful opportunity to demonstrate a valid constitutional justification for the SVP’s differential legislative treatment.” (*Id. at p. 800*.) The court noted that a more inclusive record might be made to justify the different procedures available in SVP cases on the one hand, and NGI and OMHD petitions on the other. (*Ibid.*) The People resisted remand arguing that, even if the trial court was obligated under equal protection principles to advise Cannon of his jury trial rights and obtain his personal waiver, any error in failing [****11] to do so was harmless. (*Id. at pp. 800–801*.) Relying in part on [Blackburn](#), the court held it could not find harmless error. It presumed counsel reasonably believed Cannon wished to waive a jury trial. (*Id. at p. 795*.) However, the record before it was insufficient to show that Cannon had been adequately advised by counsel of his jury rights or had “knowingly and intelligently” acceded to their waiver. (*Id. at p. 801*.) A remand would also give both parties an opportunity to create a more complete record on this question.

[***598] We granted review to address the narrow question of whether a strict scrutiny or rational basis standard applies to Cannon’s equal protection challenge.⁴

II. DISCUSSION

A. Jury Trial Rights in Civil Commitment Proceedings.

CA(2) (2) We first consider the constitutional source of the jury trial right in the case of a civil

commitment. The right to a trial by jury and the way the right may be waived have been enshrined in the California Constitution since the state’s founding. [Article I, section 16 of the California Constitution](#) declares: “Trial by jury is an inviolate right and shall be secured to all ... A jury may be waived in a criminal cause by the consent of both parties expressed in open court by the defendant and the defendant’s counsel. [****12] In a civil cause a jury may be waived by the consent of the parties expressed as prescribed by statute.” Thus, [HN2](#) while the constitution specifically speaks to criminal jury waivers, it empowers the Legislature to address the requirements for civil jury waivers by statute.

As we have noted: “From the outset of our state’s history, our courts have explained [**1000] that [\[Article I, section 16\]](#) was intended to preserve the right to a [*514] civil jury as it existed at common law in 1850 when the jury trial provision was first incorporated into the California Constitution.” ([Nationwide Biweekly Administration, Inc. v. Superior Court \(2020\) 9 Cal.5th 279, 315 \[261 Cal.Rptr.3d 713, 462 P.3d 461\]](#).) Additionally, we long ago recognized that “the rules under which the parties to a [civil] lawsuit may waive a jury trial must be prescribed by the Legislature, which is without power to delegate to the courts the responsibility of determining the circumstances under which such a waiver may be permitted.” ([Grafton Partners v. Superior Court \(2005\) 36 Cal.4th 944, 952 \[32 Cal.Rptr.3d 5, 116 P.3d 479\]](#), citing [Exline v. Smith \(1855\) 5 Cal. 112, 112–113](#); [Biggs v. Lloyd \(1886\) 70 Cal. 447, 448–449 \[11 P. 831\]](#).) [Code of Civil Procedure section 631](#) embodies the exclusive legislatively selected means by which the constitutional right to a civil jury may be waived in California.⁵ ([Parker v. James](#)

⁴This court has subsequently granted review and is holding three more cases addressing the same issue. ([People v. Morrison \(2025\) 110 Cal.App.5th 702 \[331 Cal.Rptr.3d 836\]](#), review granted June 25, 2025, **S291041**; [People v. Washington](#) (Mar. 19, 2025, B327869) [nonpub. opn.], review granted June 18, 2025, S290585; [People v. Magana](#) (Mar. 19, 2025, B327869) [nonpub. opn.], review granted June 18, 2025, S290583.)

⁵[HN3 CA\(3\) \(3\)](#) By statute, the constitutional right to a civil jury may be waived in one of six ways: “(1) By failing to appear at the trial. [¶] (2) By written consent filed with the clerk or judge. [¶] (3) By oral consent, in open court, entered in the minutes. [¶] (4) By failing to announce that a jury is required, at the time the cause is first set for trial, if it is set upon notice or stipulation, or within five

Granger, Inc. (1935) 4 Cal.2d 668, 679 [52 P.2d 226].)

CA(4) (4) Several points bear emphasis. As both this court and the United States Supreme Court have repeatedly observed, **HN4** the adjudication of a civil commitment [****13] petition is not a criminal proceeding. (*Moore v. Superior Court (2010) 50 Cal.4th 802, 818 [114 Cal.Rptr.3d 199, 237 P.3d 530]*; *People v. Allen (2008) 44 Cal.4th 843, 860 [80 Cal.Rptr.3d 183, 187 P.3d 1018]*.) Nevertheless, our courts have recognized that, as [***599] a matter of procedural due process, several protections afforded criminal defendants must be extended to those facing possible civil commitment.⁶ But while those procedural protections include the right to a civil jury on demand (see *post*), the full panoply of rights applicable in criminal matters does not apply in civil commitment cases.⁷ [***515] (*Allen v. Illinois (1986) 478 U.S. 364, 372 [92 L.Ed.2d 296, 106 S.Ct. 2988]*; *Hubbart v. Superior Court (1999) 19 Cal.4th 1138, 1170–1179 [81 Cal.Rptr.2d 492, 969 P.2d 584]*; *Conservatorship of John L. (2010) 48 Cal.4th 131, 151 [105 Cal.Rptr.3d 424, 225 P.3d*

554] (John L.).) The legislative provision of “procedural protections similar to those afforded criminal defendants ‘does not transform a civil commitment proceeding into a criminal prosecution.’” (*People v. Allen, supra*, 44 Cal.4th at p. 861, quoting *Kansas v. Hendricks, supra*, 521 U.S. at pp. 364–365; see also *Hubbart, at p. 1174, fn. 33.*)

CA(5) (5) Further, **HN5** this court has long described civil commitment adjudications as being “in the nature of special civil proceedings [that were] unknown to the common law” (*In re De La O (1963) 59 Cal.2d 128, 150 [28 Cal.Rptr. 489, 378 P.2d 793]*; see also *In re Liggett (1921) 187 Cal. 428, 430 [202 P. 660]*; *Matter of Application of O’Connor (1915) 29 Cal.App. 225, 235–236 [155 P. 115]*.) Beginning in the early 20th century, the Legislature began to provide involuntary civil commitments [***1001] for those who, for a variety of reasons, posed a danger to their own safety or that of others. The *Lanterman-Petris-Short (LPS) Act (§ 5000 et seq.) of 1967* launched a series of enactments to provide more detailed administrative and judicial commitment procedures.⁸ Because these commitments [****14] place a substantial burden on the freedom of those committed, the circumstances permitting such treatment are subject to both legislative determinations and judicial review. Lower courts, applying our own precedents, have repeatedly held that the jury trial provisions of *article I, section 16 of the California Constitution* do not apply to these special civil cases. (See, e.g., *People v. Rowell (2005) 133 Cal.App.4th 447, 451–452 [34 Cal.Rptr.3d 843]* [SVPA proceedings]; *People v. Berry (1968) 257 Cal.App.2d 731, 736 [65 Cal.Rptr. 125]* [former § 6312.2, MDSO proceedings]; *Smith v. Superior Court (1965) 234 Cal.App.2d 1, 5–6 [43 Cal.Rptr. 869]* [former § 6735 for commitment, mentally ill

days after notice of setting if it is set without notice or stipulation. [¶] (5) By failing to timely pay the fee described in *subdivision (b)*, unless another party on the same side of the case has paid that fee. [¶] (6) By failing to deposit with the clerk or judge, at the beginning of the second and each succeeding day’s session, the sum provided in *subdivision (e)*.” (*Code Civ. Proc.*, § 631, *subd. (f)*, italics added.)

⁶ See, e.g., *Camacho v. Superior Court (2023) 15 Cal.5th 354, 379 [312 Cal.Rptr.3d 490, 534 P.3d 484]* (SVP, speedy trial); *People v. Allen, supra*, 44 Cal.4th at p. 870 (SVP right to testify over the objection of counsel); *People v. Burnick (1975) 14 Cal.3d 306, 322–323 [121 Cal.Rptr. 488, 535 P.2d 352]* (proof beyond a reasonable doubt in NGI proceeding); *People v. Feagley (1975) 14 Cal.3d 338, 375–376 [121 Cal.Rptr. 509, 535 P.2d 373]* (unanimous jury in mentally disordered sex offender (MDSO) proceedings).

⁷ See, e.g., *People v. McKee (2010) 47 Cal.4th 1172, 1193–1195 [104 Cal.Rptr.3d 427, 223 P.3d 566]* (*McKee*) (SVP commitment statute does not violate *ex post facto* clause); *Conservatorship of Ben C. (2007) 40 Cal.4th 529, 539 [53 Cal.Rptr.3d 856, 150 P.3d 738]* (due process does not require independent appellate review of whether there is any arguable issue on appeal); *Kansas v. Hendricks (1997) 521 U.S. 346, 369 [138 L.Ed.2d 501, 117 S.Ct. 2072]* (initiation of civil commitment proceeding “does not constitute a second prosecution” for double jeopardy purposes).

⁸ For a detailed history of involuntary hospitalization proceedings of mentally ill patients in California before enactment of the LPS Act, see Projects, *Civil Commitment of the Mentally Ill (1967) 14 UCLA L.Rev. 822*.

and dangerous individuals]; [People v. Fuller \(1964\) 226 Cal.App.2d 331, 335 \[38 Cal.Rptr. 25\]](#) [former ***600] § 5504, sexual psychopathic offenders].)

CA(6) (6) That is not to say, however, that a person facing civil commitment is bereft of constitutional protection. Instead, those protections are provided under a different constitutional rubric. **HN6** Any civil commitment “constitutes a significant deprivation of liberty” and “can engender adverse social consequences to the individual.” ([Addington v. Texas \(1979\) 441 U.S. 418, 425–426 \[60 L.Ed.2d 323, 99 S.Ct. 1804\]](#).) As a result, we have recognized that a jury trial must be made available to civil commitment candidates as a matter of procedural due process when the statutory scheme fails to provide one. (See, [*516] e.g., [Gary W., supra, 5 Cal.3d at pp. 306–307](#).) Further, as a matter of *equal protection*, the state cannot arbitrarily withhold jury trial availability from one group of defendants while statutorily granting it to [****15] another. (See, e.g., [Baxstrom v. Herold \(1966\) 383 U.S. 107, 110 \[15 L.Ed.2d 620, 86 S.Ct. 760\] \(Baxstrom\)](#); [Humphrey v. Cady \(1972\) 405 U.S. 504, 509 \[31 L.Ed.2d 394, 92 S.Ct. 1048\]](#).) Some statutory schemes vary in terms of procedure. The difference in how a jury trial right is exercised by a SVP candidate is at issue here. Under all three of the schemes Cannon asks to be compared, a jury trial is made available. However, the particulars of how the right is invoked or waived are provided for differently. It is the standard of review for that differential treatment that we consider.

Cannon does not allege that the SVPA’s commitment scheme denies him the right to a civil jury, or that the on-demand requirement constitutes a violation of the state or federal *due process clause*. Instead, he alleges that, as a matter of *equal protection*, the legislative requirement that courts advise alleged NGI’s and OMHD’s of their jury rights and obtain a personal waiver must be extended to an alleged SVP before proceeding with a bench trial. At this stage, we are not being asked to decide the ultimate question of whether the differences in procedure can be constitutionally

justified. That issue will be reserved for the trial court to determine in the first instance, applying the level of scrutiny we clarify here.

*B. Comparison of the Relevant Statutes for Equal Protection Purposes. [****16]*

HN7 CA(7) (7) Comparing the three commitment schemes, the Legislature has provided for a jury trial in two different ways. Under the NGI and OMHD statutes, a jury is available as a general matter, unless waived. ([Pen. Code, §§ 1026.5, subd. \(b\)\(4\), 2972, subd. \(a\)\(2\)](#).) The SVPA, by contrast, provides for a jury trial when either an SVP candidate, or the People, requests one. ([§ 6603, subd. \(f\)](#).) Additionally, the statutes relating to NGI and OMHD defendants call for the court to advise them of their right to a jury trial and secure a personal waiver of that right before proceeding by bench trial. ([Pen. Code, §§ 1026.5, subd. \(b\)\(3\), 2972, subd. \(a\)\(1\)](#).) The SVPA, however, does not contain those requirements. If neither the alleged SVP, their counsel, nor the prosecutor demand a jury trial, the statute provides for a court [**1002] trial, which includes all the attendant due process rights, including assistance of counsel, presentation of a defense, and proof beyond a reasonable doubt. ([§§ 6603, subds. \(a\), \(e\), 6604](#).)⁹

[*517]

HN8 CA(8) (8) [*601]** The right to equal protection under both the federal and California Constitutions is intended to ensure that the “government does not treat a group of people unequally without some justification.” ([People v. Chatman \(2018\) 4 Cal.5th 277, 288 \[228 Cal.Rptr.3d 379, 410 P.3d 9\] \(Chatman\)](#).) “Equal

⁹ In [Feagley](#), we held that an individual facing commitment under the MDSO law, a precursor to the SVPA, was constitutionally entitled to a unanimous jury verdict based on equal protection and due process principles. ([Feagley, supra, 14 Cal.3d at pp. 350–352](#).) The Legislature subsequently codified this constitutional protection into the MDSO law (see [People v. Henderson \(1981\) 117 Cal.App.3d 740, 747 \[172 Cal.Rptr. 858\]](#)), and it incorporated the same requirement into the SVPA when it enacted the law in 1995. ([§ 6603, subd. \(g\)](#); Stats. 1995, ch. 763, § 3, p. 5922.)

protection does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance [****17] to the purpose for which the classification is made.” (*Baxstrom, supra*, 383 U.S. at p. 111.) “Unlike other provisions of the Constitution, the Equal Protection Clause confers no substantive rights and creates no substantive liberties. The function of the Equal Protection Clause, rather, is simply to measure the validity of classifications created by state laws.” (*San Antonio School District v. Rodriguez* (1973) 411 U.S. 1, 59 [36 L.Ed.2d 16, 93 S.Ct. 1278] (conc. opn. of Stewart, J.), fn. omitted (*San Antonio School District*)).

HN9 CA(9) (9) “The degree of justification required to satisfy equal protection depends on the type of unequal treatment at issue.” (*People v. Hardin* (2024) 15 Cal.5th 834, 847 [318 Cal.Rptr.3d 513, 543 P.3d 960] (*Hardin*)). Strict scrutiny is our most exacting level of constitutional review in which ““the state bears the burden of establishing not only that it has a *compelling* interest which justifies the law but that the distinctions drawn by the law are *necessary* to further its purpose.”” (*Warden v. State Bar* (1999) 21 Cal.4th 628, 641 [88 Cal.Rptr.2d 283, 982 P.2d 154].) In addition, any unequal treatment that is based on suspect classifications or that significantly burdens a fundamental right or interest is subject to strict scrutiny analysis. (*Eric B., supra*, 12 Cal.5th at p. 1107.) If the statutory classification, however, does not differentiate based on a protected class or significantly burden a fundamental right or interest, the legislation is presumed valid unless the *challenger* can establish ““there is no *rational* relationship between a disparity in treatment and some legitimate government purpose.”” ([****18] *Hardin*, at p. 847, quoting *Chatman, supra*, 4 Cal.5th at pp. 288–289.)

HN10 CA(10) (10) “Although a fundamental interest may be involved, both the United States Supreme Court and this court have recognized that not every limitation or incidental burden on a fundamental right is subject to the strict scrutiny

standard. When the regulation merely has an incidental effect on exercise of protected rights, strict scrutiny is not applied. [Citations.] It is only when there exists a real and appreciable impact on, or a significant interference with the exercise of the fundamental right that the strict scrutiny doctrine will be applied.” (*Fair Political Practices Com. v. Superior Court* (1979) 25 Cal.3d 33, 47 [157 Cal.Rptr. 855, 599 P.2d 46]; see also *Gould v. Grubb* (1975) 14 Cal.3d 661, 670 [122 Cal.Rptr. 377, 536 P.2d 1337]; *Butt v. State of California* [*518] (1992) 4 Cal.4th 668, 685–686 [15 Cal.Rptr.2d 480, 842 P.2d 1240].) Furthermore, within this specific context, we have emphasized that, despite the liberty interests involved, not ““every detail of every civil commitment program is subject to strict scrutiny.”” (*McKee, supra*, 47 Cal.4th at p. 1210, fn. 13.)

CA(11) (11) *Hardin* explained that **HN11** the burden of persuasion under a rational basis analysis is on the challenger: “The underlying rationale [***602] for a statutory classification need not have been ‘ever actually articulated’ by lawmakers, nor ‘be empirically substantiated.’ [Citation.] Evaluating potential justifications for disparate [**1003] treatment, a court reviewing a statute under this standard must ‘treat the statute’s potential logic and assumptions [****19] far more permissively than with other standards of constitutional or regulatory review.’ [Citation.] ‘If a plausible basis exists for the disparity, courts may not second-guess its “‘wisdom, fairness, or logic.”’ [Citation.] ‘[T]he logic behind a potential justification need [not] be persuasive or sensible—rather than simply rational.”” (*Hardin, supra*, 15 Cal.5th at p. 852; see also *People v. Williams* (2024) 17 Cal.5th 99, 124 [324 Cal.Rptr.3d 680, 554 P.3d 394].)

Cannon advances two arguments in favor of strict scrutiny review. First, he contends heightened review is necessary because, in addition to the right to demand a jury trial as provided, he has a separate fundamental right to the judicial advisement and waiver procedures themselves. Alternatively, he

contends that, even if these procedural rights themselves are not fundamental, the Legislature's on-demand procedure in the SVPA imposes a significant burden on his fundamental liberty interests. His argument outstrips the authority upon which he relies.

C. The Fundamental Interests at Issue.

1. The Fundamental Liberty Interest Mandates a Jury Trial Right.

Defendant places great weight on [Gary W., supra, 5 Cal.3d 296](#), but that case does not support the argument that he has a fundamental right to the particular procedures requiring advisement and personal waiver. The statutory [****20] scheme reviewed in [Gary W.](#) provided that a person who had originally been sent to the California Youth Authority (CYA, or Youth Authority) as a minor could be civilly committed for treatment after reaching his mandatory CYA release date, upon a showing that he was a danger to the public safety due to a mental or physical disorder. The statutory framework did not provide for a jury trial of any kind for these commitments, even though other commitment procedures did, including those available under the LPS and MDSO statutes, which provided for a jury trial on demand. ([Gary W., at p. 303](#); see also [*519] former [§ 6318](#) [applicable to MDSO's]; [§§ 5302–5303](#) [applicable to imminently dangerous persons under the LPS Act]; former [§§ 3050, 3051, 3108](#) [applicable to narcotics addicts under the LPS Act].)

[Gary W.](#) acknowledged that “[c]ommitment proceedings are ‘special proceedings of a civil nature.’” ([Gary W., supra, 5 Cal.3d at p. 309.](#)) In considering the challenge that his commitment without a jury trial denied him due process and equal protection, the court explained: “The commitment and detention for treatment of a physically dangerous Youth Authority ward does not of itself deny equal protection. As appellant acknowledges, the Legislature has enacted a unified framework of laws [****21] providing for the involuntary commitment of persons who present a

danger to society. It is not unreasonable that the Legislature should devise several means by which to detect and isolate persons who may present a danger to society.” ([Gary W., supra, 5 Cal.3d at p. 304.](#))

[CA\(12\) \(12\)](#) The court articulated the basis for selecting the strict scrutiny standard of review. [HN12](#) “Although normally any rational connection between distinctions drawn by a statute and the legitimate purpose thereof will suffice to uphold the statute’s constitutionality [***603] [citation], closer scrutiny is afforded a statute which affects fundamental interests or employs a suspect classification. [Citations.] In such cases the state bears the burden of establishing both that the state has a compelling interest which justifies the law and that the distinction is necessary to further that purpose. [Citations.]

[CA\(13\) \(13\)](#) “A variety of interests have been held to be so ‘fundamental’ as to impose this burden on the state. Voting [citation], procreation [citation], interstate travel [citation], and education [citation] have all been characterized as fundamental for this purpose. [HN13](#) The right to a jury trial in an action which may lead to the involuntary confinement of the defendant, even [****22] if such confinement is for the purpose of treatment, is no less fundamental. Its fundamental nature is reflected by the absolute right to jury trial accorded by the [**1004] [Sixth](#) [criminal cases] and [Seventh Amendments](#) [civil cases] to the United States Constitution and by [article I, section 7 of the California Constitution](#) in all criminal trials and in those civil actions in which such a right was available at common law.¹⁰ Its fundamental nature was further emphasized by the United States Supreme Court in [Duncan v. Louisiana \(1968\) 391 U.S. 145 \[20 L.Ed.2d 491, 88 S.Ct. 1444\]](#), where the court held that due process requires that the

¹⁰ As previously indicated, the right to a jury, which was preserved under [article I, section 7 of the California Constitution](#) at the time of [Gary W.](#), now appears under [article I, section 16 of the California Constitution](#).

right to jury trial be extended to defendants in state criminal prosecutions of a serious nature.” (*Gary W.*, *supra*, 5 Cal.3d at pp. 306–307.) In this regard, *Gary W.* went on to observe: “To the person [*520] who is threatened with involuntary confinement, these considerations are equally important whether the threat of confinement originates in a civil action or a criminal prosecution.” (*Id.* at p. 307.)

Gary W. grounded its analysis in the fact that an involuntary commitment, whether as a result of civil or criminal adjudication, impinges on the committed person’s liberty interest, citing the criminal case of *Duncan*, where the high court “found the right to jury trial was required by the dictate of the *Fourteenth Amendment* that no state ‘deprive any person of life, liberty [****23] or property, without due process of law.’” The court recognized that ‘A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government’ and that ‘the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges.’” (*Gary W.*, *supra*, 5 Cal.3d at p. 307, quoting *Duncan v. Louisiana*, *supra*, 391 U.S. at pp. 155–156.) *Gary W.* concluded that in the case of involuntary commitment, it is the *liberty interest* that is fundamental, whether confinement is imposed in the criminal or civil context. (*Gary W.*, at p. 307.)

HN14 CA(14) (14) “In extending the right to trial by jury to other classes of persons subject to civil commitment proceedings, the California Legislature has recognized that the interests involved in civil commitment proceedings are no less fundamental than those in criminal proceedings and that liberty is no less precious because forfeited in a civil proceeding than when taken as a consequence of a criminal conviction. We conclude that in the absence of a compelling state purpose for the distinction between [***604] the class of persons subject to commitment pursuant to [section](#)

[1800](#) and to other classes [****24] of persons subject to involuntary confinement, the right to jury trial is a requirement of both due process of law and equal protection of the law.” (*Gary W.*, *supra*, 5 Cal.3d at p. 307.)

The court held that Gary W. was entitled to a new commitment hearing because he was completely denied any opportunity to have a jury determine whether he posed a public danger. It recognized that different commitment schemes may employ different procedures while explaining: “The complexity of the various commitment statutes does not obscure the effect of denial of the right to jury trial. We consider here a fundamental right, not minor procedural differences among the various commitment procedures.” (*Gary W.*, *supra*, 5 Cal.3d at p. 308.) Significantly, it went on to hold that, like mentally disordered sex offenders, CYA wards who faced civil commitment having reached majority, were *entitled* to a jury trial *on demand* and a verdict [*521] reached by a three-fourths of jurors as is provided for a civil jury verdict.¹¹ *Gary W.* held that due process and equal protection required the provision of a civil jury trial *when requested*. It did not hold that a particular court advisement or personal waiver procedure was included in the fundamental [**1005] liberty interest on which its holding was [****25] based.

The People agree that Cannon has a fundamental liberty interest in having his SVP commitment petition tried by a jury upon his request. They urge, however, that consistent with *Gary W.*, the SVPA complies with the California Constitution because it expressly provides the right to a jury, and it adequately protects the exercise and waiver of the right through the on-demand procedure and the statutory right to the assistance and advice of counsel. Relying in part on *Barrett*, the People

¹¹ As noted in footnote 9, *ante*, this court subsequently held that, when tried by a jury, a civil commitment defendant is constitutionally entitled to a unanimous verdict before confinement. The unanimous jury verdict requirement was subsequently incorporated into the SVPA.

further contend that Cannon has failed to establish a separate and additional fundamental right or interest in a particular express judicial advisement of the jury right or personal waiver procedure before a court may proceed with a bench trial. Cannon responds by claiming the statements in *Barrett* on the issue were dicta, the case is distinguishable, and our more recent decisions in *Blackburn* and *Tran* underscore the fundamental nature of jury advisement and waiver rights themselves in civil commitment proceedings.

Cannon’s equal protection claim then turns on whether the differences between the “demand through counsel” procedure of the SVPA, as opposed to the court advisement and waiver procedure [****26] of the NGI and OMHD schemes, withstand scrutiny when reviewed under the appropriate standard.

2. Cannon Fails To Establish That a Particular Jury Advisement and Personal Waiver Procedure Itself Constitutes a Separate and Distinct Fundamental Right or Interest.

HN15 CA(15) (15) In the equal protection context, the United States Supreme Court has described a “fundamental” right or interest triggering strict scrutiny as one “explicitly or implicitly guaranteed by the Constitution.” (*San Antonio School District, supra*, 411 U.S. at p. 33.) We recognized in *Serrano v. Priest* (1976) 18 Cal.3d 728 [135 Cal.Rptr. 345, 557 P.2d 929] (*Serrano II*), [***605] however, that our *state equal protection clause* is “possessed of an independent vitality which, in a given case, may demand an analysis different from that which would obtain if only the federal standard were applicable.” (*Id. at p. 764.*) Thus, we will apply strict scrutiny to “legislative classifications which, *because of their impact on those individual rights and liberties* which lie at the core of our free and representative form of government, are properly [*522] considered ‘fundamental.’” (*Id. at pp. 767–768 & fn. 48*, italics added.) It may be that under our state inquiry, considerations of substantive due process could

also inform our determination of fundamental rights. In that context, both this court and the United States Supreme Court have employed a two-step methodology. [****27] (See *Washington v. Glucksberg* (1997) 521 U.S. 702, 720–721 [138 L.Ed.2d 772, 117 S.Ct. 2258, 117 S.Ct. 2302] (*Glucksberg*); *Dawn D. v. Superior Court* (1998) 17 Cal.4th 932, 940 [72 Cal.Rptr.2d 871, 952 P.2d 1139] (*Dawn D.*); *In re Marriage Cases* (2008) 43 Cal.4th 757, 824 [76 Cal.Rptr.3d 683, 183 P.3d 384].) “First, the court must make a “careful description” of the asserted fundamental liberty interest.’ [Citation.] This ‘careful description’ is concrete and particularized, rather than abstract and general” (*Dawn D., at p. 940*; see *Glucksberg, at p. 721.*) “Second, the court must determine whether the asserted interest, as carefully described, is one of our fundamental rights and liberties; central to this determination is whether the asserted interest finds support in our history, our traditions, and the conscience of our people.” (*Dawn D., at p. 940.*)

CA(16) (16) In asserting the advisement and waiver procedures themselves constitute fundamental rights, Cannon describes an interest in “personally *deciding* whether to waive a jury trial.” We agree that SVPA commitment candidates have a right to personally decide whether to demand or waive jury. As we clarify, that decision is reserved to a commitment candidate so long as they are competent to make it, and counsel may not override this choice when made by a competent client. (See *post*, at p. 531.) The crux of Cannon’s argument, however, concerns the *method* by which SVP candidates are informed [**1006] of their statutory jury right, the *manner* in which their decision is communicated to the court, and, in [****28] light of the candidate’s decision, whether a court or jury trial is called for. Cannon fails to persuade that the particular procedure he identifies, while certainly efficacious, is rooted in either the state or federal Constitution, or otherwise fundamental under our precedents. However, **HN16** before moving forward without a jury, the court must be able to conclude that a civil commitment

candidate was aware of the right to demand a jury and made the decision to forgo doing so. This judicial obligation supports the essential jury trial right. Yet, even in a criminal context, no state or federal court has ever held that a particular kind of judicial advisement is constitutionally mandated. (See, e.g., *People v. Sivongxxay* (2017) 3 Cal.5th 151, 168 [219 Cal.Rptr.3d 265, 396 P.3d 424]; *U.S. v. Cochran* (9th Cir. 1985) 770 F.2d 850, 851.) Before a criminal jury waiver may be accepted, the court must be satisfied that a defendant has been made aware of his or her right to a jury trial, which can be accomplished through judicial explanation or consultation with counsel. The court must also be satisfied that the defendant understands the right and personally announces in court a decision to waive it.

[*523]

HN17 CA(17) (17) [*606]** In the civil context, as we have noted, the state constitutional right to a jury may be waived either expressly, impliedly based [****29] on conduct, or by “failing to announce that a jury is required” (*Code Civ. Proc.*, § 631, *subd. (f)(4)*.) Furthermore, the client’s choice to demand or waive a jury in all matters has long been expected to be made *in consultation* with legal counsel, and particularly in civil matters, the decision is traditionally communicated to the court *through the attorney*.

CA(18) (18) To be clear, **HN18** barring issues related to a client’s mental competency, we have never held that the attorney exercises absolute control over the jury right *decision* in either the civil or criminal context. As a general rule, “in both civil and criminal matters, a party’s attorney has general authority to control the procedural aspects of the litigation and, indeed, to bind the client in these matters.” (*In re Horton* (1991) 54 Cal.3d 82, 94 [284 Cal.Rptr. 305, 813 P.2d 1335].) “An attorney is not authorized, however, merely by virtue of his retention in litigation, to ‘impair the client’s substantial rights or the cause of action itself.’” (*Blanton v. Womancare, Inc.* (1985) 38 Cal.3d 396, 404 [212 Cal.Rptr. 151, 696 P.2d 645],

quoting *Linsk v. Linsk* (1969) 70 Cal.2d 272, 276 [74 Cal.Rptr. 544, 449 P.2d 760].) Thus, in the criminal context, we have observed that “[i]t is for the defendant to decide such fundamental matters as ... whether to waive the right to trial by jury” (*Horton*, at p. 95, citing *People v. Holmes* (1960) 54 Cal.2d 442, 443–444 [5 Cal.Rptr. 871, 353 P.2d 583].)

CA(19) (19) Additionally, **HN19** the Rules of Professional Conduct speak to the allocation of authority between [****30] attorneys and their clients. *Rules of Professional Conduct*, rule 1.2(a) states in part: “Except as otherwise provided by law in a criminal case, the lawyer shall abide by the *client’s decision*, after *consultation with the lawyer*, ... whether to waive jury trial” (Italics added.) A lawyer is also ethically obligated to: “reasonably* consult with the client about the means by which to accomplish the client’s objectives in the representation”; “keep the client reasonably* informed about significant developments relating to the representation”; and “shall explain a matter to the extent reasonably* necessary to permit the client to make informed decisions regarding the representation.”¹² (*Rules Prof. Conduct*, rule 1.4(a)(2), (3), (b).) Of course, these ethical obligations apply when representing those facing civil commitment.

CA(20) (20) As discussed *post*, **HN20** the SVPA honors this traditional allocation of responsibility between attorney and client by vesting in the SVP candidate the authority to decide whether to waive or demand a jury trial. But it does not follow from this conclusion that an attorney, who remains obligated to inform [*524] [**1007] and confer with their client regarding the waiver decision, lacks the ability to properly advise them, or convey their waiver decision to the court. [****31] As we observed in *John L., supra*, 48 Cal.4th 131, “in the absence of any contrary indication, the superior court may assume that an attorney is competent and

¹² Asterisks in the rules denote a term defined under *rule 1.0.1 of the Rules of Professional Conduct*.

fully communicates with the proposed [commitment candidate] about the entire proceeding.” (*Id. at p. 156.*)

While jury advisement and personal waiver provisions similar to those incorporated [***607] in the NGI and OMHD statutes can be found in other civil commitment schemes, they have not been uniformly adopted across all of them. For instance, some statutory schemes require a court advisement but also require an actual defense request for a jury with the default proceeding being a bench trial absent such a demand. (See, e.g., §§ 5302, 5303 [jury right procedures under the LPS Act’s 180-day postcertification commitments]; see also § 5350; *Prob. Code, § 1828* [the advisement and demand procedures for conservatorship proceedings for gravely ill individuals under the LPS Act].) As we observed in *Barrett*, “Of the nine commitment procedures [in California], a majority (including § 6500 *et seq.*) either do not reference jury trial matters at all (such that a right to jury trial on request has been constitutionally implied), or they say nothing about advisements or waivers of any jury trial right otherwise provided therein.” (*Barrett, supra, 54 Cal.4th at p. 1110*, *fn. omitted.*) [****32]

This constitutional, legislative, and judicial context does not demonstrate that SVP candidates have a separate fundamental right or interest in the particular advisement and waiver procedure Cannon claims. The Legislature certainly may choose to implement it in the SVPA context. However, the equal protection question here is whether the on-demand procedure it selected significantly burdens an SVP defendant’s fundamental liberty interests to such a degree that strict scrutiny is required. We now turn to the standard by which the current legislative scheme is reviewed. The holding in *Barrett* informs this consideration.

D. Our Case Law Supports Rational Basis Review

Cannon contends *Barrett*’s conclusion that rational basis review applies to a similar equal protection

challenge was dictum because there we disposed of the constitutional claim on the threshold question of whether the two comparator groups were similarly situated for the purposes of the law. ¹³ [*525] Alternatively, he claims *Barrett* was wrongly decided. Defendant misreads *Barrett*. Having ruled that “persons like Barrett ‘are entitled to jury trial upon request’” (*Barrett, supra, 54 Cal.4th at p. 1097*, quoting *O’Brien v. Superior Court (1976) 61 Cal.App.3d 62, 69 [132 Cal.Rptr. 13]*), we went on to specifically “assess the adequacy of this basic [****33] rule, and decide whether additional adjunct procedures [of judicial admonition and personal waiver] must be followed in open court for a valid nonjury trial to occur.” (*Barrett, at p. 1097.*) The adjunct procedures *Barrett* considered are the same advisement and waiver procedures at issue here. The *Barrett* analysis is not dictum. While several aspects of that case, including the nature and degree of Barrett’s disability, are distinguishable from the question as it is framed here, that precedent nevertheless supports the conclusion that the jury advisement and waiver procedures themselves do not constitute independent fundamental rights or interests and that the legislatively selected procedures in the SVPA, which make a jury trial available on demand, do not impose a [***608] significant burden on the fundamental liberty interest itself.

Barrett was a developmentally disabled adult who had lived in a private residence [**1008] with assistance. ¹⁴ However, her increasingly violent

¹³ *CA(21) (21)* After the court granted review and the parties filed briefs in this case, we decided *Hardin, supra, 15 Cal.5th 834*, in which *HN21* we altered the traditional analytical framework for conducting rational basis review. In cases such as this one in which the statutes themselves draw distinctions between identifiable groups, we no longer ask at the outset whether the groups are similarly situated for purposes of the law in question. (*Id. at pp. 850–851.*)

¹⁴ Following *Barrett*, the Legislature replaced terms “mental retardation” and “mentally retarded” throughout the *section 6500* statutory scheme with the terms “developmental disability” and “developmentally disabled.” (Stats. 2012, ch. 25, § 19, eff. June 27, 2012.) When citing quoted material, the former set of terms is

behavior resulted in a civil commitment petition alleging she was a danger to herself and others. (See [§ 6500](#) [pertaining to allegedly dangerous developmentally disabled persons].) The court ultimately set a date for a trial on the commitment petition. [****34] There was no record of any advisement as to a jury trial or its waiver. At a trial, at which Barrett was present and assisted by counsel, the People called Barrett’s psychologist who testified she had an IQ in the range of the 40s to 50s, “a level deemed ‘moderate’ in the sense that it was neither mild nor severe.” (*Barrett, supra*, 54 Cal.4th at p. 1091.) Additionally, she had cognitive deficiencies associated with her developmental disability that caused her to have serious difficulty with behavior control and made her a danger to herself and others. (*Ibid.*) Over the course of several years, she had assaulted family and staff, damaged property, and injured herself. (*Id. at pp. 1091–1092.*)

Barrett was committed to a secure treatment facility for one year, with renewal commitments available. She appealed alleging a denial of due process and equal protection. It was undisputed that the relevant commitment procedures did not provide the right for a jury trial, and as a result, did not include any judicial admonition or personal waiver requirement. The parties agreed, however, “under long-standing equal protection principles” that, [*526] absent a waiver, she was entitled to a jury trial. (*Barrett, supra*, 54 Cal.4th at p. 1089.) As does Cannon here, Barrett asserted that “the trial [****35] court was constitutionally compelled to (1) expressly advise her that she could request a jury and (2) obtain her personal waiver of a jury, before holding a bench trial.” (*Ibid.*) Addressing her claims, the court reasoned as follows: “California has no fewer than nine involuntary commitment procedures that may apply to persons who have various mental problems, and who pose a threat to their own welfare or to the safety of others. Some of these laws, including [section 6500 et seq.](#), operate in a manner largely independent of the criminal justice

system. (See §§ 4825 [developmentally disabled persons under the LDDSA], [5000 et seq.](#) [mentally ill persons under the LPS Act].) Others apply depending on whether a criminal prosecution has occurred. (See [§ 3000 et seq.](#) [narcotic addicts whether or not they have been convicted of crimes].) Certain accused criminals may receive a mental health commitment in lieu of conviction and punishment. (See *Pen. Code*, §§ 1026–1027 [defendants acquitted by reason of insanity], [1367 et seq.](#) [defendants found mentally incompetent].) Also, dangerously disordered offenders may be held upon discharge by the juvenile authorities (see *Welf. & Inst. Code*, § 1800 et seq.), or after serving a prison term (see § 6600 et seq. [sexually violent predators]; *Pen. Code*, § 2960 et seq. [mentally disordered offenders]).” (*Barrett, supra*, 54 Cal.4th at pp. 1093–1094.)

The court [****36] observed that no statute authorized a jury trial in a case like Barrett’s. [***609] Nonetheless, “there is no dispute that someone facing commitment under [section 6500 et seq.](#) has the right to trial by jury on the allegations of the petition. Neither party rests this premise on any provision of the federal or state Constitution that directly or expressly grants the right to a jury in criminal or civil trials. Rather, they invoke a long and unbroken line of California appellate court cases holding or assuming—largely on the basis of federal and state equal protection principles affecting fundamental interests—that persons alleged to be [developmentally disabled] and dangerous cannot be denied a jury *altogether* where jury trials are granted by statute to persons alleged to be mentally impaired and dangerous under comparable commitment laws.” (*Barrett, supra*, 54 Cal.4th at pp. 1096–1097, *fn. omitted.*)

[**1009] [CA\(22\)](#) (22) Barrett argued that simply providing a jury trial by constitutional implication was insufficient and “to protect the interests at stake ... the jury trial option needs its own supplemental layer of support. In other words, the decision whether to try the case to the court or to a jury belongs solely to the person facing

commitment, and it must be made *personally*, not [****37] through counsel.” (*Barrett, supra*, 54 Cal.4th at p. 1097.) She urged the lack of judicial advisement and personal waiver in her case constituted structural error and compelled reversal. (*Id.* at p. 1098.) The court rejected those arguments. It recognized that *HN22* “civil commitment for any purpose can affect liberty and other vital interests. [Citations]. Hence, due process safeguards [*527] apply whether the proceeding concerns [developmentally disabled] and dangerous persons [citation], or persons suffering from other dangerous disorders needing care and treatment.” (*Ibid.*)

The court went on to state: “Notably, the procedural safeguards required in this context are flexible [citation], and the quantum and quality of the process due depend upon the nature and purpose of the challenged commitment. [Citation.] In making this determination, the courts weigh, assess, and consider various factors affected by the disputed procedure. Distilled, these considerations involve (1) the various private interests at stake, (2) any competing state or public concerns, and (3) the potential risk of an erroneous or unreliable outcome.” (*Barrett, supra*, 54 Cal.4th at p. 1099.) The court agreed with Barrett that the due process interests involved “have been deemed sufficiently fundamental to implicate [****38] certain constitutional jury trial concerns in commitment cases, at least in those relatively few instances in which a right to trial by jury has not been legislatively prescribed. It does not follow, however, that the jury trial option implied by the courts ... is illusory unless accompanied by the ancillary procedures Barrett seeks. Nor do such procedures necessarily amount to independent constitutional rights applicable in every case. Instead, their due process availability depends, in a particular instance, on a careful balancing of the public and private interests described above.” (*Id.* at p. 1100.)

The court separately considered her equal protection claim. Barrett argued that [section 6500](#)

candidates were entitled to the same court advisement of jury trial availability on demand called for under the LPS Act. (See [§ 5300, subds. \(a\)–\(c\)](#); *Barrett, supra*, 54 Cal.4th at pp. 1106–1107.) Predating *Hardin* (see fn. 13, *ante*), the *Barrett* court presumed candidates for commitment under the two schemes were similarly situated for purposes of the jury trial [***610] right, but not for the “ancillary purpose” of express advisement and personal waiver. (*Barrett, at p. 1108.*)

The court compared the two schemes and observed the critical differentiating factor was the nature of the mental condition covered by [****39] each. The scheme at issue in *Barrett* involved dangerous developmentally disabled persons who are presumed to lack the ability to understand and evaluate their situation. The LPS scheme addressed those who, as a result of a mental illness or disorder, are dangerous to themselves or others. Among other differences, under the LPS Act, a “mental illness” may affect ““only limited areas of functioning, leaving other areas unimpaired, and consequently ... *many mentally ill persons retain the capacity to function in a competent manner.*”” (*Barrett, supra*, 54 Cal.4th at p. 1109, quoting *In re Qawi* (2004) 32 Cal.4th 1, 17 [7 Cal.Rptr.3d 780, 81 P.3d 224].) This reality suggests that mental conditions that may give rise to a 180-day LPS [*528] commitment “do not necessarily imply incompetence or a reduced ability to understand, and make decisions about, the conduct of the proceedings.” ¹⁵ (*Barrett, at p. 1109.*)

[**1010] [CA\(23\)](#) (23) Applying rational basis review, the court rejected Barrett’s assertion that the Legislature arbitrarily decided developmentally

¹⁵ The record below in this matter did not touch in depth on the effect of Cannon’s condition on his overall intellectual functioning beyond the mental condition impacting his sexual aggression. It does reflect that he was convicted of a criminal offense and neither the court nor counsel in the criminal cases raised a question about his competence to stand trial or to form the mens rea required for a conviction. The remand order here permits the parties to delve further into this question and consider, if necessary, Cannon’s ability to make informed decisions about the proceedings.

disabled persons were unsuited for the procedural protections at issue and unfairly subjected them to a more burdensome set of procedures. It explained: [HN23](#) “[A]n equal protection violation does not occur merely because different statutory procedures have been included in different civil [****40] commitment schemes. [Citation.] Nothing compels the state ‘to choose between attacking every aspect of a problem or not attacking the problem at all.’ [Citation.] Far from having to ‘solve all related ills at once’ [citation], the Legislature has ‘broad discretion’ to proceed in an incremental and uneven manner without necessarily engaging in arbitrary and unlawful discrimination.” ([Barrett, supra, 54 Cal.4th at p. 1110.](#))

[CA\(24\) \(24\) Barrett](#) rejected the contrary views of two concurring and dissenting justices that a heightened form of review was necessary to evaluate classifications based on a person’s developmental disability. ([Barrett, supra, 54 Cal.4th at p. 1144](#) (conc. & dis. opn. of Liu, J.); see also [id. at p. 1113](#) (conc. & dis. opn. of Werdegar, J.)) Cannon urges [Barrett](#)’s statements about rational basis review were dicta because we disposed of the equal protection claim at the “similarly situated” threshold. He misses the mark. [Barrett](#) concluded the two groups were not similarly situated for purposes of the advisement and waiver procedures because of their different intellectual circumstances. As a result, in the majority’s view, that difference provided the rational basis for differential treatment. As [Hardin](#) later clarified: [HN24](#) “[I]n cases involving challenges to statutes [****41] ... that facially distinguish between identifiable groups or classes of individuals, ‘[t]o ask whether two groups are similarly situated in this context’ ... is essentially ‘the same as asking whether the distinction between them can be justified under the [***611] appropriate test of equal protection.’” ([Hardin, supra, 15 Cal.5th at p. 849](#), quoting [Fullerton Joint Union High School Dist. v. State Bd. of Education \(1982\) 32 Cal.3d 779, 798, fn. 19 \[187 Cal.Rptr. 398, 654 P.2d 168\]](#) (plur. opn.)) The [Barrett](#) majority did not view defendant’s constitutional

claims as involving fundamental rights, unduly burdening fundamental interests, or implicating [*529] protected classifications. It compared the fundamental liberty interests involving the right to a jury with the secondary procedural steps sought by Barrett. The decision supports the conclusion that rational basis review applies to Cannon’s challenge. Cannon argues, however, that the later cases of [Blackburn](#) and [Tran](#) can be read to support a contrary conclusion. He reads those cases too broadly.

[Blackburn](#) and [Tran](#), both of which discussed [Barrett](#), are not to the contrary. Those cases involved the specific requirements of the NGI and OMHD statutes as written.¹⁶ Indeed, in [Blackburn](#), we explicitly *declined* to address whether mentally disordered offenders have a constitutional right, at all, to a jury trial in commitment extension [****42] proceedings. ([Blackburn, supra, 61 Cal.4th at p. 1120.](#)) Instead, we considered the particular statutory language incorporating the admonition and waiver requirements into the NGI and OMHD laws and what it revealed about the Legislature’s intent in passing them. As noted, the question in this case turns on whether the SVPA, which does not include the language at issue in [Blackburn](#) and [Tran](#), violates equal protection as a result of the omission. Neither [Blackburn](#) nor [Tran](#) considered that issue. Their holdings were based on the trial court’s failure to honor the statutes as they had been enacted. The SVPA and its different procedural approach were not before the court in [Blackburn](#) or [Tran](#), nor did those cases involve an equal protection claim based on a comparison among them. That is the very issue which will now be before the court on remand. The discussions in [Blackburn](#) [**1011] and [Tran](#), which address the purpose of the advisement and waiver procedures, may well inform that consideration, but they do not resolve it.

¹⁶ When [Blackburn](#) was decided, alleged OMHD’s were still referred to as mentally disordered offenders or MDO’s.

[Blackburn](#) and [Tran](#) held that, under both the NGI and OMHD schemes, the Legislature intended the decision to waive a jury trial rests solely with a competent defendant, not their attorney. ([Blackburn, supra, 61 Cal.4th at p. 1125](#); [Tran, supra, 61 Cal.4th at p. 1166.](#)) Additionally, [****43] those cases interpreted the statutory jury advisement provisions to mean the Legislature intended trial courts to directly advise the defendant of their right to a jury trial even when they are represented by counsel. ([Blackburn, at p. 1123](#); [Tran, at p. 1166.](#)) In both cases, the defendants’ attorneys requested a bench trial. ([Blackburn, at p. 1117](#); [Tran, at p. 1164.](#)) Neither record indicated whether the trial court directly advised the defendant of the jury trial right. ([Blackburn, at p. 1116](#); [Tran, at p. 1168.](#)) Nor did either trial court obtain the defendant’s personal waiver or find that he lacked the capacity to make a knowing and voluntary waiver. ([Blackburn, at p. 1130](#); [Tran, at p. 1168.](#)) [***612] Thus, we concluded both trial courts violated *the statute* by accepting defense counsel’s waiver of a jury for their client. ([Blackburn, at p. 1130](#); [Tran, at p. 1168.](#))

[*530]

[CA\(25\)](#) (25) Turning to potential remedies, [Blackburn](#) and [Tran](#) held that [HN25](#) when the trial courts fail to follow the explicit statutory requirements, the reviewing court should *treat* that failure “as tantamount to the denial of a jury trial” right ([Blackburn, supra, 61 Cal.4th at p. 1134](#)) and deem it reversible under [California Constitution, article VI, section 13](#), unless: (1) the totality of circumstances in the record affirmatively shows the defendant’s personal waiver was knowing and voluntary despite the court’s failure to provide a statutorily required advisement, or (2) there was substantial evidence the [****44] defendant lacked the capacity to make a knowing and voluntary waiver at the time the court accepted defense counsel’s waiver. ([Blackburn, at p. 1136](#); [Tran, supra, 61 Cal.4th at p. 1170.](#)) “In both scenarios, the requirement of an *affirmative* showing means that no valid waiver may be presumed from a silent

record.” ([Blackburn, at p. 1136](#); [Tran, at p. 1170.](#)) Under the latter two sets of circumstances, the court’s failure to comply with the statutorily required jury advisement and waiver is subject to harmless error analysis under [article VI, section 13 of the California Constitution](#). ([Blackburn, at p. 1136](#); [Tran, at p. 1170.](#))

Cannon broadly argues that this remedy portion of [Blackburn](#) demonstrates that jury advisement and personal waiver procedures themselves are independent fundamental rights because failure to provide them is “tantamount to the denial of a jury trial.” ([Blackburn, supra, 61 Cal.4th at p. 1134.](#)) He again misreads the opinion. [Blackburn](#) determined it was impossible on a silent record to determine whether the outcome of the trial would have been different if the court had properly followed the appropriate statutory procedures. (*Ibid.*) But we recognized that in different circumstances—where the record shows the defendant lacked the capacity to make a proper waiver, or in fact made such a waiver even without the statutory advisement—the failure to follow statutory directives could be [****45] harmless. (*Id. at p. 1136.*) This recognition is consistent with our conclusion here that there is, in fact, a difference between the deprivation of an advisement and personal waiver, on the one hand, and the deprivation of jury trial, on the other; one is not tantamount to the other.

[CA\(26\)](#) (26) On this record, like the Court of Appeal, we cannot conclude the trial court violated Cannon’s rights by accepting his counsel’s [**1012] representation of his client’s jury waiver. As we previously observed here as well as in [Blackburn](#), [HN26](#) generally ““counsel is captain of the ship”” and has authority to bind the client in procedural aspects of litigation. ([Blackburn, supra, 61 Cal.4th at p. 1120.](#)) However, as noted, this captaincy generally does not extend to the decision to waive jury. Thus, given “the possibility of ‘a significant deprivation of liberty’ ... we train our attention on the text and purpose of the particular statutes that govern this special proceeding to [*531] determine whether the decision to waive

a jury trial must be made by the defendant or may be made by counsel notwithstanding the defendant's [***613] wishes.” (*Id.* at p. 1124.)

CA(27) (27) Despite its procedural differences with the NGI and OMHD statutes, **HN27** the statutory text of the SVPA indicates the Legislature also intended an [****46] alleged SVP to maintain control over the jury trial decision itself, assuming they are mentally competent to do so. As in *Blackburn* and *Tran*, use of the term “person subject to this article” in *section 6603* refers to the *defendant*, rather than his or her attorney. For instance, *section 6603, subdivision (a)* specifically indicates “[a] person subject to this article is entitled to a trial by jury ... [and] the assistance of counsel ...” (italics added), and *section 6603, subdivisions (d)(1)* and *(k)(1)* refer specifically to “the counsel for the person subject to this article” (italics added). (See also *§ 6603.3* [drawing distinctions between the “person subject to this article” and their attorney].) Thus, based on the plain statutory language and consistent with our application of the NGI and OMHD statutes in *Tran* and *Blackburn*, we conclude the alleged SVP, rather than counsel, has final say over whether to demand a jury trial. The question remains as to *how* defendants are informed of their option and how that “final say” may be conveyed to the court.

CA(28) (28) Unlike in *Blackburn* and *Tran*, the Legislature has not directly spoken on that issue in the SVP context. There is no argument that the availability of a jury trial is an essential protection for the fundamental liberty interests [****47] at stake, and the decision is reserved to the defendant in the final analysis. We are also, of course, mindful that **HN28** “[t]he purpose of an advisement is to inform the defendant of a particular right so that he or she can make an informed choice about whether to waive that right.” (*Blackburn, supra*, 61 Cal.4th at p. 1125.) The question here then is by what procedure do trial and appellate courts ensure that a commitment candidate made their own informed decision as to a jury trial.

Just as the statutory *inclusion* of jury advisement and personal waiver procedures was critical to our holdings in *Blackburn* and *Tran*, the noticeable absence of similar procedural components from the SVPA leads to a different conclusion: the Legislature chose to protect an alleged SVP’s right to make an informed choice of fact finder *through* the statutory right to and advice of counsel. As we observed in *Barrett*, “Counsel is presumed competent and informed as to applicable constitutional and statutory law. This presumption necessarily includes the defense right to seek a jury trial in a [civil commitment] proceeding, regardless of any court advisement.” (*Barrett, supra*, 54 Cal.4th at p. 1105; see also *John L., supra*, 48 Cal.4th at pp. 156–157.) Because the decision as to a jury trial is significant, the record must support a [****48] [*532] judicial conclusion, through the express representations of counsel or otherwise, that counsel has explained the jury trial right and obtained the client’s permission to demand or waive a jury.

Cannon contends this court foreclosed such a conclusion when *Blackburn* dismissed the notion that it was sufficient to provide the advisement to counsel rather than the defendant under the OMHD statute. (*Blackburn, supra*, 61 Cal.4th at p. 1124.) As we have pointed out, however, the Legislature chose a *different* set of procedures in the SVPA. Whether this legislative decision can be constitutionally *justified* under the appropriate standard of review anticipates the next step in the equal protection analysis. Our immediate task is to resolve the following claims: (1) whether the [**1013] right [***614] to a jury advisement and personal waiver is, itself, a fundamental right, and (2) whether the SVPA’s on-demand procedures constitute a significant burden on a defendant’s fundamental liberty interests, triggering the most exacting form of scrutiny. We reject both assertions. It is important to emphasize, however, that designating these procedures as “ancillary” or “secondary” distinguishes between the fundamental right to demand a jury and the additional [****49] procedural framework bearing on that right. It

should not be understood to undermine the important purposes that procedures like these serve when the Legislature adopts them. The question here is not whether they can be employed. Rather, it is whether they are constitutionally compelled.

CA(29) (29) To summarize: **HN29** A comparison of the SVPA with the NGI and OMHD commitment schemes reveals that all three make a civil jury trial available to a commitment candidate, but they differ in the procedures for doing so. In the former, a jury trial is available on demand. The statute permits counsel to explain the right to the defendant and convey the client's choice of jury trial or waiver to the court. In the latter, before proceeding to a bench trial, the court must provide the admonition and obtain a waiver from the defendant. **CA(30) (30)** On remand, the court must determine whether the People put forward a justification for the Legislature's choice of differing procedures and whether the defense can establish that those proffered reasons fail to demonstrate a rational basis for the legislative choice. The court must also determine whether the facts presented demonstrate by a preponderance of the evidence that Cannon **[****50]** was aware of his right to demand a jury trial and chose to waive it. (See [Blackburn, supra, 61 Cal.4th at p. 1137.](#))

Because Cannon did not raise his equal protection challenge in the trial court, the Court of Appeal ultimately ordered the case remanded “to give the People a meaningful opportunity to demonstrate a valid constitutional justification for the SVP's differential legislative treatment.” ([Cannon, supra, 85 Cal.App.5th at p. 800](#), citing [McKee, supra, 47 Cal.4th at pp. 1208–1210.](#)) Given that we granted review solely to resolve the governing level of **[*533]** scrutiny, and the parties likewise anticipate having an opportunity to litigate this issue more fully below, we affirm the Court of Appeal's order.

E. Response to the Dissent

Our dissenting colleagues raise several points which we address in turn.

CA(31) (31) The dissent suggests that there is a difference of some kind between a fundamental “right” and a fundamental “interest.” In this context, however, whatever distinction there may be makes no difference to the outcome; the dissent's suggestion to the contrary is unpersuasive and unsupported. The dissent asserts the “state's duty is conditional.” (Dis. opn. of Liu, J., *post*, p. 540.) This is not quite right. A state's duty is not conditional. It is more precise to say that **HN30** the state has a duty not to illegitimately **[****51]** place conditions on a fundamental right or interest. To make that assertion simply states the guarantee protected by the [equal protection clause](#). It does not define *what* a fundamental interest is or how it purportedly differs from a fundamental right. In this context, however, whatever distinction there may be makes no difference to the outcome. The dissent offers no definition or analysis in support of its conclusion that the procedures challenged here qualify as either a **[***615]** fundamental right or a fundamental interest invoking strict scrutiny.

CA(32) (32) The dissent suggests that the distinction between “rights” and “interests” is meaningful because the latter encompasses broader circumstances. In the end, however, **HN31** strict scrutiny is called for when a state-chosen difference in treatment violates or improperly burdens rights and interests recognized as fundamental, or when it discriminates based on membership in a protected class. Rational basis review applies if differential treatment does not impinge upon fundamental rights and interests or protected status but is allegedly irrational in the distinctions it makes. As a review of the authorities cited here shows, the terms “rights” and “interests” are often used interchangeably **[****52]** in the relevant case law and are often used in **[**1014]** conjunction to ensure that protections are not interpreted too narrowly.

The discussion in [Gary W., supra, 5 Cal.3d 296](#) is instructive. There, the court, in concluding that due process requires the “right” to a jury trial, spoke of “interests” that have been “held to be so

‘fundamental’ as to impose this [strict scrutiny] burden on the state.” (*Id.* at p. 306.) It immediately supported this statement by pointing to the recognized fundamental “interests” in voting, procreation, and interstate travel, citing cases that repeatedly cast those interests as “rights.” (See, e.g., *Castro v. State of California* (1970) 2 Cal.3d 223, 234 [85 Cal.Rptr. 20, 466 P.2d 244] [fundamental “right of suffrage”]; *Skinner v. Oklahoma* (1942) 316 U.S. 535, 536, 541 [86 L.Ed. 1655, 62 S.Ct. 1110] [fundamental “right to have offspring”]; *Shapiro v. [*534] Thompson* (1969) 394 U.S. 618, 630 [22 L.Ed.2d 600, 89 S.Ct. 1322] [fundamental “right to travel interstate”].) Urging that the “legal terminology” can be confusing, our dissenting colleagues put forward the notion that rights and interests are somehow different. No authority is cited for this proposition. To the contrary, numerous cases, including a number of those quoted here, have repeatedly used them in conjunction when describing how to evaluate the manner in which statutes are to be interpreted.

In support of the proffered “distinction,” the dissent points to examples that all involve rights [****53] and interests properly held to be so important as to be fundamental. A poll tax perniciously burdens the “right to vote” on an equal basis with other citizens, which is deemed “fundamental” because it is ““preservative of other basic civil and political rights”” (*Harper v. Virginia Bd. of Elections* (1966) 383 U.S. 663, 667 [16 L.Ed.2d 169, 86 S.Ct. 1079].) Discriminatory schemes for funding public schools burden what we recognized as the “right to education” which we found to be “fundamental” based on the “indispensable role [it] plays in the modern [society].” (*Serrano v. Priest* (1971) 5 Cal.3d 584, 605 [96 Cal.Rptr. 601, 487 P.2d 1241].) In *Serrano I* and *Serrano II*, where we interpreted our constitutional protection to education more broadly than our federal counterparts (see *Serrano II, supra*, 18 Cal.3d at pp. 765–766), we also used the term “interest.” This example proves the point. Whether described as a “right” or an “interest,” this court has concluded that access to education is so important

as to be fundamental.

The dissent would conclude that heightened scrutiny should apply here by focusing solely on Cannon’s second argument regarding the burden the SVPA’s jury procedures place on his ability to select a jury trial and ignoring his first argument that he has a separate fundamental right to the advisement and waiver procedures themselves. (Dis. opn. of Liu, J., *post*, at p. 547.) [****54] [****616] We decline to do so. We address *Gary W.* in detail because Cannon relies on this precedent to argue that he has a fundamental right to the procedures he seeks and that strict scrutiny applies *whenever* the availability of a jury in a civil commitment proceeding is implicated in any way. In order to address his arguments fully, we must first identify the *source* of that right on which he relies, which we have recognized protects the fundamental liberty interest.

Related to this point, the dissent takes issue with the reliance on due process principles in the fundamental interests analysis. In particular, it questions mention of the two-step methodology under *Glucksberg, supra*, 521 U.S. 702 and *Dawn D., supra*, 17 Cal.4th 932, to explore Cannon’s claim that he has a fundamental right or interest in the judicial advisement and personal waiver procedures he seeks. (Dis. opn. of Liu, J., *post*, at p. 542.) The dissent asserts *Glucksberg* and *Dawn D.* can play no part in assessing [*535] whether an interest is fundamental for equal protection purposes because those cases focused only on questions of substantive due process, not equal protection. Both logic and precedent undermine the assertion.

CA(33) (33) As we have discussed, *HN32* the concepts of due process and equal protection are complementary and [****55] sometimes interrelated. The dissent’s analysis would uncouple them. As noted, equal protection is not a source of [**1015] substantive rights or liberties. Instead, it serves separately to ensure any differential legislative treatment is adequately justified under

the appropriate level of scrutiny. We have explained that the right to demand a jury trial in civil commitments is based not on [article I, section 16 of the California Constitution](#), but on principles of procedural due process protecting the fundamental liberty interest. Equal protection is also implicated when the Legislature grants a jury right to one group of civil commitment candidates, but not to others. While Cannon does not claim a *due process* right to the advisement and waiver procedures in the NGI and OMHD statutes, he does claim a *fundamental* interest in such procedures. If such a fundamental interest exists, it would flow from the fundamental liberty interest protected by procedural due process. It can find no independent purchase in equal protection, which confers no substantive rights of its own but stands as an independent safeguard against unjustified, unequal treatment. [HN33 CA\(34\)](#) (34) An equal protection challenge may lie even when the involved interest has not been recognized as fundamental. [****56] But it is the nature of the right or interest that is significant to selecting the *standard of review* applicable to such a challenge.

The dissent asserts that we have never held that a court must first conclude that a deprivation infringes on a fundamental right as a matter of due process before applying heightened scrutiny. (Dis. opn. of Liu, J., *post*, at p. 543.) It cites to our decision in [McKee, supra, 47 Cal.4th at p. 1207](#) for the undisputed principle that “[d]ue process and equal protection protect different constitutional interests: due process affords individuals a baseline of substantive and procedural rights, whereas equal protection safeguards against the arbitrary denial of benefits to a certain defined class of individuals, *even when the due process clause does not require that such benefits be offered.*” (Italics added.)

[CA\(35\)](#) (35) We agree that [HN34](#) an interest does not need to derive from due process principles to rank as fundamental for equal protection purposes, but it must find its footing on some fundamental ground rather [***617] than simply asserting it is a right or benefit granted to some but not others.

Thus, the two-step substantive due process analysis under [Glucksberg](#) and [Dawn D.](#) can inform whether an interest is fundamental for equal protection purposes, [****57] given the provenance of the jury trial right at issue. [In re Marriage Cases, supra, 43 \[*536\] Cal.4th at page 784](#), for example, considered substantive due process rights associated with marriage in the course of considering the level of scrutiny that applied to an equal protection challenge to laws that treated same-sex unions differently.

Here, Cannon argues that the particular advisement and waiver procedures he seeks sit at the core of the right to secure a jury trial, which we have recognized as being essential under due process analysis given the fundamental liberty interests at stake. Before we can determine whether the legislative choice to employ *different* jury trial procedures must be subject to strict scrutiny, we need to determine whether he holds a fundamental right or interest in the procedures he seeks. Cannon has the right to decide whether to demand a jury. ([Gary W., supra, 5 Cal.3d at pp. 306–307.](#)) As we have explained, however, that conclusion does not mean the procedures he seeks are fundamental or that they impinge upon or substantially burden the jury right or render it illusory, nor do they substantially burden the underlying liberty interests at stake.

The dissent also criticizes the majority’s reliance on [Barrett](#), claiming it “conducted no fundamental interest [****58] analysis at all,” and confined its analysis to the “similarly situated” step. (Dis. opn. of Liu, J., *post*, at p. 547.) It posits that we “simply do not know” if the court believed the classifications at issue were justified under strict scrutiny or rational basis. (*Id.* at p. 548.) The dissent ignores the fact that Barrett, like Cannon here, also claimed a separate fundamental right in the advisement and waiver procedures. Thus, as previously discussed, the [Barrett](#) court addressed that very question to determine whether she had a [**1016] fundamental right or interest in these ancillary procedures as part and parcel of the jury

trial right. The court concluded that Barrett did not have such a right in the procedures at issue. (*Barrett, supra*, 54 Cal.4th at p. 1100.) That analysis certainly *did* inform the equal protection analysis that followed.

Additionally, it is not accurate to claim that the majority went no further than the “similarly situated” threshold step. The court also addressed “Barrett’s equal protection claim ... that ... the Legislature has arbitrarily decided that alleged mentally retarded persons are unsuited to such protection, and has unfairly subjected them to more burdensome procedures than persons facing commitment in almost [****59] any other circumstance. In essence, Barrett simply implies that if some such schemes include these provisions, then all must.” (*Barrett, supra*, 54 Cal.4th at p. 1109.) We stated, “an equal protection violation does not occur merely because different statutory procedures have been included in different civil commitment schemes. [Citation.] Nothing compels the state ‘to choose between attacking every aspect of a problem or not attacking the problem at all.’ [Citation.]” (*Id. at p. 1110.*) [*537] These statements are all hallmarks of rational basis review. Finally and importantly, we know that the court viewed the justifications for the disparate treatment under rational basis review because it told us that it did so. “Justices Liu and Werdegar are aware [***618] that we have correctly applied the United States Supreme Court’s prevailing ‘rational basis’ standard” (*Id. at p. 1111, fn. 21.*)

Lastly, the dissent claims the majority has suggested the holdings in *Blackburn* and *Tran* were a “function of the limitations of the records in those cases” and that such a suggestion is undermined by the fact that “Tran *might have known* he had a jury trial right given his experiences at three prior hearings.” (Dis opn. of J. Liu, *post*, at p. 547, citing *Tran, supra*, 61 Cal.4th at pp. 1173–1174 (conc. & dis. opn. of Cantil-Sakauye, C. J).) The holdings at [****60] issue related to the *available remedies* required because of the trial court’s statutory

violations. Those holdings certainly were predicated, in part, on the record limitations. The holdings regarding what was required of the trial court were a function of the statutory provisions themselves and what the Legislature had prescribed by including them. It is also not wholly accurate to say we applied the *Blackburn* holding in *Tran* in the face of evidence of a valid waiver. Instead, we declined to infer from the circumstances that Tran knowingly and voluntarily waived his right to a jury trial because, *based on the NGI statute*, the onus was on the *People* to prove consent to the bench trial, with the default proceeding being a jury trial absent such a showing, and the record was inconclusive on that point. (*Tran, at p. 1169.*)

III. DISPOSITION

We affirm the Court of Appeal’s order remanding this matter to the trial court for further proceedings. The order declaring defendant Cannon to be an SVP and committing him to the SDSH for an indeterminate term is conditionally affirmed pending the outcome of those proceedings. If the reasons underlying differential statutory treatment are found insufficient under rational [****61] basis review, or if the court concludes the record presented is insufficient to show Cannon was aware of and agreed to his counsel’s exercise of a jury waiver on his behalf, the order of commitment shall be set aside and the matter rescheduled for trial.

Guerrero, C. J., Kruger, J., Groban, J., and Jenkins, J., concurred.

Dissent by: Liu, J.; Evans, J.

Dissent

LIU, J., Dissenting.—We granted review to decide what standard of review applies to defendant William Joseph Cannon’s equal protection claim that alleged sexually violent predators (SVPs), no less than other persons subject to civil commitment,

are entitled to personal advisement and waiver of the right to a jury trial in commitment proceedings. Today's opinion **[**1017]** concludes that rational **[*538]** basis review is the appropriate standard because an alleged SVP has no "separate fundamental right or interest in the particular advisement and waiver procedure Cannon claims" (maj. opn., *ante*, at p. 524) and because "the legislatively selected procedures in the [Sexually Violent Predator Act], which make a jury trial available on demand, do not impose a significant burden on the fundamental liberty interest" that the right to a jury trial protects (*id.* at p. 525).

In focusing primarily on **[****62]** whether an alleged SVP has a "fundamental right" to personal advisement and waiver, the reasoning in today's opinion obscures the main issue in this case. Under the "fundamental interest" strand of equal protection **[***619]** analysis as developed by this court and the United States Supreme Court, the proper inquiry is whether the lack of a personal advisement and waiver requirement in the context of civil commitment appreciably burdens an alleged committee's exercise of the right to a jury trial. Our precedent makes clear the answer is yes. Accordingly, alleged committees have a fundamental interest in these procedures, and the selective denial of these procedures to alleged SVPs is subject to heightened equal protection scrutiny, not rational basis review.

I.

Under the commitment schemes for persons not guilty by reason of insanity and for offenders with mental health disorders, a valid jury trial waiver requires that the trial court advise the alleged committee of the right to a jury trial and obtain a personal waiver of that right from the alleged committee. (*Pen. Code*, §§ 1026.5, *subd. (b)(3)–(4)*, 2972, *subd. (a)(1)–(2)*.) Under the commitment scheme for SVPs, there are no such procedures for a jury trial waiver, and a jury trial is provided only upon **[****63]** an alleged SVP's request. (*Id.*, §

6603, *subd. (f)*.) The question is what standard of equal protection review applies to this disparate treatment.

Because the object of disparate treatment in this case is a set of procedures (i.e., personal advisement and waiver of the jury trial right), much of today's opinion looks to *due process* principles to resolve the *equal protection* issue before us. (Maj. opn., *ante*, at pp. 513–516, 518–521.) The result of this analytical confusion is a lack of focus on the relevant inquiry for determining the proper standard of equal protection review. This case has to do with the "fundamental interest" strand of equal protection analysis, and I begin by describing how this strand differs from due process doctrine and other aspects of equal protection doctrine.

[*539]

A.

A useful starting point is to clarify what is meant by a claim that the state has violated an individual's "fundamental rights." As relevant here, a "fundamental right" typically belongs to one of two categories. The first are rights that appear expressly in the text of the federal or state Constitution. For example, "the privilege against compelled self-incrimination has been viewed as 'fundamental.' [Citations.] ... The **[****64]** right to compulsory process is a 'fundamental' right. [Citations.] Another 'fundamental' right is the right of confrontation." (*People v. Barnum* (2003) 29 Cal.4th 1210, 1222–1223 [131 Cal.Rptr.2d 499, 64 P.3d 788].) These rights are expressly enumerated in the federal or state Constitution, or both. (See *U.S. Const.*, 5th & 6th *Amends.*; *Cal. Const.*, art. I, § 15.)

A second category consists of fundamental rights implied by the *Fourteenth Amendment's* provision that no state shall "deprive any person of life, liberty, or property, without due process of law." The high court has "long recognized that the ... *Due Process Clause* ... 'guarantees more than fair

process.’ [Citation.] The Clause also includes a substantive component that ‘provides heightened protection against government interference with certain fundamental rights and liberty interests.’” (*Troxel v. Granville* (2000) 530 U.S. 57, 65 [147 L.Ed.2d 49, 120 S.Ct. 2054].) For example, “the ‘liberty’ protected by the Due Process Clause includes the right of parents to ‘establish a home and bring up children’ and ‘to control the education of their own.’” (*Ibid.*) The right to marry is also recognized as fundamental because of its connection to the liberty protected [**1018] by the due process clause. (*Obergefell v. Hodges* (2015) 576 U.S. 644, 664 [192 L.Ed.2d 609, 135 S.Ct. 2584] (*Obergefell*); [***620] *Loving v. Virginia* (1967) 388 U.S. 1, 12 [18 L.Ed.2d 1010, 87 S.Ct. 1817].)

Separate and apart from claims asserting fundamental rights, equal protection claims target state-enacted discrimination or disparate treatment. Although virtually all legislation involves classifications of some [****65] sort and legislators have wide latitude in policymaking, “both federal and California decisions make clear that heightened scrutiny applies to State-maintained discrimination whenever the disfavored class is suspect *or* the disparate treatment has a real and appreciable impact on a fundamental right or interest.” (*Butt v. State of California* (1992) 4 Cal.4th 668, 685–686 [15 Cal.Rptr.2d 480, 842 P.2d 1240] (*Butt*).)

The most familiar equal protection claims subject to heightened scrutiny are those challenging discrimination against a suspect class. The “traditional indicia of suspectness” include whether the group has been “saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to [*540] command extraordinary protection from the majoritarian political process.” (*San Antonio School District v. Rodriguez* (1973) 411 U.S. 1, 28 [36 L.Ed.2d 16, 93 S.Ct. 1278] (*Rodriguez*); see *U.S. v. Carolene Products Co.* (1938) 304 U.S. 144, 152, fn. 4 [82

L.Ed. 1234, 58 S.Ct. 778].) The paradigmatic example is discrimination against African Americans; such discrimination offends equal protection regardless of the importance of the good or service withheld. (See, e.g., *Holmes v. City of Atlanta* (1955) 350 U.S. 879 [100 L.Ed. 776, 76 S.Ct. 141] [invalidating exclusion of African Americans from public golf courses]; *Mayor and City Council of Baltimore City v. Dawson* (1955) 350 U.S. 877 [100 L.Ed. 774, 76 S.Ct. 133] [invalidating racial segregation of public recreational facilities].) As a matter of state equal protection doctrine, we have held that discrimination on the basis [****66] of sexual orientation is subject to strict scrutiny because gay people “historically ha[ve] been subjected to invidious and prejudicial treatment” and “the characteristic in question generally bears no relationship to the individual’s ability to perform or contribute to society.” (*In re Marriage Cases* (2008) 43 Cal.4th 757, 843 [76 Cal.Rptr.3d 683, 183 P.3d 384].)

Another set of equal protection claims subject to heightened scrutiny are those challenging laws whose “disparate treatment has a real and appreciable impact on a fundamental ... interest.” (*Butt, supra*, 4 Cal.4th at p. 686.) Because this legal terminology can be confusing, it is important to note the distinction between fundamental interests and fundamental rights: Fundamental rights are secured to every person, and the assertion of a violation does not depend on any comparative claim. Fundamental rights are freestanding in that the state may not deny such rights to anyone, whether or not it denies such rights to others. Fundamental interests are not freestanding in this sense; they are not independent rights or entitlements that the state has a duty to protect or provide for each person. Instead, the state’s duty is conditional; if legislation protects or provides a fundamental interest for some people but not others, a heightened [****67] justification for the disparate treatment is required. And this is so whether or not the person asserting a fundamental interest belongs to a suspect class.

Today's opinion includes a slew of verbiage that muddles these doctrines (see maj. opn., *ante*, at p. 533 [declining to distinguish between fundamental rights and *****621** fundamental interests in this context]; *id.* at pp. 533–535 [contesting my description of the doctrines above]), though fortunately for our case law those assertions are dicta. (*Id.* at p. 533 [“In this context, ... whatever distinction there may be makes no difference to the outcome”]; see [Sonic-Calabasas A, Inc. v. Moreno \(2013\) 57 Cal.4th 1109, 1158 \[163 Cal.Rptr.3d 269, 311 P.3d 184\]](#) [“Dicta consists of observations and statements unnecessary to the appellate court’s resolution of the case.”].) The fact is that the distinction I have drawn between “fundamental rights” and “fundamental interests” is a recitation of ****1019** hornbook constitutional law. (See ***541** Brest et al., *Processes of Constitutional Decisionmaking: Cases and Materials* (6th ed. 2015) *The Constitution in the Modern Welfare State*, ch. 10, p. 1802 [“[A]lthough the state does not have to extend the right to vote generally, once it does so it may not invidiously discriminate in how it provides the right. We might call such a guarantee a ‘fundamental interest’ as opposed ******68** to a ‘fundamental right’ like speech or the right to travel that the state must guarantee to all of its citizens.”]; Stone et al., *Constitutional Law* (8th ed. 2018) *Fundamental Interests and the Equal Protection Clause*, ch. 6, § E, pp. 824–825 [summarizing the “fundamental interests” strand of equal protection cases: “Sometimes the Constitution recognizes that the state need not provide certain things, but it constrains the distribution of those things once the state has provided them.”]; Feldman & Sullivan, *Constitutional Law* (21st ed. 2022) *The “Fundamental Interests” Branch of Equal Protection*, § 5, p. 836 [“Such [fundamental] interests that are capable of escalating review are not rooted in any independent source of protection elsewhere in the Constitution; if they were, there would be no need for litigants to resort to equal protection in order to protect them indirectly.”].)

An example of the fundamental interest strand of

equal protection analysis is the high court’s treatment of voting in state elections. “While the right to vote in federal elections is conferred by Art. I, § 2, of the [federal] Constitution [citation], the right to vote in state elections is nowhere expressly mentioned.” ([Harper v. Virginia Bd. of Elections \(1966\) 383 U.S. 663, 665 \[16 L.Ed.2d 169, 86 S.Ct. 1079\]](#).) Yet “once the franchise is granted to the electorate, lines ******69** may not be drawn which are inconsistent with the *Equal Protection Clause of the Fourteenth Amendment*.” (*Ibid.*) Because voting “is preservative of other basic civil and political rights” (*id.* at p. 667), it “is too precious, too fundamental to be ... burdened or conditioned” by a poll tax (*id.* at p. 670) regardless of whether there is a freestanding right to vote in state elections.

Another example is education. While the United States Supreme Court has declined to recognize a fundamental right to education ([Rodriguez, supra, 411 U.S. at p. 35](#)), this court has nonetheless applied heightened scrutiny to equal protection challenges to public school financing schemes or other school policies on the ground that education is a “‘fundamental interest.’” ([Serrano v. Priest \(1971\) 5 Cal.3d 584, 609 \[96 Cal.Rptr. 601, 487 P.2d 1241\]](#) (*Serrano I*); see [Serrano v. Priest \(1976\) 18 Cal.3d 728, 767–768 \[135 Cal.Rptr. 345, 557 P.2d 929\]](#) (*Serrano II*) [affirming post-*Rodriguez* that education is a fundamental interest under state equal protection doctrine]; [Butt, supra, 4 Cal.4th at p. 686](#) [same].) Our heightened equal protection scrutiny in those cases did not depend on whether the claimant was a member of a suspect class or whether the federal or state Constitution expressly or implicitly *****622** established a freestanding right to education.

[*542]

Some cases have held that a particular law infringes on a fundamental right and violates both due process and equal protection. (See, e.g., [Obergefell, supra, 576 U.S. at p. 675](#) [state laws excluding same-sex couples from ******70** marriage violate both due process and equal protection]; [In re](#)

[Humphrey \(2021\) 11 Cal.5th 135, 150 \[276 Cal.Rptr.3d 232, 482 P.3d 1008\]](#) [“Principles of equal protection and substantive due process ... converge in the money bail context. The accused retains a fundamental constitutional right to liberty.”]; [In re Gary W. \(1971\) 5 Cal.3d 296, 307 \[96 Cal.Rptr. 1, 486 P.2d 1201\] \(Gary W.\)](#) [lack of jury trial right in juvenile civil commitment proceedings violates both due process and equal protection].) Once it is established that a law infringes on a fundamental right, it is understandable that the law may be invalid both as a matter of due process (i.e., the law violates a freestanding right) and as a matter of equal protection (i.e., the law lacks a compelling rationale for denying the right to some people while leaving others protected).

Importantly, however, these cases do not suggest that in determining whether a particular deprivation impinges on a fundamental interest and warrants heightened equal protection scrutiny, courts must first conclude as a matter of due process that the deprivation **[**1020]** infringes an independent fundamental right. To the contrary, we have explained—notably, in a case about a law that treated SVPs less favorably than other civil committees—that “[d]ue process and equal protection protect different constitutional **[****71]** interests: due process affords individuals a baseline of substantive and procedural rights, whereas equal protection safeguards against the arbitrary denial of benefits to a certain defined class of individuals, even when the [due process clause](#) does not require that such benefits be offered.” ([People v. McKee \(2010\) 47 Cal.4th 1172, 1207 \[104 Cal.Rptr.3d 427, 223 P.3d 566\] \(McKee\)](#), italics added.) We have maintained a distinction between fundamental rights, which give rise to freestanding claims for constitutional protection, and fundamental interests, which warrant heightened protection to the extent they are selectively withheld.

B.

The surest sign of confusion in today’s opinion is its suggestion—citing [Washington v. Glucksberg \(1997\) 521 U.S. 702, 720–721 \[138 L.Ed.2d 772, 117 S.Ct. 2258, 117 S.Ct. 2302\]](#), [Dawn D. v. Superior Court \(1998\) 17 Cal.4th 932, 940 \[72 Cal.Rptr.2d 871, 952 P.2d 1139\]](#), and [In re Marriage Cases, supra, 43 Cal.4th 757, 824](#)—that “substantive due process” methodology may inform the equal protection inquiry before us. (Maj. opn., ante, at p. 522.) [Glucksberg](#) and [Dawn D.](#) are key precedents on “analyzing substantive due process claims”; they discuss how courts are to determine whether an asserted interest is a fundamental right under the [due process clause](#). ([Dawn D., at p. 941](#); see [Glucksberg, at pp. 720–721](#).) But those cases say nothing about **[*543]** how to assess whether an interest ranks as fundamental for equal protection purposes. Indeed, neither [Glucksberg](#) nor [Dawn D.](#) addressed any equal protection claim at all. Likewise, the cited passage of [In re Marriage Cases](#) discusses whether **[****72]** the right to marry is a fundamental liberty under the [due process clause](#), not whether it is a fundamental interest for equal protection purposes. While due process and equal protection may offer “complementary” protections (maj. opn., ante, at p. 535), **[***623]** dicta in today’s opinion appear to conflate the two, despite the hornbook rule that a fundamental interest need not itself be rooted in a due process liberty interest. (Compare *id.* at p. 535 [“If such a fundamental interest exists, it would flow from the fundamental liberty interest protected by procedural due process.”] with Feldman & Sullivan, Constitutional Law, *supra*, § 5, p. 836 [fundamental interests “are not rooted in any independent source of protection elsewhere in the Constitution; if they were, there would be no need for litigants to resort to equal protection in order to protect them indirectly”].)

Instead of substantive due process cases, [Serrano I](#) and [Serrano II](#) are the pertinent authorities here. In [Serrano I](#), we applied strict scrutiny to wealth-based disparities in public school financing because “the distinctive and priceless function of education in our society warrants, indeed compels, our

treating it as a ‘fundamental interest.’” (*Serrano I, supra*, 5 Cal.3d at pp. 608–609.) In reaching [****73] this conclusion, we did not hinge our analysis on whether education is an express or implied fundamental right. Rather, we observed that education is “crucial to participation in, and the functioning of, a democracy”; that education, like voting, is “‘preservative of other basic civil and political rights’”; that “the public schools of this state are the bright hope for entry of the poor and oppressed into the mainstream of American society”; that education has a universal and lasting impact on the development of American youth; and that the state makes public school attendance compulsory. (*Id. at pp. 607–609, 610.*)

In *Serrano II*, we affirmed our prior decision applying strict scrutiny and striking down wealth-based disparities in public school financing on equal protection grounds despite the high court’s intervening decision in *Rodriguez* finding no express or implied fundamental right to education under the federal Constitution. (*Serrano II, supra*, 18 Cal.3d at p. 762; see *Rodriguez, supra*, 411 U.S. at p. 35.) *Rodriguez* held that rational [**1021] basis review applies to equal protection claims challenging wealth-based disparities in public school financing. (*Rodriguez, at p. 40.*) But we declined to adopt the high court’s rubric for assessing whether an interest is fundamental for purposes of equal protection. [****74] (*Serrano II, at pp. 767–768.*) We said we are not constrained “to gauge the importance of rights and interests affected by legislative classifications wholly through determining the extent to which they are ‘explicitly or implicitly guaranteed’ [citation] by the terms of our ... state Constitution. In applying our state constitutional provisions guaranteeing equal protection of [**544] the laws we shall continue to apply strict and searching judicial scrutiny to legislative classifications which, because of their impact on those individual rights and liberties which lie at the core of our free and representative form of government, are properly considered ‘fundamental.’” (*Id. at pp. 767–768*, fns. omitted.)

In re Marriage Cases is also instructive. In evaluating the constitutionality of a statutory scheme that designated legal unions between heterosexual couples as “marriages” and legal unions between same-sex couples as “domestic partnerships,” we conducted two separate analyses. The first was a fundamental rights analysis, which asked whether same-sex couples have a fundamental right to marriage. (*In re Marriage Cases, supra*, 43 Cal.4th at pp. 809–831.) [***624] We concluded that the California Constitution “guarantees same-sex couples the same substantive constitutional rights as opposite-sex [****75] couples to choose one’s life partner and enter with that person into a committed, officially recognized, and protected family relationship that enjoys all of the constitutionally based incidents of marriage.” (*Id. at p. 829.*)

But this conclusion did not answer whether the state could designate some unions as marriages and others as domestic partnerships, where the latter gave same-sex couples the same substantive rights as the former, just under a different name. (*In re Marriage Cases, supra*, 43 Cal.4th at p. 830.) In determining whether this difference violated equal protection, we saw no need to resolve whether the constitutional right to a legal union encompassed the right to have the union designated a “marriage.” (*Ibid.*) We did not decide, for example, whether it would be constitutional for the state to change the official name of legal unions “for all couples.” (*Ibid.*) Instead, we said “one of the core elements embodied in the state constitutional right to marry is the right of an individual and a couple to have their own official family relationship accorded respect and dignity equal to that accorded the family relationship of other couples.” (*Id. at p. 844.*) The assignment of a different name to same-sex unions “poses a risk” of denying gay couples [****76] this right of equal dignity. (*Ibid.*; see *id. at p. 831* [“serious risk”]; *id. at p. 846* [“very significant risk”].) This risk led us to conclude that the naming classification merited strict scrutiny under equal protection principles.

These venerable precedents do not state a rigid formula for assessing whether an interest ranks as fundamental for equal protection purposes. But they do indicate that the analysis differs from the [Glucksberg/Dawn D.](#) methodology for discerning substantive due process rights. In addition to considering the importance of an asserted interest to society and affected individuals, we have examined the “impact” of the asserted interest “on those individual rights and liberties which lie at the core of our free and representative form of government” ([Serrano II, supra, 18 Cal.3d at pp. 767–768](#)) and [*545] the “risk” that deprivation of the asserted interest would pose to the enjoyment of a fundamental right ([In re Marriage Cases, supra, 43 Cal.4th at p. 844](#)). Quite apart from whether the asserted interest is itself a fundamental right (it need not be), what matters is what we might call *proximity* to a fundamental right—that is, whether deprivation of the asserted interest appreciably burdens, negatively impacts, or risks eroding the effective exercise of a fundamental right. That is the relevant [****77] inquiry here.

[**1022] II.

Against this doctrinal backdrop, it is evident that much of today’s opinion goes on an unnecessary tangent in laboring to prove that Cannon has no separate fundamental right to the personal advisement and waiver process he seeks. (Maj. opn., *ante*, at pp. 521–524.) This *due process* inquiry does not answer the *equal protection* question before us, and as the Attorney General notes in his briefing, “Cannon has never contended that the state or federal [Due Process Clause](#) provides independent constitutional support for the procedures that he seeks.”

[***625] Nor does today’s opinion frame the correct inquiry when it says “the legislatively selected procedures in the [Sexually Violent Predator Act], which make a jury trial available on demand, do not impose a significant burden on the fundamental liberty interest itself.” (Maj. opn.,

ante, at p. 525.) The court says that “[Gary W.](#) concluded that in the case of involuntary commitment, it is the *liberty interest* that is fundamental” (*Id.* at p. 520.) But that is because the issue in [Gary W.](#) was whether potential California Youth Authority committees had a right to a jury trial *at all*; in that context, we held that in order to protect the fundamental liberty interest [****78] of civil commitment candidates, “a jury trial must be made available ... as a matter of procedural due process when the statutory scheme fails to provide one.” (Maj. opn., *ante*, at p. 515, citing [Gary W., supra, 5 Cal.3d at pp. 306–307](#).) Now that it is well established that potential committees have a fundamental right to a jury trial, it is not clear why the court thinks we should examine whether the lack of personal advisement and waiver in the *Sexually Violent Predator Act’s* (SVPA; *Welf. & Inst. Code*, § 6600 *et seq.*) on-demand procedure burdens “the fundamental liberty interest itself” (maj. opn., *ante*, at p. 525) as opposed to whether it burdens the fundamental jury trial right “[*m*]andate[*d*]” by that liberty interest (*id.* at p. 518).

In [In re Marriage Cases](#), we did not ask whether the different names assigned to legal unions of same-sex versus opposite-sex couples burdened the fundamental liberty interest that undergirds the right to marry. Instead, we asked whether the difference in naming posed a risk to effective enjoyment of *the right to marry itself*, a core element of which is the right to have one’s [*546] official family relationship be accorded the same respect and dignity as the family relationships of other couples. ([In re Marriage Cases, supra, 43 Cal.4th at p. 844](#).) By the same logic, the pertinent inquiry here is not whether lack of personal advisement [****79] and waiver burdens an alleged SVP’s fundamental liberty interest, but *whether lack of those procedures burdens the effective exercise of the fundamental right to a jury trial*.

This specificity is important because the inquiry, when properly focused this way, finds a ready

answer in our precedents. In the criminal context, we have recognized that “a judgment ... resulting from a court trial must be reversed if the defendant did not expressly waive the right to a trial by jury.” (*People v. Ernst* (1994) 8 Cal.4th 441, 443 [34 Cal.Rptr.2d 238, 881 P.2d 298].) That is because we consider the lack of express waiver to be equivalent to denial of the right itself: “without an express waiver by defendant of his right to have the case tried to a jury,” a bench trial “denie[s] defendant his right to a jury trial.” (*Id.* at p. 448.) In *People v. Collins* (2001) 26 Cal.4th 297 [109 Cal.Rptr.2d 836, 27 P.3d 726], the trial court assured the defendant that he would receive a benefit by waiving his right to a jury trial. We said the trial court’s action “rendered that waiver involuntary” and explained that “[l]ike a trial court’s denial of the right to jury trial by an outright refusal to provide such a trial, ... improperly inducing a waiver of that right amounts to a ‘structural defect in the proceedings’” requiring reversal. (*Id.* at p. 312.)

We applied *Ernst*’s and *Collins*’s understandings [****80] of the impact of waiver protections on the jury trial right to civil commitment proceedings in *People v. Blackburn* (2015) 61 Cal.4th 1113 [**1023] [191 Cal.Rptr.3d 458, 354 P.3d 268] (*Blackburn*) [***626] and *People v. Tran* (2015) 61 Cal.4th 1160 [191 Cal.Rptr.3d 251, 354 P.3d 148] (*Tran*). In *Blackburn*, we considered whether a trial court must advise a civil committee of the right to a jury trial and whether the trial court must obtain a personal waiver of that right in proceedings for extending the involuntary commitment of mentally disordered offenders (MDOs) (now referred to as offenders with mental health disorders (OMHDs)). (Maj. opn., ante, at p. 509 & fn. 2.) Citing *Ernst* and *Collins*, we held that in civil commitment proceedings, “we treat a trial court’s failure to obtain a required personal jury trial waiver as tantamount to the denial of a jury trial, and as such, it constitutes a ‘miscarriage of justice’ under *California Constitution, article VI, section 13*.” (*Blackburn*, at p. 1134.) We reiterated this holding

in *Tran*, explaining that an “acceptance of an invalid jury trial waiver ... result[s] in a complete denial of the defendant’s right to a jury trial” in civil commitment hearings for persons originally committed after pleading guilty by reason of insanity (NGIs). (*Tran*, at p. 1169.) *Blackburn* and *Tran* established that denial of an express waiver requirement in OMHD and NGI commitment proceedings is tantamount to denial of a jury trial right [****81] and constitutes structural error requiring automatic reversal.

[*547]

Contrary to what the court suggests (maj. opn., ante, at pp. 529–532), the holdings in *Blackburn* and *Tran* were not a function of the limitations of the records in those cases. We applied *Blackburn*’s holding—i.e., that the absence of personal advisement and waiver is structural error—to the procedures in *Tran*’s fourth NGI extension hearing despite evidence that *Tran* might have known he had a jury trial right given his experiences at three prior hearings. (*Tran*, supra, 61 Cal.4th at pp. 1173–1174 (conc. & dis. opn. of Cantil-Sakauye, C. J.)) More generally, *Blackburn*’s caveat that there may be circumstances “where the record shows the defendant lacked the capacity to make a proper waiver, or in fact made such a waiver even without the ... advisement” (maj. opn., ante, at p. 530) was simply an acknowledgment of the “limited” scenarios in which lack of personal advisement and waiver might not be prejudicial. (*Blackburn*, supra, 61 Cal.4th at p. 1136.) The overall thesis that the lack of such procedures is prejudicial—i.e., that it is tantamount to denial of the jury trial right—is undeniably the core rationale for the holdings in *Blackburn* and *Tran*. That the jury trial right was provided by statute [****82] in those cases (maj. opn., ante, at p. 537) does not alter the force of this reasoning here. The basic rationale of *Blackburn* and *Tran* directly supports the conclusion that SVP candidates have a fundamental interest in such procedures and that legislative classifications providing the procedures to OMHD and NGI candidates while denying them to SVP candidates warrant heightened equal protection scrutiny.

Today’s opinion extensively discusses [People v. Barrett \(2012\) 54 Cal.4th 1081 \[144 Cal.Rptr.3d 661, 281 P.3d 753\] \(Barrett\)](#) and says *Barrett* determined that personal advisement and waiver requirements in civil commitment proceedings are not “fundamental rights” and their absence does not “unduly burden[] fundamental interests.” (Maj. opn., ante, at p. 528.) But [Barrett](#) conducted no fundamental interest analysis at all. Instead, the court held that the [***627] equal protection claim at issue failed at the “threshold” step of establishing that “dangerous mentally retarded persons and dangerous mentally disordered persons are similarly situated ... as to the ancillary purpose that an express jury trial advisement, and an express personal waiver, purportedly serve.” ([Barrett](#), at pp. 1107–1108.) The court reasoned that in light of their differing “mental conditions,” “the two groups are not similarly [****83] situated as to ... comprehending and controlling the decision whether to request a jury trial. Thus, any disparate statutory treatment with respect to jury trial advisements does not deprive persons like *Barrett* of equal protection of the law.” (*Id.* at p. 1109; see [Blackburn, supra](#), 61 Cal.4th at [**1024] pp. 1128–1129 [discussing [Barrett](#)’s reasoning].) [Barrett](#) went no further.

The court defends its reading of *Barrett* by observing that “[t]o ask whether two groups are similarly situated in this context” ... is essentially “the same as asking whether the distinction between them can be justified under the appropriate test of equal protection.”” (Maj. opn., ante, at p. 528, [*548] citing [People v. Hardin \(2024\) 15 Cal.5th 834, 849 \[318 Cal.Rptr.3d 513, 543 P.3d 960\] \(Hardin\)](#).) But this is true whether the “appropriate test of equal protection” is rational basis review or heightened scrutiny. The court in [Barrett](#) may have believed that the differences between persons with intellectual disabilities and persons with mental illness in terms of their “mental conditions” ([Barrett, supra](#), 54 Cal.4th at p. 1109) are sufficient to justify disparate treatment with regard to personal advisement and waiver (1) only under rational basis review or (2) even under

heightened scrutiny. We simply do not know.

In that respect, [Barrett](#)’s reliance on the threshold “similarly situated” analysis illustrates [****84] the concerns that recently led us to jettison that approach: “[O]ne can only reach the conclusion that two groups are similarly situated with respect to the purposes of a particular law after considering the law’s aims and how the differential treatment relates to those aims. But the first, ‘similarly situated’ step of the analysis provides substantially less guidance about how this inquiry is to proceed: ‘How similarly situated, precisely, relative to which aims? These are questions courts already explore at the justification step, using the tiers of scrutiny to guide their answers.’ [Citation.] In the context of challenges like this one, the similarly situated test serves no real purpose. At best it duplicates the justification inquiry prescribed at the second step of the analysis; at worst it creates an unnecessary threshold obstacle to the adjudication of potentially meritorious constitutional challenges; and in all events it injects unnecessary uncertainty into the analysis, particularly in the situations in which the challenged law reflects multiple, sometimes competing aims.” ([Hardin, supra](#), 15 Cal.5th at p. 849.) If anything, these concerns underscore the infeasibility of drawing any inference from [Barrett](#) as [****85] to the applicable standard of equal protection review. In short, [Barrett](#) said nothing about whether potential committees have a fundamental interest in personal advisement and waiver.

Apart from its misplaced reliance on [Barrett](#), today’s opinion provides virtually no analysis of whether the absence of personal advisement and waiver in this context has an appreciable impact on the fundamental right to a jury trial. The court says that although personal advisement and waiver are part of some civil commitment statutes, they “have not been uniformly adopted across all of them” (maj. opn., ante, at p. 524) [***628] and that “the Legislature chose to protect an alleged SVP’s right to make an informed choice of fact finder *through* the statutory right to and advice of counsel” (*id.* at

p. 531). But the fact that the Legislature has made these choices does not supply a constitutional justification for them, nor does it illuminate the standard of review. It simply restates the equal protection question before us.

To be sure, “the SVPA honors th[e] traditional allocation of responsibility between attorney and client” (maj. opn., *ante*, at p. 523), and the Legislature [*549] evidently believed the presence of counsel would be [****86] sufficient to ensure a potential committee’s effective exercise of the jury trial right. But the fact that “the Legislature chose a *different* set of procedures in the SVPA” than in the OMHD and NGI statutes (maj. opn., *ante*, at p. 532) frames the question—it does not provide any analysis—of whether the lack of personal advisement and waiver burdens the fundamental right to a jury trial. As to that question, we held in [Blackburn](#) that lack of personal advisement and waiver, even when the defendant has counsel, is tantamount to denial of the jury trial right, apart from certain “limited” circumstances. ([Blackburn](#), *supra*, 61 Cal.4th at p. 1136; [**1025] see *id.* at p. 1130.) It is difficult to see how [Blackburn](#)’s reasoning does not compel the conclusion that SVP candidates, no less than OMHD and NGI candidates, have a fundamental interest in such procedures and that the disparate treatment merits heightened review.

III.

Up to this point, I have said “heightened scrutiny” or “heightened review,” not strict scrutiny, applies to Cannon’s equal protection claim. Because intermediate scrutiny is not an available standard of review in our doctrine, we are left with “the ‘rigidity of [a] two-tier[ed] framework’ that ‘applies either a standard that is virtually [****87] always met [rational basis] or one that is almost never satisfied [strict scrutiny].’” ([Hardin](#), *supra*, 15 Cal.5th at p. 868 (dis. opn. of Liu, J.)) As explained above, I do not think it is correct to apply “the sort of lax analysis that has become typical

“‘[i]n areas of social and economic policy’” (*id.* at p. 867) to important protections in a civil commitment proceeding. But I am not convinced that the legislative classification here warrants the most exacting scrutiny either. The procedures required in civil commitment proceedings “are flexible [citation], and the quantum and quality of the process due depend upon the nature and purpose of the challenged commitment.” ([Barrett](#), *supra*, 54 Cal.4th at p. 1099.) Because it is the Legislature’s prerogative to craft procedures that are sensitive to “the special character of the commitment proceeding at issue” (*id.* at p. 1100), I do not think it is correct to apply a standard of review that would presumptively invalidate all such distinctions.

I would instead apply the instruction in [McKee](#) that on remand “[t]he trial court must determine whether the legislative distinctions in classes of persons subject to civil commitment are reasonable and factually based—not whether they are incontrovertible or uncontroversial.” ([McKee](#), *supra*, 47 Cal.4th at pp. 1210–1211.) To uphold the [****88] disparate treatment at issue, the trial court must be satisfied that [***629] it is “based on a reasonable perception” of “unique” features of SVP candidates or SVP proceedings compared to OMHD and NGI candidates or proceedings, “rather than a special stigma that SVP’s may bear in the eyes of California’s electorate” or the Legislature. ([McKee](#), at p. 1210.) [*550] This is neither a reflexively deferential standard nor is it an impossible standard to meet. In my view, this approach is properly responsive to the core of the equal protection concern while respecting the Legislature’s prerogative to make reasonable policy choices.

In the future, the civil commitment context may prove to be an appropriate area for our courts to transcend the rigid rational basis/strict scrutiny binary and adopt an approach with “nuance and sensitivity” to account for the competing interests at stake in each case. ([Hardin](#), *supra*, 15 Cal.5th at p. 868 (dis. opn. of Liu, J.); see [People v. Nolasco](#)

[\(2021\) 67 Cal.App.5th 209, 224–225 \[281 Cal.Rptr.3d 880\]](#) [[“McKee](#) seems to have applied what purported to be a form of ‘heightened scrutiny’ that appears to be less rigorous than strict scrutiny but more onerous than rational basis scrutiny.”].)

EVANS, J., Dissenting.—I dissent for the reasons stated in parts I. and II. of Justice Liu’s dissenting opinion.

[****89]

Pers. Adm'r of Mass. v. Feeney

Supreme Court of the United States

February 26, 1979, Argued ; June 5, 1979, Decided

No. 78-233

Reporter

442 U.S. 256 *; 99 S. Ct. 2282 **; 60 L. Ed. 2d 870 ***; 1979 U.S. LEXIS 128 ****; 19 Fair Empl. Prac. Cas. (BNA) 1377; 19 Empl. Prac. Dec. (CCH) P9240

PERSONNEL ADMINISTRATOR OF
MASSACHUSETTS ET AL. v. FEENEY

Subsequent History: On remand at [Feeney v. Massachusetts](#), 475 F. Supp. 109, 1979 U.S. Dist. LEXIS 10327 (D. Mass., 1979)

Prior History: [****1] APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

[Feeney v. Massachusetts](#), 451 F. Supp. 143, 1978 U.S. Dist. LEXIS 17967 (D. Mass., 1978)

Disposition: [451 F.Supp. 143](#), reversed and remanded.

Core Terms

veteran, classification, male, civil service, nonveterans, female, military, gender-based, formula, gender, score, appointment, jobs, public employment, hire, adverse effect, candidate, overtly, rank, sex, discriminatory purpose, foreseeable, covertly, reaffirm, disproportionate impact, civil service position, eligible list, disproportionately, discriminatory, enlistment

Case Summary

Procedural Posture

Appellant, the Personnel Director for the State of

Massachusetts, challenged an order of a United States district court, which held that the veterans' hiring preference statute, [Mass. Gen. Laws Ann. ch. 31, § 23](#), violated the [Equal Protection Clause](#) of [U.S. Const. amend. XIV](#) by discriminating against women. Appellee, a female who was not a veteran, had lost civil service positions to male veterans despite her high test scores.

Overview

Appellee was a female civil service worker who had lost several positions to male veterans despite her high test scores. She filed a claim against appellant, the State of Massachusetts, and twice argued successfully before the district court that [Mass. Gen. Laws Ann. ch. 31, § 23](#), the veterans' hiring preference statute, violated the [Equal Protection Clause](#) of [U.S. Const. amend. XIV](#) by discriminating on the basis of sex. On appeal, the Court reversed. After a close examination of the statute, the Court found that although the result of the statute had a disproportionate impact on women, it had not been enacted in order to discriminate against women. The statute contained gender neutral language. Because the statute was gender-neutral on its face, the Court considered first whether the statutory classification was neutral and then whether the adverse effect reflected invidious gender-based discrimination. The statutory classification was neutral because it was intended to discriminate against non-veterans, not against women. Female veterans were entitled to its benefits. Moreover, the legislative purpose had not been to invidiously discriminate against women.

Outcome

The Court reversed the district court's order and held that appellee, a female civil service worker who was not a veteran, had not suffered a civil rights violation under the veterans' hiring preference statute of appellant, the State of Massachusetts. Although the statute had a disparate impact on women, it did not have a discriminatory intent.

LexisNexis® Headnotes

Constitutional Law > Equal Protection > Nature & Scope of Protection

Labor & Employment
Law > Discrimination > Disparate
Impact > General Overview

HN1 Equal Protection, Nature & Scope of Protection

A neutral law does not violate the [Equal Protection Clause](#) solely because it results in a disproportionate impact; instead the disproportionate impact must be traced to a purpose to discriminate.

Military & Veterans
Law > Veterans > Readjustment & Related
Benefits > Employment & Reemployment

HN2 Readjustment & Related Benefits, Employment & Reemployment

See [Mass. Gen. Laws Ann. ch. 4, § 7](#) (1976).

Military & Veterans
Law > Veterans > Readjustment & Related
Benefits > Employment & Reemployment

Military & Veterans Law > Veterans > General
Overview

HN3 Readjustment & Related Benefits, Employment & Reemployment

For jobs in the official service, the veterans' preference mechanics of [Mass. Gen. Laws Ann., ch. 31, § 23](#) are uncomplicated. All applicants for employment must take competitive examinations. Grades are based on a formula that gives weight both to objective test results and to training and experience. Candidates who pass are then ranked in the order of their respective scores on an "eligible list." The statute requires, however, that disabled veterans, veterans, and surviving spouses and surviving parents of veterans be ranked, in the order of their respective scores, above all other candidates.

Military & Veterans
Law > Veterans > Readjustment & Related
Benefits > Employment & Reemployment

HN4 Readjustment & Related Benefits, Employment & Reemployment

See [Mass. Gen. Laws Ann. ch. 31, § 23](#).

Constitutional Law > Equal Protection > Nature & Scope of Protection

Constitutional Law > Equal
Protection > Judicial Review > Standards of
Review

HN5 Equal Protection, Nature & Scope of Protection

The equal protection guarantee of [U.S. Const. amend. XIV](#) does not take from the states all power of classification. Most laws classify, and many affect certain groups unevenly, even though the law itself treats them no differently from all other members of the class described by the law. When

the basic classification is rationally based, uneven effects upon particular groups within a class are ordinarily of no constitutional concern.

Constitutional Law > Equal Protection > Nature & Scope of Protection

HN6 Equal Protection, Nature & Scope of Protection

The calculus of effects, the manner in which a particular law reverberates in a society, is a legislative and not a judicial responsibility. In assessing an equal protection challenge, a court is called upon only to measure the basic validity of the legislative classification. When some other independent right is not at stake and when there is no reason to infer antipathy, it is presumed that even improvident decisions will eventually be rectified by the democratic process.

Constitutional Law > Equal Protection > Nature & Scope of Protection

HN7 Equal Protection, Nature & Scope of Protection

Certain classifications in themselves supply a reason to infer antipathy.

Constitutional Law > Equal Protection > National Origin & Race

Labor & Employment
Law > Discrimination > Disparate Impact > General Overview

HN8 Equal Protection, National Origin & Race

A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification. This rule applies as well to a classification that is

ostensibly neutral but is an obvious pretext for racial discrimination.

Constitutional Law > Equal Protection > National Origin & Race

Labor & Employment
Law > Discrimination > Disparate Impact > General Overview

Constitutional Law > Equal Protection > Nature & Scope of Protection

HN9 Equal Protection, National Origin & Race

Even if a neutral law has a disproportionately adverse effect upon a racial minority, it is unconstitutional under the [Equal Protection Clause](#) only if that impact can be traced to a discriminatory purpose.

Constitutional Law > Equal Protection > Gender & Sex

HN10 Equal Protection, Gender & Sex

Classifications based upon gender, not unlike those based upon race, have traditionally been the touchstone for pervasive and often subtle discrimination. Such classifications must bear a close and substantial relationship to important governmental objectives and are in many settings unconstitutional.

Constitutional Law > Equal Protection > Gender & Sex

Labor & Employment Law > ... > Gender & Sex Discrimination > Scope & Definitions > General Overview

Constitutional Law > Equal Protection > Nature & Scope of Protection

HN11 Equal Protection, Gender & Sex

Any state law overtly or covertly designed to prefer males over females in public employment requires an exceedingly persuasive justification to withstand a constitutional challenge under the [Equal Protection Clause](#) of [U.S. Const. amend. XIV](#).

Labor & Employment Law > ... > Disparate Impact > Defenses > Business Necessity & Job Relatedness

Constitutional Law > Equal Protection > Nature & Scope of Protection

Labor & Employment
Law > Discrimination > Disparate Impact > General Overview

Labor & Employment Law > ... > Employment Practices > Selection Procedures > General Overview

Labor & Employment Law > ... > Employment Practices > Selection Procedures > Neutral Factors

Labor & Employment Law > ... > Racial Discrimination > Employment Practices > Testing

HN12 Defenses, Business Necessity & Job Relatedness

When a neutral law has a disparate impact upon a group that has historically been the victim of discrimination, an unconstitutional purpose may still be at work. But [U.S. Const. amend. XIV](#) guarantees equal laws, not equal results.

Civil Rights Law > ... > Contractual Relations & Housing > Fair Housing Rights > General Overview

Constitutional Law > Equal

Protection > Gender & Sex

Labor & Employment
Law > Discrimination > Disparate Impact > General Overview

HN13 Contractual Relations & Housing, Fair Housing Rights

When a statute gender-neutral on its face is challenged on the ground that its effects upon women are disproportionately adverse, a twofold inquiry is appropriate. The first question is whether the statutory classification is indeed neutral in the sense that it is not gender-based. If the classification itself, covert or overt, is not based upon gender, the second question is whether the adverse effect reflects invidious gender-based discrimination. In this second inquiry, impact provides an important starting point, but purposeful discrimination is the condition that offends the Constitution.

Constitutional Law > Equal Protection > Nature & Scope of Protection

Labor & Employment
Law > Discrimination > Disparate Impact > General Overview

HN14 Equal Protection, Nature & Scope of Protection

Just as there are cases in which impact alone can unmask an invidious classification, there are others, in which, notwithstanding impact, the legitimate noninvidious purposes of a law cannot be missed.

Constitutional Law > Equal Protection > Gender & Sex

Labor & Employment
Law > Discrimination > Disparate Impact > General Overview

Constitutional Law > Equal Protection > Nature
& Scope of Protection

HN15 Equal Protection, Gender & Sex

Invidious discrimination does not become less so because the discrimination accomplished is of a lesser magnitude. Discriminatory intent is simply not amenable to calibration. It either is a factor that has influenced the legislative choice or it is not.

Constitutional Law > Equal Protection > Nature
& Scope of Protection

Labor & Employment
Law > Discrimination > Disparate
Impact > General Overview

HN16 Equal Protection, Nature & Scope of Protection

Discriminatory purpose implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group.

Constitutional Law > Equal
Protection > Judicial Review > Standards of
Review

Labor & Employment
Law > Discrimination > Disparate
Impact > General Overview

HN17 Judicial Review, Standards of Review

Proof of discriminatory intent must necessarily usually rely on objective factors. The inquiry is practical. What a legislature or any official entity is "up to" may be plain from the results its actions achieve, or the results they avoid. Often it is made clear from what has been called, in a different

context, "the give and take of the situation."

Constitutional Law > Equal
Protection > Gender & Sex

Military & Veterans
Law > Veterans > Readjustment & Related
Benefits > Employment & Reemployment

HN18 Equal Protection, Gender & Sex

When the totality of legislative actions establishing and extending [*Mass. Gen. Laws Ann., ch. 31, § 23*](#) are considered, the law remains what it purports to be: a preference for veterans of either sex over nonveterans of either sex, not for men over women.

Lawyers' Edition Display

Decision

Massachusetts law operating to advantage of males by giving veterans lifetime preference for state employment, held not violative of equal protection.

Summary

A female nonveteran who had taken and passed a number of open competitive examinations for civil service positions with the state of Massachusetts failed to secure employment for positions on several occasions because of the Massachusetts Veterans Preference Statute, which grants an absolute lifetime preference to veterans by requiring that "any person, male or female, including a nurse," qualifying for a civil service position, who was honorably discharged from the United States Armed Forces after at least 90 days of active service, at least one day of which was during wartime, must be considered for appointment to a civil service position ahead of any qualifying nonveterans. Alleging that the absolute preference formula, by inevitably operating to exclude women from consideration for the best Massachusetts civil service jobs, denied women

equal protection of the laws in violation of the United States Constitution, the woman brought an action in the United States District Court for the District of Massachusetts. The District Court declared the law unconstitutional and enjoined its operation ([415 F Supp 485](#)), but on direct appeal from the decision of the three-judge District Court, the United States Supreme Court vacated the judgment and remanded the case for further consideration in light of an intervening Supreme Court decision holding that a neutral law does not violate the [Fourteenth Amendment's equal protection clause](#) solely because it results in a racially disproportionate impact, it being necessary to trace such disproportionate impact to a purpose to discriminate. On remand, the District Court reaffirmed its original judgment, concluding that a veterans' hiring preference is inherently nonneutral because it favors a class from which women have traditionally been excluded, and that the consequences of the Massachusetts absolute preference formula for the employment opportunities of women were too inevitable to have been unintended ([451 F Supp 143](#)).

On direct appeal from the decision of the three-judge District Court, the United States Supreme Court reversed and remanded. In an opinion by Stewart, J., joined by Burger, Ch. J., and White, Powell, Blackmun, Rehnquist, and Stevens, JJ., it was held that the Massachusetts Veterans Preference Statute does not violate the [equal protection clause of the Fourteenth Amendment](#) on sex discrimination grounds, since the distinction drawn by the statute between veterans and nonveterans is not a pretext for gender discrimination, and it had not been shown that the law in any way reflects a purpose to discriminate on the basis of sex.

Stevens, J., joined by White, J., concurring, expressed the view that the claim that the law was intended to benefit males as a class over females as a class was refuted by the fact that the number of males disadvantaged by the law (1,867,000) was sufficiently large and sufficiently close to the

number of disadvantaged females (2,954,000).

Marshall, J., joined by Brennan, J., dissenting, expressed the view that Massachusetts' choice of an absolute veterans preference system evinced purposeful gender-based discrimination and could not withstand scrutiny under the [equal protection clause](#) because the statutory scheme bore no substantial relationship to a legitimate governmental objective.

Headnotes

LAW §325 > equal protection -- state employment -- veterans preference -- sex discrimination -- > Headnote: [LEdHN\[1A\]](#) [1A] [LEdHN\[1B\]](#) [1B] [LEdHN\[1C\]](#) [1C] [LEdHN\[1D\]](#) [1D]

A state law granting an absolute lifetime preference to veterans, by requiring that "any person, male or female, including a nurse," qualifying for a civil service position, who was honorably discharged from the United States Armed Forces after 90 days of active service, at least one day of which was during wartime, must be considered for appointment to a civil service position ahead of any qualifying nonveterans, does not violate the [equal protection clause of the Fourteenth Amendment](#) as discriminating on the basis of sex, notwithstanding that the preference operates to the advantage of males, where the distinction drawn by the statute between veterans and nonveterans is not a pretext for gender discrimination, and it is not shown that the law in any way reflects a purpose to discriminate on the basis of sex. (Marshall and Brennan, JJ., dissented from this holding.)

LAW §317 > Fourteenth Amendment -- equal protection -- classification -- > Headnote: [LEdHN\[2\]](#) [2]

The equal protection guarantee of the [Fourteenth Amendment](#) does not take from the states all power of classification.

COURTS §92.7 > legislative and judicial responsibility -- effects of law -- > Headnote:
[LEdHN\[3\]](#) [3]

The calculus of effects, the manner in which a particular law reverberates in a society, is a legislative and not a judicial responsibility.

LAW §317 > equal protection -- legislative classification -- > Headnote:
[LEdHN\[4\]](#) [4]

In assessing an equal protection challenge, a court is called upon only to measure the basic validity of the legislative classification.

RIGHTS §4.5 > racial classification -- equal protection -- > Headnote:
[LEdHN\[5\]](#) [5]

A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification, and such applies as well to a classification that is ostensibly neutral but is an obvious pretext for racial discrimination; however, even if a neutral law has a disproportionately adverse effect upon a racial minority, it is unconstitutional under the [equal protection clause of the Fourteenth Amendment](#) only if that impact can be traced to a discriminatory purpose.

LAW §325 > sex classification -- > Headnote:
[LEdHN\[6\]](#) [6]

Classifications based upon gender must bear a close and substantial relationship to important governmental objectives.

LAW §325 > OFFICERS §5 > public employment -- states' discretion -- preference of males -- equal protection -- > Headnote:
[LEdHN\[7\]](#) [7]

Although public employment is not a constitutional right, and the states have wide discretion in framing employee qualifications, any state law overtly or covertly designed to prefer males over females in public employment will require an exceedingly persuasive justification to withstand a constitutional challenge under the [equal protection clause of the Fourteenth Amendment](#).

LAW §314 > Fourteenth Amendment -- > Headnote:
[LEdHN\[8\]](#) [8]

The [Fourteenth Amendment](#) guarantees equal laws, not equal results.

LAW §325 > gender-based distinctions -- equal protection -- > Headnote:
[LEdHN\[9\]](#) [9]

For purposes of equal protection, when a statute gender-neutral on its face is challenged on the ground that its effects upon women are disproportionately adverse, a two-fold inquiry is appropriate: the first question is whether the statutory classification is indeed neutral in the sense that it is not gender-based; if the classification

itself, covert or overt, is not based upon gender, the second question is whether the adverse effect reflects invidious gender-based discrimination, and in the second inquiry, impact provides an important starting point, although purposeful discrimination is the condition that offends the United States Constitution.

LAW §316 > equal protection -- discrimination -- intent -- degree of discrimination -- > Headnote:
[LEdHN\[10\]](#) [10]

For purposes of equal protection, invidious discrimination does not become less so because the discrimination accomplished is of a lesser magnitude than that intended; discriminatory intent is not amenable to calibration.

EVIDENCE §166 > presumption -- intent -- criminal and civil law -- > Headnote:
[LEdHN\[11\]](#) [11]

In both criminal and civil law, it is presumed that a person intends the natural and foreseeable consequences of his voluntary actions.

LAW §316 > equal protection -- discriminatory intent -- > Headnote:
[LEdHN\[12A\]](#) [12A][LEdHN\[12B\]](#) [12B]

For purposes of equal protection analysis, the inevitability or foreseeability of consequences of a neutral rule may bear upon the existence of discriminatory intent, and when the adverse consequences of a law upon an identifiable group are inevitable, a strong inference that the adverse effects were desired can reasonably be drawn, but in such inquiry--made as it is under the United

States Constitution--an inference is a working tool, not a synonym for proof, and when the impact is essentially an unavoidable consequence of a legislative policy that has always been deemed legitimate in itself, and when the statutory history and all of the available evidence affirmatively demonstrate the opposite of the inference, the inference does not ripen into proof.

Syllabus

During her 12-year tenure as a state employee, appellee, who is not a veteran, had passed a number of open competitive civil service examinations for better jobs, but because of Massachusetts' veterans' preference statute, she was ranked in each instance below male veterans who had achieved lower test scores than appellee. Under the statute, all veterans who qualify for state civil service positions must be considered for appointment ahead of any qualifying nonveterans. The statutory preference, which is available to "any person, male or female, including a nurse," who was honorably discharged from the United States Armed Forces after at least 90 days of active service, at least one day of which was during "wartime," operates overwhelmingly to the advantage of males. Appellee brought an action in Federal District Court, alleging that the absolute-preference formula established in the Massachusetts statute inevitably operates to exclude women from consideration for the best state civil service jobs and thus discriminates against women in violation [****2] of the [Equal Protection Clause of the Fourteenth Amendment](#). A three-judge court declared the statute unconstitutional and enjoined its operation, finding that while the goals of the preference were legitimate and the statute had not been enacted for the purpose of discriminating against women, the exclusionary impact upon women was so severe as to require the State to further its goals through a more limited form of preference. On an earlier appeal, this Court vacated the judgment and remanded the case for further consideration in light

of the intervening decision in [Washington v. Davis](#), 426 U.S. 229, which held that a neutral law does not violate the [Equal Protection Clause](#) solely because it results in a racially disproportionate impact and that, instead, the disproportionate impact must be traced to a purpose to discriminate on the basis of race. Upon remand, the District Court reaffirmed its original judgment, concluding that a veterans' hiring preference is inherently nonneutral because it favors a class from which women have traditionally been excluded, and that the consequences of the Massachusetts absolute-preference formula for the employment opportunities [****3] of women were too inevitable to have been "unintended."

Held: Massachusetts, in granting an absolute lifetime preference to veterans, has not discriminated against women in violation of the [Equal Protection Clause of the Fourteenth Amendment](#). Pp. 271-281.

(a) Classifications based upon gender must bear a close and substantial relationship to important governmental objectives. Although public employment is not a constitutional right and the States have wide discretion in framing employee qualifications, any state law overtly or covertly designed to prefer males over females in public employment would require an exceedingly persuasive justification to withstand a constitutional challenge under the [Equal Protection Clause](#). Pp. 271-273.

(b) When a statute gender-neutral on its face is challenged on the ground that its effects upon women are disproportionately adverse, a twofold inquiry is appropriate. The first question is whether the statutory classification is indeed neutral in the sense that it is not gender-based. If the classification itself, covert or overt, is not based upon gender, the second question is whether the adverse effect reflects invidious gender-based discrimination. [****4] Pp. 273-274.

(c) Here, the appellee's concession and the District

Court's finding that the Massachusetts statute is not a pretext for gender discrimination are clearly correct. Apart from the facts that the definition of "veterans" in the statute has always been neutral as to gender and that Massachusetts has consistently defined veteran status in a way that has been inclusive of women who have served in the military, this is not a law that can plausibly, or even rationally, be explained only as a gender-based classification. Significant numbers of nonveterans are men, and all nonveterans -- male as well as female -- are placed at a disadvantage. The distinction made by the Massachusetts statute is, as it seems to be, quite simply between veterans and nonveterans, not between men and women. Pp. 274-275.

(d) Appellee's contention that this veterans' preference is "inherently nonneutral" or "gender-biased" in the sense that it favors a status reserved under federal military policy primarily to men is wholly at odds with the District Court's central finding that Massachusetts has not offered a preference to veterans for the purpose of discriminating against women; nor can it be [****5] reconciled with the assumption made by both the appellee and the District Court that a more limited hiring preference for veterans could be sustained, since the degree of the preference makes no constitutional difference. Pp. 276-278.

(e) While it would be disingenuous to say that the adverse consequences of this legislation for women were unintended, in the sense that they were not volitional or in the sense that they were not foreseeable, nevertheless "discriminatory purpose" implies more than intent as volition or intent as awareness of consequences; it implies that the decisionmaker selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group. When the totality of legislative actions establishing and extending the Massachusetts veterans' preference are considered, the law remains what it purports to be: a preference for veterans of either sex over nonveterans of either

sex, not for men over women. Pp. 278-280.

(f) Although absolute and permanent preferences have always been subject to the objection that they give the veteran more than a square deal, the [Fourteenth Amendment](#) "cannot [****6] be made a refuge from ill-advised . . . laws." [District of Columbia v. Brooke](#), 214 U.S. 138, 150. The substantial edge granted to veterans by the Massachusetts statute may reflect unwise policy, but appellee has simply failed to demonstrate that the law in any way reflects a purpose to discriminate on the basis of sex. Pp. 280-281.

Counsel: Thomas R. Kiley, Assistant Attorney General of Massachusetts, argued the cause for appellants. With him on the brief were Francis X. Bellotti, Attorney General, and Edward F. Vena, Assistant Attorney General.

Richard P. Ward argued the cause for appellee. With him on the brief were Stephen B. Perlman, Eleanor D. Acheson, John H. Mason, and John Reinstein. *

[****7]

Judges: STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, BLACKMUN, REHNQUIST, and STEVENS, JJ., joined. STEVENS, J., filed a concurring opinion, in which WHITE, J., joined, post, p. 281. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, post, p. 281.

*Briefs of amici curiae urging reversal were filed by Solicitor General McCree, Deputy Solicitor General Easterbrook, and William C. Bryson for the United States; and by John J. Curtin, Jr., for the American Legion.

Samuel J. Rabinove and Phyllis N. Segal filed a brief for the National Organization for Women et al. as amici curiae urging affirmance.

Briefs of amici curiae were filed by Deanne Siemer for the United States Office of Personnel Management et al.; and by Paul D. Kamenar for the Washington Legal Foundation.

Opinion by: STEWART

Opinion

[*259] [***875] [**2285] MR. JUSTICE STEWART delivered the opinion of the Court.

[LEdHN\[1A\]](#) [1A] This case presents a challenge to the constitutionality of the Massachusetts veterans' preference statute, [Mass. Gen. Laws Ann., ch. 31, § 23](#), on the ground that it discriminates against women in violation of the [Equal Protection Clause of the Fourteenth Amendment](#). Under ch. 31, [§ 23](#),¹ all [**2286] veterans who qualify for state civil service positions must be considered for appointment ahead of any qualifying nonveterans. The preference operates overwhelmingly to the advantage of males.

[****8] The appellee Helen B. Feeney is not a veteran. She brought this action pursuant to [42 U. S. C. § 1983](#), alleging that the absolute-preference formula established in ch. 31, [§ 23](#), inevitably operates to exclude women from consideration for the best Massachusetts civil service jobs and thus unconstitutionally denies them the equal protection of the laws.² The three-judge District Court agreed, one judge dissenting. [Anthony v. Massachusetts](#), 415 F.Supp. 485 (Mass. 1976).³

¹For the text of ch. 31, [§ 23](#), see n. 10, *infra*. The general Massachusetts Civil Service law, Mass. Gen. Laws Ann., ch. 31, was recodified on January 1, 1979, 1978 Mass. Acts, ch. 393, and the veterans' preference is now found at [Mass. Gen. Laws Ann., ch. 31, § 26](#) (West 1979). Citations in this opinion, unless otherwise indicated, are to the ch. 31 codification in effect when this litigation was commenced.

²No statutory claim was brought under Title VII of the Civil Rights Act of 1964, [42 U. S. C. § 2000e et seq.](#) Section 712 of the Act, [42 U. S. C. § 2000e-11](#), provides that "[nothing] contained in this subchapter shall be construed to repeal or modify any Federal, State, territorial or local law creating special rights or preference for veterans." The parties have evidently assumed that this provision precludes a Title VII challenge.

³The appellee's case had been consolidated with a similar action brought by Carol A. Anthony, a lawyer whose efforts to obtain a

[****9] [*260] The District Court found that the absolute preference afforded by Massachusetts to veterans has a devastating impact upon the employment opportunities of women. Although it found that the goals of the preference were worthy and legitimate and that the legislation had not been enacted for the purpose of discriminating against women, the court reasoned that its exclusionary impact upon women was nonetheless so severe as to require the State to further its goals through a more limited form of preference. Finding [***876] that a more modest preference formula would readily accommodate the State's interest in aiding veterans, the court declared ch. 31, § 23, unconstitutional and enjoined its operation.⁴

[****10] Upon an appeal taken by the Attorney General of Massachusetts,⁵ this Court vacated the judgment and remanded the case for further consideration in light of our intervening decision in *Washington v. Davis*, 426 U.S. 229. *Massachusetts v. Feeney*, 434 U.S. 884. The *Davis* case held that *HN1* a neutral law does not violate the *Equal Protection Clause* solely because it results in a racially disproportionate impact; instead the disproportionate impact must be traced to a purpose to discriminate on the basis of race. 426 U.S., at 238-244.

Upon [****11] remand, the District Court, one

civil service Counsel I position had been frustrated by ch. 31, § 23. In 1975, Massachusetts exempted all attorney positions from the preference, 1975 Mass. Acts, ch. 134, and Anthony's claims were accordingly found moot by the District Court. *Anthony v. Massachusetts*, 415 F.Supp., at 495.

⁴The District Court entered a stay pending appeal, but the stay was rendered moot by the passage of an interim statute suspending ch. 31, § 23, pending final judgment and replacing it with an interim provision granting a modified point preference to veterans. 1976 Mass. Acts, ch. 200, now codified at *Mass. Gen. Laws Ann., ch. 31, § 26* (West 1979).

⁵The Attorney General appealed the judgment over the objection of other state officers named as defendants. In response to our certification of the question whether Massachusetts law permits this, see *Massachusetts v. Feeney*, 429 U.S. 66, the Supreme Judicial Court answered in the affirmative. *Feeney v. Commonwealth*, 373 Mass. 359, 366 N. E. 2d 1262 (1977).

judge concurring and one judge again dissenting, concluded that a veterans' hiring preference is inherently nonneutral because it favors a class from which women have traditionally been excluded, and that [*261] the consequences of the Massachusetts absolute-preference formula for the employment opportunities of women were too inevitable to have been "unintended." Accordingly, the court reaffirmed its original judgment. *Feeney v. Massachusetts*, 451 F.Supp. 143. The Attorney General again appealed to this Court pursuant to 28 U. S. C. § 1253, and probable jurisdiction of the [**2287] appeal was noted. 439 U.S. 891.

I

A

The Federal Government and virtually all of the States grant some sort of hiring preference to veterans.⁶ [****13] The Massachusetts preference, which is loosely termed an "absolute lifetime" preference, is among the most generous.⁷

⁶The first comprehensive federal veterans' statute was enacted in 1944. Veterans' Preference Act of 1944, 58 Stat. 387. The Federal Government has, however, engaged in preferential hiring of veterans, through official policies and various special laws, since the Civil War. See, e. g., Res. of Mar. 3, 1865, No. 27, 13 Stat. 571 (hiring preference for disabled veterans). See generally House Committee on Veterans' Affairs, *The Provision of Federal Benefits for Veterans, An Historical Analysis of Major Veterans' Legislation, 1862-1954*, 84th Cong., 1st Sess., 258-265 (Comm. Print 1955). For surveys of state veterans' preference laws, many of which also date back to the late 19th century, see *State Veterans' Laws, Digests of State Laws Regarding Rights, Benefits, and Privileges of Veterans and Their Dependents*, House Committee on Veterans' Affairs, 91st Cong., 1st Sess. (1969); Fleming & Shanor, *Veterans Preferences in Public Employment: Unconstitutional Gender Discrimination?*, 26 Emory L. J. 13 (1977).

⁷The forms of veterans' hiring preferences vary widely. The Federal Government and approximately 41 States grant veterans a point advantage on civil service examinations, usually 10 points for a disabled veteran and 5 for one who is not disabled. See Fleming & Shanor, *supra* n. 6, at 17, and n. 12 (citing statutes). A few offer only tie-breaking preferences. *Id.*, at n. 14 (citing statutes). A very few States, like Massachusetts, extend absolute hiring or positional preferences to qualified veterans. *Id.*, at n. 13. See, e. g., N. J. Stat. Ann. § 11: 27-4 (West 1976); S. D. Comp. Laws Ann. § 3-3-1 (1974); Utah Code Ann. § 34-30-11 (1953); *Wash. Rev. Code §§*

It [*262] applies to all positions in the State's classified civil [***877] service, which constitute approximately 60% of the public jobs in the State. It is available to "any person, male or female, including a nurse," who was honorably discharged from the [****12] United States Armed Forces after at least 90 days of active service, at least one day of which was during "wartime." ⁸ [****14] Persons who are deemed veterans and who are otherwise qualified for a particular civil service job may exercise the preference at any time and as many times as they wish. ⁹

[41.04.010](#), [73.16.010](#) (1976).

⁸ [HN2](#) *Massachusetts Gen. Laws Ann., ch. 4, § 7*, Forty-third (West 1976), which supplies the general definition of the term "veteran," reads in pertinent part:

"'Veteran' shall mean any person, male or female, including a nurse, (a) whose last discharge or release from his wartime service, as defined herein, was under honorable conditions and who (b) served in the army, navy, marine corps, coast guard, or air force of the United States for not less than ninety days active service, at least one day of which was for wartime service"

Persons awarded the Purple Heart, ch. 4, [§ 7](#), Forty-third, or one of a number of specified campaign badges or the Congressional Medal of Honor are also deemed veterans. [Mass. Gen. Laws Ann., ch. 31, § 26](#) (West 1979).

"Wartime service" is defined as service performed by a "Spanish War veteran," a "World War I veteran," a "World War II veteran," a "Korean veteran," a "Vietnam veteran," or a member of the "WAAC." [Mass. Gen. Laws Ann., ch. 4, § 7](#), Forty-third (West 1976). Each of these terms is further defined to specify a period of service. The statutory definitions, taken together, cover the entire period from September 16, 1940, to May 7, 1975. See *ibid.*

"WAAC" is defined as follows: "any woman who was discharged and so served in any corps or unit of the United States established for the purpose of enabling women to serve with, or as auxiliary to, the armed forces of the United States and such woman shall be deemed to be a veteran." *Ibid.*

⁹ The Massachusetts preference law formerly imposed a residency requirement, see 1954 Mass. Acts, ch. 627, § 3 (eligibility conditioned upon Massachusetts domicile prior to induction or five years' residency in State). The distinction was invalidated as violative of the [Equal Protection Clause](#) in [Stevens v. Campbell](#), 332 F.Supp. 102, 105 (Mass. 1971). Cf. [August v. Bronstein](#), 369 F.Supp. 190 (SDNY 1974) (upholding, *inter alia*, nondurational residency requirement in New York veterans' preference statute), summarily aff'd, 417 U.S. 901.

[*263] Civil service positions in Massachusetts fall into two general categories, labor and official. [HN3](#) For jobs in the official service, with which the proofs in this action were concerned, the preference mechanics are uncomplicated. All applicants for employment must take competitive examinations. [**2288] Grades are based on a formula that gives weight both to objective test results and to training and experience. Candidates who pass are then ranked in the order of their respective scores [****15] on an "eligible list." Chapter 31, [§ 23](#), requires, however, that disabled veterans, veterans, and surviving spouses and surviving parents of veterans be ranked -- in the order of their respective scores -- above all other candidates. ¹⁰

[****16] Rank [***878] on the eligible list and availability for employment are the sole factors that determine which candidates are considered for appointment to an official civil service position. When a public agency has a vacancy, it requisitions a list of "certified eligibles" from the state personnel division. Under formulas prescribed by civil service rules, a small number of candidates from the top of an appropriate list, three if there is only one vacancy, are certified. The appointing agency [*264] is then required to choose from

¹⁰ [HN4](#) Chapter 31, [§ 23](#), provides in full:

"The names of persons who pass examinations for appointment to any position classified under the civil service shall be placed upon the eligible lists in the following order: --

"(1) Disabled veterans . . . in the order of their respective standing; (2) veterans in the order of their respective standing; (3) persons described in section twenty-three B [the widow or widowed mother of a veteran killed in action or who died from a service-connected disability incurred in wartime service and who has not remarried] in the order of their respective standing; (4) other applicants in the order of their respective standing. Upon receipt of a requisition, names shall be certified from such lists according to the method of certification prescribed by the civil service rules. A disabled veteran shall be retained in employment in preference to all other persons, including veterans."

A 1977 amendment extended the dependents' preference to "surviving spouses," and "surviving parents." 1977 Mass. Acts, ch. 815.

among these candidates.¹¹ Although the veterans' preference thus does not guarantee that a veteran will be appointed, it is obvious that the preference gives to veterans who achieve passing scores a well-nigh absolute advantage.

B

The [****17] appellee has lived in Dracut, Mass., most of her life. She entered the work force in 1948, and for the next 14 years worked at a variety of jobs in the private sector. She first entered the state civil service system in 1963, having competed successfully for a position as Senior Clerk Stenographer in the Massachusetts Civil Defense Agency. There she worked for four years. In 1967, she was promoted to the position of Federal Funds and Personnel Coordinator in the same agency. The agency, and with it her job, was eliminated in 1975.

During her 12-year tenure as a public employee, Ms. Feeney took and passed a number of open competitive civil service examinations. On several she did quite well, receiving in 1971 the second highest score on an examination for a job with the Board of Dental Examiners, and in 1973 the third highest on a test for an Administrative Assistant position with a mental health center. Her high scores, however, did not win her a place on the certified eligible list. Because of the veterans' preference, she was ranked sixth behind five male veterans on the Dental Examiner list. She was not certified, and a lower scoring veteran was eventually appointed. [****18] On the 1973 examination, she was placed in a position on the list behind 12 male veterans, 11 of whom had lower scores. Following the other examinations that she took, her name was similarly ranked below those of veterans who had achieved passing grades.

[*265] Ms. Feeney's interest in securing a better

job in state government did not wane. Having been consistently eclipsed by veterans, however, she eventually concluded that further competition for civil service positions of interest to veterans would be futile. In 1975, shortly after her civil defense job was abolished, she commenced this litigation.

[***879] [**2289] C

The veterans' hiring preference in Massachusetts, as in other jurisdictions, has traditionally been justified as a measure designed to reward veterans for the sacrifice of military service, to ease the transition from military to civilian life, to encourage patriotic service, and to attract loyal and well-disciplined people to civil service occupations.¹² See, e. g., [Hutcheson v. Director of Civil Service](#), 361 Mass. 480, 281 N. E. 2d 53 (1972). The Massachusetts law dates back to 1884, when the State, as part of its [****19] first civil service legislation, gave a statutory preference to civil service applicants who were Civil War veterans if their qualifications were equal to those of nonveterans. 1884 Mass. Acts, ch. 320, § 14 (sixth). This tie-breaking provision blossomed into a truly absolute preference in 1895, when the State enacted its first general veterans' preference law and exempted veterans from all merit selection requirements. 1895 Mass. Acts, ch. 501, § 2. In response to a challenge brought by a male nonveteran, this statute was declared violative of state constitutional provisions guaranteeing that government should be [*266] for the "common good" and prohibiting hereditary titles. [Brown v. Russell](#), 166 Mass. 14, 43 N. E. 1005 (1896).

¹² Veterans' preference laws have been challenged so often that the rationale in their support has become essentially standardized. See, e. g., [Koelfgen v. Jackson](#), 355 F.Supp. 243 (Minn. 1972), summarily aff'd, 410 U.S. 976; [August v. Bronstein](#), *supra*; [Rios v. Dillman](#), 499 F.2d 329 (CA5 1974); cf. [Mitchell v. Cohen](#), 333 U.S. 411, 419 n. 12. See generally Blumberg, *De Facto and De Jure Sex Discrimination Under the Equal Protection Clause: A Reconsideration of the Veterans' Preference in Public Employment*, 26 Buffalo L. Rev. 3 (1977). For a collection of early cases, see Annot., *Veterans' Preference Laws*, 161 A. L. R. 494 (1946).

¹¹ A 1978 amendment requires the appointing authority to file a written statement of reasons if the person whose name was not highest is selected. 1978 Mass. Acts, ch. 393, § 11, currently codified at [Mass. Gen. Laws Ann., ch. 31, § 27](#) (West 1979).

[****20] The current veterans' preference law has its origins in an 1896 statute, enacted to meet the state constitutional standards enunciated in *Brown v. Russell*. That statute limited the absolute preference to veterans who were otherwise qualified.¹³ [****21] A closely divided Supreme Judicial Court, in an advisory opinion issued the same year, concluded that the preference embodied in such a statute would be valid. [*Opinion of the Justices, 166 Mass. 589, 44 N. E. 625 \(1896\)*](#). In 1919, when the preference was extended to cover the veterans of World War I, the formula was further limited to provide for a priority in eligibility, in contrast to an absolute preference in hiring.¹⁴ See [*Corliss v. Civil Service Comm'rs, 242 Mass. 61, \[***880\] 136 N. E. 356 \(1922\)*](#). In [*Mayor of Lynn v. Commissioner of Civil Service, 269 Mass. 410, 414, 169 N. E. 502, 503-504 \(1929\)*](#), the Supreme Judicial Court, adhering to the views expressed in its 1896 advisory opinion, sustained this statute against a state constitutional challenge.

Since 1919, the preference has been repeatedly amended to cover persons who served in subsequent wars, declared or [*267] undeclared. See 1943 Mass. Acts, ch. 194; 1949 Mass. Acts, ch. 642, § 2 (World War II); 1954 Mass. Acts, ch. 627 (Korea); 1968 Mass. Acts, ch. 531, § 1 (Vietnam).

¹³ 1896 Mass. Acts, ch. 517, § 2. The statute provided that veterans who passed examinations should "be preferred in appointment to all persons not veterans" A proviso stated: "But nothing herein contained shall be construed to prevent the certification and employment of women."

¹⁴ 1919 Mass. Acts, ch. 150, § 2. The amended statute provided that "the names of veterans who pass examinations . . . shall be placed upon the . . . eligible lists in the order of their respective standing, above the names of all other applicants," and further provided that "upon receipt of a requisition not especially calling for women, names shall be certified from such lists" The exemption for "women's requisitions" was retained in substantially this form in subsequent revisions, see, e. g., 1954 Mass. Acts, ch. 627, § 5. It was eliminated in 1971, 1971 Mass. Acts, ch. 219, when the State made all single-sex examinations subject to the prior approval of the Massachusetts Commission Against Discrimination, 1971 Mass. Acts, ch. 221.

¹⁵ [****23] The [**2290] current preference formula in ch. 31, § 23, [****22] is substantially the same as that settled upon in 1919. This absolute preference -- even as modified in 1919 -- has never been universally popular. Over the years it has been subjected to repeated legal challenges, see [*Hutcheson v. Director of Civil Service, supra*](#) (collecting cases), to criticism by civil service reform groups, see, e. g., Report of the Massachusetts Committee on Public Service on Initiative Bill Relative to Veterans' Preference, S. No. 279 (1926); Report of Massachusetts Special Commission on Civil Service and Public Personnel Administration 37-43 (June 15, 1967), and, in 1926, to a referendum in which it was reaffirmed by a majority of 51.9%. See *id.*, at 38. The present case is apparently the first to challenge the Massachusetts veterans' preference on the simple ground that it discriminates on the basis of sex.¹⁶

D

The first Massachusetts veterans' preference statute defined the term "veterans" in gender-neutral language. See [*268] 1896 Mass. Acts, ch. 517 § 1 ("a person" who served in the United States Army or Navy), and subsequent amendments have followed this pattern, see, e. g., 1919 Mass. Acts, ch. 150, § 1 ("any person who has served . . ."); 1954 Mass. Acts, ch. 627, § 1 ("any person, male or

¹⁵ A provision requiring public agencies to hire disabled veterans certified as eligible was added in 1922. 1922 Mass. Acts, ch. 463. It was invalidated as applied in [*Hutcheson v. Director of Civil Service, 361 Mass. 480, 281 N. E. 2d 53 \(1972\)*](#) (suit by veteran arguing that absolute preference for disabled veterans was arbitrary on facts). It has since been eliminated and replaced with a provision giving disabled veterans an absolute preference in retention. See [*Mass. Gen. Laws Ann., ch. 31, § 26*](#) (West 1979). See n. 10, *supra*.

¹⁶ For cases presenting similar challenges to the veterans' preference laws of other States, see [*Ballou v. State Department of Civil Service, 75 N. J. 365, 382 A. 2d 1118 \(1978\)*](#) (sustaining New Jersey absolute preference); [*Feinerman v. Jones, 356 F.Supp. 252 \(MD Pa. 1973\)*](#) (sustaining Pennsylvania point preference); [*Branch v. Du Bois, 418 F.Supp. 1128 \(ND Ill. 1976\)*](#) (sustaining Illinois modified point preference); [*Wisconsin Nat. Organization for Women v. Wisconsin, 417 F.Supp. 978 \(WD Wis. 1976\)*](#) (sustaining Wisconsin point preference).

female, including a nurse"). Women who have served in official [****24] United States military units during wartime, then, have always been entitled to the benefit of the preference. In addition, Massachusetts, through a 1943 amendment to the definition of "wartime service," extended the preference to women who served in unofficial auxiliary women's units. 1943 Mass. Acts, ch. 194.¹⁷

When [***881] the first general veterans' preference statute was adopted in 1896, there were no women veterans.¹⁸ The statute, however, covered [****25] only Civil War veterans. Most of them were beyond middle age, and relatively few were actively competing for public employment.¹⁹ [****26] Thus, the impact of [*269] [**2291] the preference upon the employment opportunities of nonveterans as a group and women in particular was slight.²⁰

¹⁷The provision, passed shortly after the creation of the Women's Army Auxiliary Corps (WAAC), see n. 21, *infra*, is currently found at [Mass. Gen. Laws Ann., ch. 4, § 7](#), cl. 43 (West 1976), see n. 8, *supra*. "Wartime service" is defined as service performed by a member of the "WAAC." A "WAAC" is "any woman who was discharged and so served in any corps or unit of the United States established for the purpose of enabling women to serve with, or as auxiliary to, the armed forces of the United States and such woman shall be deemed to be a veteran." *Ibid*.

¹⁸Small numbers of women served in combat roles in every war before the 20th century in which the United States was involved, but usually unofficially or disguised as men. See M. Binkin & S. Bach, *Women and the Military* 5 (1977) (hereinafter Binkin and Bach). Among the better known are Molly Pitcher (Revolutionary War), Deborah Sampson (Revolutionary War), and Lucy Brewer (War of 1812). Passing as one "George Baker," Brewer served for three years as a gunner on the U. S. S. Constitution ("Old Ironsides") and distinguished herself in several major naval battles in the War of 1812. See J. Laffin, *Women in Battle* 116-122 (1967).

¹⁹By 1887, the average age of Civil War veterans in Massachusetts was already over 50. Massachusetts Civil Service Commissioners, Third Annual Report 22 (1887). The tie-breaking preference which had been established under the 1884 statute had apparently been difficult to enforce, since many appointing officers "prefer younger men." *Ibid*. The 1896 statute which established the first valid absolute preference, see [supra](#), at 266, again covered only Civil War veterans. 1896 Mass. Acts, ch. 517, § 1.

²⁰In 1896, for example, 2,804 persons applied for civil service

Notwithstanding the apparent attempts by Massachusetts to include as many military women as possible within the scope of the preference, the statute today benefits an overwhelmingly male class. This is attributable in some measure to the variety of federal statutes, regulations, and policies that have restricted the number of women who could enlist in the United States Armed Forces,²¹

positions: 2,031 were men, of whom only 32 were veterans; 773 were women. Of the 647 persons appointed, 525 were men, of whom only 9 were veterans; 122 were women. Massachusetts Civil Service Commissioners, Thirteenth Annual Report 5, 6 (1896). The average age of the applicants was 38. *Ibid*.

²¹The Army Nurse Corps, created by Congress in 1901, was the first official military unit for women, but its members were not granted full military rank until 1944. See Binkin and Bach 4-21; M. Treadwell, *The Women's Army Corps* 6 (Dept. of Army 1954) (hereinafter Treadwell). During World War I, a variety of proposals were made to enlist women for work as doctors, telephone operators, and clerks, but all were rejected by the War Department. See *ibid*. The Navy, however, interpreted its own authority broadly to include a power to enlist women as Yeoman F's and Marine F's. About 13,000 women served in this rank, working primarily at clerical jobs. These women were the first in the United States to be admitted to full military rank and status. See *id.*, at 10.

Official military corps for women were established in response to the massive personnel needs of World War II. See generally Binkin and Bach; Treadwell. The Women's Army Auxiliary Corps (WAAC) -- the unofficial predecessor of the Women's Army Corps (WAC) -- was created on May 14, 1942, followed two months later by the WAVES (Women Accepted for Voluntary Emergency Service). See Binkin and Bach 7. Not long after, the United States Marine Corps Women's Reserve and the Coast Guard Women's Reserve (SPAR) were established. See *ibid*. Some 350,000 women served in the four services; some 800 women also served as Women's Airforce Service Pilots (WASPs). *Ibid*. Most worked in health care, administration, and communications; they were also employed as airplane mechanics, parachute riggers, gunnery instructors, air traffic controllers, and the like.

The authorizations for the women's units during World War II were temporary. The Women's Armed Services Integration Act of 1948, 62 Stat. 356, established the women's services on a permanent basis. Under the Act, women were given regular military status. However, quotas were placed on the numbers who could enlist, 62 Stat. 357, 360-361 (no more than 2% of total enlisted strength), eligibility requirements were more stringent than those for men, and career opportunities were limited. Binkin and Bach 11-12. During the 1950's and 1960's, enlisted women constituted little more than 1% of the total force. In 1967, the 2% quota was lifted, § 1 (9)(E), 81 Stat. 375, 10 U. S. C. § 3209 (b), and in the 1970's many restrictive policies concerning women's participation in the military have been

and largely to the [***882] simple [*270] fact that women have never been subjected to a military draft. See generally Binkin and Bach 4-21.

[****27] When this litigation was commenced, then, over 98% of the veterans in Massachusetts were male; only 1.8% were female. And over one-quarter of the Massachusetts population were veterans. During the decade between 1963 and 1973 when the appellee was actively participating in the State's merit selection system, 47,005 new permanent appointments were made in the classified official service. Forty-three percent of those hired were women, and 57% were men. Of the women appointed, 1.8% were veterans, while 54% of the men had veteran status. A large unspecified percentage of the female appointees were serving in lower paying positions for which males traditionally had not applied.²² [*271] On each of 50 sample [**2292] eligible lists that are part of the record in this case, one or more women who would have been certified as eligible for appointment on the basis of test results were displaced by veterans whose test scores were lower.

eliminated or modified. See generally Binkin and Bach. In 1972, women still constituted less than 2% of the enlisted strength. *Id.*, at 14. By 1975, when this litigation was commenced, the percentage had risen to 4.6%. *Ibid.*

²² The former exemption for "women's requisitions," see nn. 13, 14, *supra*, may have operated in the 20th century to protect these types of jobs from the impact of the preference. However, the statutory history indicates that this was not its purpose. The provision dates back to the 1896 veterans' preference law and was retained in the law substantially unchanged until it was eliminated in 1971. See n. 14, *supra*. Since veterans in 1896 were a small but an exclusively male class, such a provision was apparently included to ensure that the statute would not be construed to outlaw a pre-existing practice of single-sex hiring explicitly authorized under the 1884 Civil Service statute. See Rule XIX.3, Massachusetts Civil Service Law and Rules and Regulations of the Commissioners (1884) ("In case the request for any . . . certification, or any law or regulation, shall call for persons of one sex, those of that sex shall be certified; otherwise sex shall be disregarded in certification"). The veterans' preference statute at no point endorsed this practice. Historical materials indicate, however, that the early preference law may have operated to encourage the employment of women in positions from which they previously had been excluded. See Thirteenth Annual Report, *supra* n. 20, at 5, 6; Third Annual Report, *supra* n. 19, at 23.

[****28] At the outset of this litigation appellants conceded that for "many of the permanent positions for which males and females have competed" the veterans' preference has "resulted in a substantially greater proportion of female eligibles than male eligibles" not being certified for consideration. The impact of the veterans' preference law upon the public employment opportunities of women has thus been severe. This impact lies at the heart of the appellee's federal constitutional claim.

II

LEdHN[1B] [1B]The sole question for decision [***883] on this appeal is whether Massachusetts, in granting an absolute lifetime preference to veterans, has discriminated against women in violation of the Equal Protection Clause of the Fourteenth Amendment.

A

LEdHN[2] [2]LEdHN[3] [3]LEdHN[4] [4]HN5 The equal protection guarantee of the Fourteenth Amendment does not take from the States all power of classification. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 314. Most laws classify, and many affect certain groups [*272] unevenly, even though the law itself treats them no differently from all other members of the class described by the law. When the basic classification is rationally based, uneven effects upon [****29] particular groups within a class are ordinarily of no constitutional concern. New York City Transit Authority v. Beazer, 440 U.S. 568; Jefferson v. Hackney, 406 U.S. 535, 548. Cf. James v. Valtierra, 402 U.S. 137. HN6 The calculus of effects, the manner in which a particular law reverberates in a society, is a legislative and not a judicial responsibility. Dandridge v. Williams, 397 U.S. 471; San Antonio School Dist. v. Rodriguez, 411 U.S. 1. In assessing an equal protection challenge, a court is called upon only to measure the basic validity of the legislative classification. Barrett v. Indiana, 229 U.S. 26, 29-30; Railway Express Agency v. New York, 336 U.S. 106. When some other independent right is not at stake, see, e.

g., *Shapiro v. Thompson*, 394 U.S. 618, and when there is no "reason to infer antipathy," *Vance v. Bradley*, 440 U.S. 93, 97, it is presumed that "even improvident decisions will eventually be rectified by the democratic process" *Ibid*.

[****30] LEdHN[5] [5]HN7 Certain classifications, however, in themselves supply a reason to infer antipathy. Race is the paradigm. HN8 A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification. *Brown v. Board of Education*, 347 U.S. 483; *McLaughlin v. Florida*, 379 U.S. 184. This rule applies as well to a classification that is ostensibly neutral but is an obvious pretext for racial discrimination. *Yick Wo v. Hopkins*, 118 U.S. 356; *Guinn v. United States*, 238 U.S. 347; cf. *Lane* [**2293] *v. Wilson*, 307 U.S. 268; *Gomillion v. Lightfoot*, 364 U.S. 339. But, as was made clear in *Washington v. Davis*, 426 U.S. 229, and *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, HN9 even if a neutral law has a disproportionately adverse effect upon a racial minority, it is unconstitutional under the *Equal Protection Clause* only if that impact can be traced to a discriminatory purpose.

[*273] LEdHN[6] [6]LEdHN[7] [7]HN10 Classifications based upon gender, not [****31] unlike those based upon race, have traditionally been the touchstone for pervasive and often [***884] subtle discrimination. *Caban v. Mohammed*, 441 U.S. 380, 398 (STEWART, J., dissenting). This Court's recent cases teach that such classifications must bear a close and substantial relationship to important governmental objectives, *Craig v. Boren*, 429 U.S. 190, 197, and are in many settings unconstitutional. *Reed v. Reed*, 404 U.S. 71; *Frontiero v. Richardson*, 411 U.S. 677; *Weinberger v. Wiesenfeld*, 420 U.S. 636; *Craig v. Boren*, *supra*; *Califano v. Goldfarb*, 430

U.S. 199; *Orr v. Orr*, 440 U.S. 268; *Caban v. Mohammed*, *supra*. Although public employment is not a constitutional right, *Massachusetts Bd. of Retirement v. Murgia*, *supra*, and the States have wide discretion in framing employee qualifications, see, e. g., *New York City Transit Authority v. Beazer*, *supra*, these precedents dictate that HN11 any state law overtly or covertly [****32] designed to prefer males over females in public employment would require an exceedingly persuasive justification to withstand a constitutional challenge under the *Equal Protection Clause of the Fourteenth Amendment*.

B

LEdHN[8] [8]The cases of *Washington v. Davis*, *supra*, and *Arlington Heights v. Metropolitan Housing Dev. Corp.*, *supra*, recognize that HN12 when a neutral law has a disparate impact upon a group that has historically been the victim of discrimination, an unconstitutional purpose may still be at work. But those cases signaled no departure from the settled rule that the *Fourteenth Amendment* guarantees equal laws, not equal results. *Davis* upheld a job-related employment test that white people passed in proportionately greater numbers than Negroes, for there had been no showing that racial discrimination entered into the establishment or formulation of the test. *Arlington Heights* upheld a zoning board decision that tended to perpetuate racially segregated housing patterns, [*274] since, apart from its effect, the board's decision was shown to be nothing more than an application of a constitutionally neutral zoning policy. Those [****33] principles apply with equal force to a case involving alleged gender discrimination.

LEdHN[9] [9]HN13 When a statute gender-neutral on its face is challenged on the ground that its effects upon women are disproportionately adverse, a twofold inquiry is thus appropriate. The first question is whether the statutory classification

is indeed neutral in the sense that it is not gender based. If the classification itself, covert or overt, is not based upon gender, the second question is whether the adverse effect reflects invidious gender-based discrimination. See [Arlington Heights v. Metropolitan Housing Dev. Corp., supra](#). In this second inquiry, impact provides an "important starting point," [429 U.S., at 266](#), but purposeful discrimination is "the condition that offends the Constitution." [Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 16](#).

It is against this background of **[***885]** precedent that we consider the merits of the case before us.

III

A

[LEdHN\[1C\]](#) [1C]The question whether ch. 31, [§ 23](#), establishes a classification that is overtly or **[**2294]** covertly based upon gender must first be considered. The appellee has conceded that **[****34]** ch. 31, [§ 23](#), is neutral on its face. She has also acknowledged that state hiring preferences for veterans are not *per se* invalid, for she has limited her challenge to the absolute lifetime preference that Massachusetts provides to veterans. The District Court made two central findings that are relevant here: first, that ch. 31, [§ 23](#), serves legitimate and worthy purposes; second, that the absolute preference was not established for the purpose of discriminating against women. The appellee has thus acknowledged and the District Court has thus found **[*275]** that the distinction between veterans and nonveterans drawn by ch. 31, [§ 23](#), is not a pretext for gender discrimination. The appellee's concession and the District Court's finding are clearly correct.

If the impact of this statute could not be plausibly explained on a neutral ground, impact itself would signal that the real classification made by the law was in fact not neutral. See [Washington v. Davis, 426 U.S., at 242](#); [Arlington Heights v. Metropolitan Housing Dev. Corp., supra, at 266](#). But there can

be but one answer to the question whether this veteran preference **[****35]** excludes significant numbers of women from preferred state jobs because they are women or because they are nonveterans. Apart from the facts that the definition of "veterans" in the statute has always been neutral as to gender and that Massachusetts has consistently defined veteran status in a way that has been inclusive of women who have served in the military, this is not a law that can plausibly be explained only as a gender-based classification. Indeed, it is not a law that can rationally be explained on that ground. Veteran status is not uniquely male. Although few women benefit from the preference, the nonveteran class is not substantially all female. To the contrary, significant numbers of nonveterans are men, and all nonveterans -- male as well as female -- are placed at a disadvantage. Too many men are affected by ch. 31, [§ 23](#), to permit the inference that the statute is but a pretext for preferring men over women.

Moreover, as the District Court implicitly found, the purposes of the statute provide the surest explanation for its impact. [HN14](#) Just as there are cases in which impact alone can unmask an invidious classification, cf. [Yick Wo v. Hopkins, 118 U.S. 356](#), **[****36]** there are others, in which -- notwithstanding impact -- the legitimate noninvidious purposes of a law cannot be missed. This is one. The distinction made by ch. 31, [§ 23](#), is, as it seems to be, quite simply between veterans and nonveterans, not between men and women.

[*276] B

The dispositive question, then, is whether the appellee has shown that a gender-based discriminatory purpose has, at least in some measure, shaped the Massachusetts veterans' preference legislation. As did the **[***886]** District Court, she points to two basic factors which in her view distinguish ch. 31, [§ 23](#), from the neutral rules at issue in the *Washington v. Davis* and *Arlington Heights* cases. The first is the nature of the preference, which is said to be demonstrably

gender-biased in the sense that it favors a status reserved under federal military policy primarily to men. The second concerns the impact of the absolute lifetime preference upon the employment opportunities of women, an impact claimed to be too inevitable to have been unintended. The appellee contends that these factors, coupled with the fact that the preference itself has little if any relevance to actual job performance, [****37] more than suffice to prove the discriminatory intent required to establish a constitutional violation.

1

The contention that this veterans' preference is "inherently nonneutral" or "gender-biased" presumes that the State, by favoring veterans, intentionally incorporated into its public employment policies the panoply of sex-based and assertedly discriminatory [**2295] federal laws that have prevented all but a handful of women from becoming veterans. There are two serious difficulties with this argument. First, it is wholly at odds with the District Court's central finding that Massachusetts has not offered a preference to veterans for the purpose of discriminating against women. Second, it cannot be reconciled with the assumption made by both the appellee and the District Court that a more limited hiring preference for veterans could be sustained. Taken together, these difficulties are fatal.

[LEdHN\[10\]](#) [10]To the extent that the status of veteran is one that few [*277] women have been enabled to achieve, every hiring preference for veterans, however modest or extreme, is inherently gender-biased. If Massachusetts by offering such a preference can be said intentionally to have incorporated [****38] into its state employment policies the historical gender-based federal military personnel practices, the degree of the preference would or should make no constitutional difference. [HN15](#) Invidious discrimination does not become less so because the discrimination accomplished is

of a lesser magnitude.²³ Discriminatory intent is simply not amenable to calibration. It either is a factor that has influenced the legislative choice or it is not. The District Court's conclusion that the absolute veterans' preference was not originally enacted or subsequently reaffirmed for the purpose of giving an advantage to males as such necessarily compels the conclusion that the State intended nothing more than to prefer "veterans." Given this finding, simple logic suggests that an intent to exclude women from significant public jobs was not at work in this law. To reason that it was, by describing the preference as "inherently nonneutral" or "gender-biased," is merely to restate the fact of impact, not to answer the question of intent.

[****39] To be sure, this case is unusual in [***887] that it involves a law that by design is not neutral. The law overtly prefers veterans as such. As opposed to the written test at issue in *Davis*, it does not purport to define a job-related characteristic. To the contrary, it confers upon a specifically described group -- perceived to be particularly deserving -- a competitive headstart. But the District Court found, and the appellee has not disputed, that this legislative choice was legitimate. The basic distinction between veterans and nonveterans, having been found not gender-based, and the goals of the [*278] preference having been found worthy, ch. 31 must be analyzed as is any other neutral law that casts a greater burden upon women as a group than upon men as a group. The enlistment policies of the Armed Services may well have discriminated on the basis of sex. See [Frontiero v. Richardson](#), 411 U.S. 677; cf. [Schlesinger v. Ballard](#), 419 U.S. 498. But the history of discrimination against women in the military is not on trial in this case.

2

²³This is not to say that the degree of impact is irrelevant to the question of intent. But it is to say that a more modest preference, while it might well lessen impact and, as the State argues, might lessen the effectiveness of the statute in helping veterans, would not be any more or less "neutral" in the constitutional sense.

[LEdHN\[11\]](#) [11]The appellee's ultimate argument rests upon the presumption, common to the criminal [\[****40\]](#) and civil law, that a person intends the natural and foreseeable consequences of his voluntary actions. Her position was well stated in the concurring opinion in the District Court:

"Conceding . . . that the goal here was to benefit the veteran, there is no reason to absolve the legislature from awareness that the means chosen to achieve this goal would freeze women out of all those state jobs actively sought by men. To be sure, the legislature did not wish to harm women. But the cutting-off of women's opportunities was an inevitable concomitant of the chosen scheme -- as inevitable as the proposition that if tails is up, heads must be down. Where a law's consequences are *that* inevitable, [\[**2296\]](#) can they meaningfully be described as unintended?" [451 F.Supp., at 151.](#)

This rhetorical question implies that a negative answer is obvious, but it is not. The decision to grant a preference to veterans was of course "intentional." So, necessarily, did an adverse impact upon nonveterans follow from that decision. And it cannot seriously be argued that the Legislature of Massachusetts could have been unaware that most veterans are men. It would thus be disingenuous [\[****41\]](#) to say that the adverse consequences of this legislation for women were unintended, in the sense that they were not volitional or in the sense that they were not foreseeable.

[\[*279\]](#) "

[LEdHN\[12A\]](#) [12A][HN16](#) Discriminatory purpose," however, implies more than intent as volition or intent as awareness of consequences. See [United Jewish Organizations v. Carey, 430 U.S. 144, 179](#) (concurring opinion). ²⁴ It implies

that [\[***888\]](#) the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group. ²⁵ Yet nothing in the record demonstrates that this preference for veterans was originally devised or subsequently re-enacted because it would accomplish the collateral goal of keeping women in a stereotypic and predefined place in the Massachusetts Civil Service.

[\[****42\]](#) [LEdHN\[12B\]](#) [12B]

To the contrary, the statutory history shows that the benefit of the preference was consistently offered to "any person" who was a veteran. That benefit has been extended to women under a very broad statutory definition of the term veteran. ²⁶ The preference formula itself, which is the focal [\[****43\]](#) [\[*280\]](#) point of this challenge, was first adopted -- so it appears from this record -- out of a perceived need to help a small group of older Civil War veterans. It has since been reaffirmed and extended only to cover new veterans. ²⁷ [HN18](#)

on objective factors, several of which were outlined in [Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 266.](#) The inquiry is practical. What a legislature or any official entity is "up to" may be plain from the results its actions achieve, or the results they avoid. Often it is made clear from what has been called, in a different context, "the give and take of the situation." [Cramer v. United States, 325 U.S. 1, 32-33](#) (Jackson, J.).

²⁵ This is not to say that the inevitability or foreseeability of consequences of a neutral rule has no bearing upon the existence of discriminatory intent. Certainly, when the adverse consequences of a law upon an identifiable group are as inevitable as the gender-based consequences of ch. 31, [§ 23](#), a strong inference that the adverse effects were desired can reasonably be drawn. But in this inquiry -- made as it is under the Constitution -- an inference is a working tool, not a synonym for proof. When, as here, the impact is essentially an unavoidable consequence of a legislative policy that has in itself always been deemed to be legitimate, and when, as here, the statutory history and all of the available evidence affirmatively demonstrate the opposite, the inference simply fails to ripen into proof.

²⁶ See nn. 8, 17, *supra*.

²⁷ The appellee has suggested that the former statutory exception for "women's requisitions," see nn. 13, 14, *supra*, supplies evidence that

²⁴ [HN17](#) Proof of discriminatory intent must necessarily usually rely

When the totality of legislative actions establishing and extending the Massachusetts veterans' preference are considered, see [Washington v. Davis](#), 426 U.S., at 242, the law remains what it purports to be: a preference for veterans of either sex over [**2297] nonveterans of either sex, not for men over women.

[****44] IV

[LEdHN\[1D\]](#) [1D]Veterans' hiring preferences represent an awkward -- and, many argue, unfair -- exception to the widely shared view that merit and merit alone should prevail in the employment policies of government. After a war, such laws have been enacted virtually without opposition. During peacetime, they inevitably have come to be viewed in many quarters as undemocratic and unwise.²⁸ Absolute and permanent preferences, [***889] as the troubled history of this law demonstrates, have always been subject to the objection that they give the veteran [*281] more than a square deal. But the [Fourteenth Amendment](#) "cannot be made a refuge from ill-advised . . . laws." [District of Columbia v. Brooke](#), 214 U.S. 138, 150. The substantial edge granted to veterans by ch. 31, § 23, may reflect unwise policy. The appellee, however, has simply failed to demonstrate that the law in any way reflects a purpose to discriminate on the basis of sex.

Massachusetts, when it established and subsequently reaffirmed the absolute-preference legislation, assumed that women would not or should not compete with men. She has further suggested that the former provision extending the preference to certain female dependents of veterans, see n. 10, *supra*, demonstrates that ch. 31, § 23, is laced with "old notions" about the proper roles and needs of the sexes. See [Califano v. Goldfarb](#), 430 U.S. 199; [Weinberger v. Wiesenfeld](#), 420 U.S. 636. But the first suggestion is totally belied by the statutory history, see [supra](#), at 267-271, and nn. 19, 20, and the second fails to account for the consistent statutory recognition of the contribution of women to this Nation's military efforts.

²⁸ See generally Hearings on Veterans' Preference Oversight before the Subcommittee on Civil Service of the House Post Office and Civil Service Committee, 95th Cong., 1st Sess. (1977); Report of Comptroller General, *Conflicting Congressional Policies: Veterans' Preference and Apportionment vs. Equal Employment Opportunity* (Sept. 29, 1977).

[****45] The judgment is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Concur by: STEVENS

Concur

MR. JUSTICE STEVENS, with whom MR. JUSTICE WHITE joins, concurring.

While I concur in the Court's opinion, I confess that I am not at all sure that there is any difference between the two questions posed *ante*, at 274. If a classification is not overtly based on gender, I am inclined to believe the question whether it is covertly gender based is the same as the question whether its adverse effects reflect invidious gender-based discrimination. However the question is phrased, for me the answer is largely provided by the fact that the number of males disadvantaged by Massachusetts' veterans' preference (1,867,000) is sufficiently large -- and sufficiently close to the number of disadvantaged females (2,954,000) -- to refute the claim that the rule was intended to benefit males as a class over females as a class.

Dissent by: MARSHALL

Dissent

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, dissenting.

Although acknowledging that in some circumstances, discriminatory intent may be inferred from the inevitable or foreseeable impact of a statute, *ante*, [****46] at 279 n. 25, the Court concludes that no such intent has been established here. I cannot agree. In my judgment, Massachusetts' choice of an absolute veterans' preference system evinces purposeful [*282] gender-based discrimination. And because the

statutory scheme bears no substantial relationship to a legitimate governmental objective, it cannot withstand scrutiny under the [Equal Protection Clause](#).

I

The District Court found that the "prime objective" of the Massachusetts veterans' preference statute, [Mass. Gen. Laws Ann., ch. 31, § 23](#), was to benefit individuals with prior military service. [Anthony v. Commonwealth](#), 415 F.Supp. 485, 497 (Mass. 1976). See [Feeney v. Massachusetts](#), 451 F.Supp. 143, 145 (Mass. 1978). Under the Court's analysis, this factual determination "necessarily compels the conclusion that the State intended nothing more than to prefer 'veterans.' Given this finding, simple logic suggests that an intent to exclude women from significant public jobs was not at work in this law." *Ante*, at 277. I find the Court's logic neither simple nor compelling.

That a legislature seeks to advantage one group does [****47] not, as a matter of logic or of common sense, exclude the possibility that it also intends to [***890] disadvantage another. Individuals in general and lawmakers in particular [**2298] frequently act for a variety of reasons. As this Court recognized in [Arlington Heights v. Metropolitan Housing Dev. Corp.](#), 429 U.S. 252, 265 (1977), "[rarely] can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern." Absent an omniscience not commonly attributed to the judiciary, it will often be impossible to ascertain the sole or even dominant purpose of a given statute. See [McGinnis v. Royster](#), 410 U.S. 263, 276-277 (1973); Ely, Legislative and Administrative Motivation in Constitutional Law, 79 Yale L. J. 1205, 1214 (1970). Thus, the critical constitutional inquiry is not whether an illicit consideration was the primary or but-for cause of a decision, but rather whether it had an appreciable role in shaping a given legislative enactment. Where there is [*283] "proof that a discriminatory purpose has been a

motivating factor in the [****48] decision, . . . judicial deference is no longer justified." [Arlington Heights v. Metropolitan Housing Dev. Corp.](#), *supra*, at 265-266 (emphasis added).

Moreover, since reliable evidence of subjective intentions is seldom obtainable, resort to inference based on objective factors is generally unavoidable. See [Beer v. United States](#), 425 U.S. 130, 148-149, n. 4 (1976) (MARSHALL, J., dissenting); cf. [Palmer v. Thompson](#), 403 U.S. 217, 224-225 (1971); [United States v. O'Brien](#), 391 U.S. 367, 383-384 (1968). To discern the purposes underlying facially neutral policies, this Court has therefore considered the degree, inevitability, and foreseeability of any disproportionate impact as well as the alternatives reasonably available. See [Monroe v. Board of Commissioners](#), 391 U.S. 450, 459 (1968); [Goss v. Board of Education](#), 373 U.S. 683, 688-689 (1963); [Gomillion v. Lightfoot](#), 364 U.S. 339 (1960); [Griffin v. Illinois](#), 351 U.S. 12, 17 n. 11 (1956). Cf. [Albemarle Paper Co. v. Moody](#), 422 U.S. 405, 425 (1975). [****49]

In the instant case, the impact of the Massachusetts statute on women is undisputed. Any veteran with a passing grade on the civil service exam must be placed ahead of a nonveteran, regardless of their respective scores. The District Court found that, as a practical matter, this preference supplants test results as the determinant of upper level civil service appointments. [415 F.Supp., at 488-489](#). Because less than 2% of the women in Massachusetts are veterans, the absolute-preference formula has rendered desirable state civil service employment an almost exclusively male prerogative. [451 F.Supp., at 151](#) (Campbell, J., concurring).

As the District Court recognized, this consequence follows foreseeably, indeed inexorably, from the long history of policies severely limiting women's participation in the military.¹ [*284] Although

¹ See [Anthony v. Massachusetts](#), 415 F.Supp. 485, 490, 495-499 (Mass. 1976); [Feeney v. Massachusetts](#), 451 F.Supp. 143, 145, 148

neutral in form, [***891] the [**2299] statute is anything but neutral in application. It inescapably reserves a major sector of public employment to "an already established class which, as a matter of historical fact, is 98% male." *Ibid.* Where the foreseeable impact of a facially neutral policy is so disproportionate, [****50] the burden should rest on the State to establish that sex-based considerations played no part in the choice of the particular legislative scheme. Cf. [*Castaneda v. Partida*, 430 U.S. 482 \(1977\)](#); [*Washington v. Davis*, 426 U.S. 229, 241 \(1976\)](#); [*Alexander v. Louisiana*, 405 U.S. 625, 632 \(1972\)](#); see generally *Brest, Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 Sup. Ct. Rev. 95, 123.

[****51] Clearly, that burden was not sustained here. The legislative history of the statute reflects the Commonwealth's patent appreciation of the impact the preference system would have on women, and an equally evident desire to mitigate that impact only with respect to certain traditionally female occupations. Until 1971, the statute and implementing civil service [*285] regulations exempted from operation of the preference any job requisitions "especially calling for women." 1954 Mass. Acts, ch. 627, § 5. See also 1896 Mass.

([Mass. 1978](#)). In addition to the 2% quota on women's participation in the Armed Forces, see *ante*, at 270 n. 21, enlistment and appointment requirements have been more stringent for females than males with respect to age, mental and physical aptitude, parental consent, and educational attainment. M. Binkin & S. Bach, *Women and the Military* (1977) (hereinafter Binkin and Bach); Note, *The Equal Rights Amendment and the Military*, 82 Yale L. J. 1533, 1539 (1973). Until the 1970's, the Armed Forces precluded enlistment and appointment of women, but not men, who were married or had dependent children. See [415 F.Supp., at 490](#); App. 85; Exs. 98, 99, 103, 104. Sex-based restrictions on advancement and training opportunities also diminished the incentives for qualified women to enlist. See Binkin and Bach 10-17; Beans, *Sex Discrimination in the Military*, 67 Mil. L. Rev. 19, 59-83 (1975). Cf. [*Schlesinger v. Ballard*, 419 U.S. 498, 508 \(1975\)](#).

Thus, unlike the employment examination in [*Washington v. Davis*, 426 U.S. 229 \(1976\)](#), which the Court found to be demonstrably job related, the Massachusetts preference statute incorporates the results of sex-based military policies irrelevant to women's current fitness for civilian public employment. See [415 F.Supp., at 498-499](#).

Acts, ch. 517, § 6; 1919 Mass. Acts, ch. 150, § 2; 1945 Mass. Acts, ch. 725, § 2 (e); 1965 Mass. Acts, ch. 53; *ante*, at 266 nn. 13, 14. In practice, this exemption, coupled with the absolute preference for veterans, has created a gender-based civil service hierarchy, with women occupying low-grade clerical and secretarial jobs and men holding more responsible and remunerative positions. See [415 F.Supp., at 488](#); [451 F.Supp., at 148 n. 9](#).

Thus, for over 70 years, the Commonwealth has maintained, as an integral part of its veterans' preference system, an exemption relegating female civil service applicants to occupations traditionally [****52] filled by women. Such a statutory scheme both reflects and perpetuates precisely the kind of archaic assumptions about women's roles which we have previously held invalid. See [Orr v. Orr](#), 440 U.S. 268 (1979); [Califano v. Goldfarb](#), 430 U.S. 199, 210-211 (1977); [Stanton v. Stanton](#), 421 U.S. 7, 14 (1975); [***892] [Weinberger v. Wiesenfeld](#), 420 U.S. 636, 645 (1975). Particularly when viewed against the range of less discriminatory alternatives available to assist veterans, ² [****53] Massachusetts' choice of a formula that so severely restricts public employment opportunities for women cannot reasonably be thought gender-neutral. Cf. *Albemarle Paper Co. v. Moody*, [supra](#), at 425. The Court's conclusion to the contrary -- that "nothing in the record" evinces a "collateral goal of keeping women in a stereotypic and predefined place in the [*286] Massachusetts Civil Service," *ante*, at 279 -- displays a singularly myopic view of the facts

² Only four States afford a preference comparable in scope to that of Massachusetts. See Fleming & Shanor, *Veterans' Preferences and Public Employment: Unconstitutional Gender Discrimination?*, 26 Emory L. J. 13, 17 n. 13 (1977) (citing statutes). Other States and the Federal Government grant point or tie-breaking preferences that do not foreclose opportunities for women. See *id.*, at 13, and nn. 12, 14; *ante*, at 261 n. 7; Hearings on Veterans' Preference Oversight before the Subcommittee on Civil Service of the House Committee on Post Office and Civil Service, 95th Cong., 1st Sess., 4 (1977) (statement of Alan Campbell, Chairman, United States Civil Service Commission).

established below.³

II

[**2300] To survive challenge under the Equal Protection Clause, statutes reflecting gender-based discrimination must be substantially related to the achievement of important governmental objectives. See Califano v. Webster, 430 U.S. 313, 316-317 (1977); Craig v. Boren, 429 U.S. 190, 197 (1976); Reed v. Reed, 404 U.S. 71, 76 (1971). Appellants here advance three interests in support of the absolute-preference system: (1) assisting veterans in their readjustment to civilian life; (2) [****54] encouraging military enlistment; and (3) rewarding those who have served their country. Brief for Appellants 24. Although each of those goals is unquestionably legitimate, the "mere recitation of a benign, compensatory purpose" cannot of itself insulate legislative classifications from constitutional scrutiny. Weinberger v. Wiesenfeld, supra, at 648. And in this case, the Commonwealth has failed to establish a sufficient relationship between its objectives and the means chosen to effectuate them.

With respect to the first interest, facilitating veterans' transition to civilian status, the statute is plainly overinclusive. Cf. Trimble v. Gordon, 430 U.S. 762, 770-772 (1977); Jimenez v. Weinberger, 417 U.S. 628, 637 (1974). By conferring a permanent preference, the legislation allows veterans to invoke their advantage repeatedly, without regard to their date of discharge. As the record demonstrates, a substantial [*287] majority of those currently enjoying the benefits of the system are not recently [***893] discharged

veterans in need of readjustment assistance.⁴

[****55] Nor is the Commonwealth's second asserted interest, encouraging military service, a plausible justification for this legislative scheme. In its original and subsequent re-enactments, the statute extended benefits retroactively to veterans who had served during a prior specified period. See *ante*, at 265-267. If the Commonwealth's "actual purpose" is to induce enlistment, this legislative design is hardly well suited to that end. See Califano v. Webster, *supra*, at 317; Weinberger v. Wiesenfeld, *supra*, at 648. For I am unwilling to assume what appellants made no effort to prove, that the possibility of obtaining an *ex post facto* civil service preference significantly influenced the enlistment decisions of Massachusetts residents. Moreover, even if such influence could be presumed, the statute is still grossly overinclusive in that it bestows benefits on men drafted as well as those who volunteered.

Finally, the Commonwealth's third interest, rewarding veterans, does not "adequately justify the salient features" of this preference system. Craig v. Boren, *supra*, at 202-203. See Orr v. Orr, *supra*, at 281. [****56] Where a particular statutory scheme visits substantial hardship on a class long subject to discrimination, the legislation cannot be sustained unless "'carefully tuned to alternative considerations.'" Trimble v. Gordon, *supra*, at 772. See Caban v. Mohammed, 441 U.S. 380, 392-393, n. 13 (1979); Mathews v. Lucas, 427 U.S. 495 (1976). Here, there are a wide variety of less discriminatory means by which Massachusetts could effect its compensatory purposes. For example, a point preference system, such as that maintained by many States and the Federal Government, [*288] see n. 2, *supra*, or an absolute preference for a limited duration, would reward veterans without excluding all qualified women

³ Although it is relevant that the preference statute also disadvantages a substantial group of men, see *ante*, at 281 (STEVENS, J., concurring), it is equally pertinent that 47% of Massachusetts men over 18 are veterans, as compared to 0.8% of Massachusetts women. App. 83. Given this disparity, and the indicia of intent noted *supra*, at 284-285, the absolute number of men denied preference cannot be dispositive, especially since they have not faced the barriers to achieving veteran status confronted by women. See n. 1, *supra*.

⁴ The eligibility lists for the positions Ms. Feeney sought included 95 veterans for whom discharge information was available. Of those 95 males, 64 (67%) were discharged prior to 1960. App. 106, 150-151, 169-170.

from upper level civil service positions. Apart from public employment, the Commonwealth, can, and does, afford assistance to veterans in various ways, including tax abatements, educational subsidies, and special programs for needy veterans. [**2301] See [Mass. Gen. Laws Ann., ch. 59, § 5](#), Fifth (West Supp. 1979); Mass. Gen. Laws Ann., ch. 69, §§ 7, 7B (West Supp. 1979); and Mass. Gen. Laws Ann., chs. 115, 115A [****57] (West 1969 and Supp. 1978). Unlike these and similar benefits, the costs of which are distributed across the taxpaying public generally, the Massachusetts statute exacts a substantial price from a discrete group of individuals who have long been subject to employment discrimination,⁵ and who, "because of circumstances totally beyond their control, have [***894] [had] little if any chance of becoming members of the preferred class." [415 F.Supp., at 499](#). See n. 1, *supra*.

In its present unqualified form, the veterans' preference statute precludes all but a small fraction of Massachusetts women from obtaining any civil service position also of interest [****58] to men. See [451 F.Supp., at 151](#) (Campbell, J., concurring). Given the range of alternatives available, this degree of preference is not constitutionally permissible.

I would affirm the judgment of the court below.

References

Validity, under [equal protection clause of Fourteenth Amendment](#), of gender-based classifications arising by operation of state law

77 Am Jur 2d, Veterans and Veterans' Laws 122

USCS, [Constitution, 14th Amendment](#)

US L Ed Digest, Constitutional Law 325

L Ed Index to Annos, Equal Protection of the Laws; Sex; Veterans' Preference Act; Women

ALR Quick Index, Sex Discrimination; Veterans

Federal Quick Index, Civil Service; Equal Protection of the Laws; Sex Discrimination; Veterans

Annotation References:

Validity, under [equal protection clause of Fourteenth Amendment](#), of gender-based classifications arising by operation of state law. [60 L Ed 2d 1188](#).

Sex discrimination. [27 L Ed 2d 935](#).

Race discrimination. [94 L Ed 1121](#), [96 L Ed 1291](#), [98 L Ed 882](#), [100 L Ed 488](#), [3 L Ed 2d 1556](#), [6 L Ed 2d 1302](#), [10 L Ed 2d 1105](#), [15 L Ed 2d 990](#), [21 L Ed 2d 915](#). [****59]

End of Document

⁵ See [Frontiero v. Richardson](#), 411 U.S. 677, 689 n. 23 (1973); [Kahn v. Shevin](#), 416 U.S. 351, 353-354 (1974); United States Bureau of the Census, Current Population Reports, No. 107, Money Income and Poverty Status of Families and Persons in the United States: 1976 (Advance Report) (Table 7) (Sept. 1977).



Cited

As of: October 18, 2026 7:14 AM Z

Pham v. Superior Court

Court of Appeal of California, Fourth Appellate District, Division Three

December 16, 2025, Opinion Filed

G065471

Reporter

117 Cal. App. 5th 115 *; 340 Cal. Rptr. 3d 204 **; 2025 Cal. App. LEXIS 830 ***; 2025 LX 558830; 2025 WL 3638359

HOANG LONG NGOC PHAM, Petitioner, v. THE SUPERIOR COURT OF ORANGE COUNTY, Respondent; NOZOMI KON, Real Party in Interest.

Notice: CERTIFIED FOR PARTIAL PUBLICATION*

Prior History: Original proceedings; petition for writ of mandate to challenge an order of the Superior Court of Orange County, No. 24D007427, Robert F. Kohler*, Temporary Judge.

Disposition: Petition denied.

Core Terms

embryo, divorce, contractual, frozen, trial court, partner, progenitor, extrinsic evidence, fertility, legal separation, reasonably susceptible, unambiguous, mutual consent, in vitro, contemporaneous, procreate, parties, ade

Case Summary

Overview

HOLDINGS: [1]-Where, as here, the parties have entered into a valid contract specifying how frozen embryos created by in vitro fertilization (IVF) shall

* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of part I. of the Discussion.

* Pursuant to [Cal. Const., art. VI, § 21](#).

be treated in the event of divorce, the contract governs. The contractual approach minimizes misunderstandings and maximizes procreative liberty by reserving to the progenitors the authority to make what is in the first instance a quintessentially personal, private decision; [2]-The trial court correctly interpreted the IVF Agreement and properly awarded the embryos to the real party in interest, who wanted to use them to attempt to obtain a pregnancy. Petitioner acknowledged in writing that he freely consented to undergo an IVF procedure to attempt to obtain a pregnancy and agreed the resulting frozen embryos would be made available to the real party in interest if she wished, in the event of divorce or legal separation.

Outcome

Petition for writ of mandate denied.

LexisNexis® Headnotes

Contracts Law > Contract

Formation > Consideration > Enforcement of Promises

Business & Corporate

Compliance > ... > Contract

Formation > Consideration > Enforcement of Promises

Family Law > Paternity &

Surrogacy > Surrogacy > Disposition of Eggs,

Preembryos & Sperm

HN1 Consideration, Enforcement of Promises

Where the parties have entered into a valid contract specifying how frozen embryos created by in vitro fertilization would be treated in the event of divorce, the parties' contract governs.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions

HN2 Appeals, Reviewability of Lower Court Decisions

A minute order that directs the preparation of a formal written order is not itself appealable.

Contracts Law > Contract Interpretation > Intent

HN3 Contract Interpretation, Intent

A court interprets a contract so as to give effect to the mutual intention of the contracting parties at the time the contract was formed. The court ascertains that intention solely from the written contract if possible, but also considers the circumstances under which the contract was made and the matter to which it relates. The court considers the contract as a whole and interprets its language in context so as to give effect to each provision, rather than interpret contractual language in isolation. It interprets words in accordance with their ordinary and popular sense, unless the words are used in a technical sense or a special meaning is given to them by usage. If contractual language is clear and explicit and does not involve an absurdity, the plain meaning governs. The parties' undisclosed intent or understanding is irrelevant to contract interpretation.

Civil Procedure > Appeals > Standards of

Review > De Novo Review

Contracts Law > Contract Interpretation > Ambiguities & Contra Proferentem

Evidence > Types of Evidence > Documentary Evidence > Parol Evidence

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

HN4 Standards of Review, De Novo Review

Whether a contract is ambiguous — i.e., reasonably susceptible to more than one interpretation — is a question of law subject to independent review on appeal. Extrinsic evidence is admissible to prove a meaning to which the contract is reasonably susceptible. If the trial court decides, after receiving the extrinsic evidence, the language of the contract is reasonably susceptible to the interpretation urged, the evidence is admitted to aid in interpreting the contract.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Contracts Law > Contract Interpretation > Ambiguities & Contra Proferentem

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

HN5 Standards of Review, De Novo Review

An appellate court independently reviews the trial court's interpretation of a contract, including the resolution of any ambiguity, unless the interpretation depends on the trial court's resolution of factual questions concerning the credibility of extrinsic evidence.

Contracts Law > Contract

Formation > Consideration > Enforcement of Promises

Business & Corporate

Compliance > ... > Contract

Formation > Consideration > Enforcement of Promises

Family Law > Paternity &

Surrogacy > Surrogacy > Disposition of Eggs, Preembryos & Sperm

Family Law > Marital Termination & Spousal Support > Dissolution & Divorce > Procedures

HN6 Consideration, Enforcement of Promises

Under a contractual approach, a court first looks to whether there is an enforceable agreement between the parties for the disposition of frozen embryos upon divorce; if there is, the court enforces the parties' agreement. This approach allows the progenitors—not the state and not the courts—to make this deeply personal life choice.

Contracts Law > Contract

Formation > Consideration > Enforcement of Promises

Business & Corporate

Compliance > ... > Contract

Formation > Consideration > Enforcement of Promises

Family Law > Paternity &

Surrogacy > Surrogacy > Disposition of Eggs, Preembryos & Sperm

HN7 Consideration, Enforcement of Promises

Where the parties have entered into a valid contract specifying how frozen embryos shall be treated in the event of divorce or legal separation, the contractual approach governs. The contractual approach minimizes misunderstandings and maximizes procreative liberty by reserving to the progenitors the authority to make what is in the first instance a quintessentially personal, private

decision. There are also significant benefits to making this decision in advance, rather than at the moment of disposition. Preexisting agreements promote serious discussions between the parties prior to participating in in vitro fertilization; and manifest choices made before disputes erupt. This minimizes misunderstandings that might arise in the future, provides certainty for progenitors and fertility clinics, and decreases the likelihood of litigation.

Family Law > Paternity &

Surrogacy > Surrogacy > Disposition of Eggs, Preembryos & Sperm

HN8 Surrogacy, Disposition of Eggs, Preembryos & Sperm

California law requires a health care provider that is providing fertility treatments to give a form to the male and female partner, or the individual without a partner, as applicable, that sets forth advanced written directives regarding the disposition of embryos, including certain choices in the event the partners separate or divorce. [*Health & Saf. Code, § 125315, subd. \(b\)*](#). When the parties separate or divorce, the choices for disposition of the embryos include making them available to the female partner or the male partner. [*§ 125315, subd. \(b\)\(3\)\(A\)-\(B\)*](#).

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

Constitutional Law > The Judiciary > Case or Controversy > Constitutionality of Legislation

HN9 Reviewability of Lower Court Decisions, Preservation for Review

An as-applied constitutional challenge is forfeited unless previously raised.

Civil Procedure > Appeals > Appellate Briefs

Civil Procedure > Appeals > Reviewability of
Lower Court Decisions > Preservation for
Review

HN10 Appeals, Appellate Briefs

When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, the appellate treats the point as waived.

Headnotes/Summary

Summary

[*115] CALIFORNIA OFFICIAL REPORTS
SUMMARY

In a marital dissolution action, the trial court awarded two frozen embryos to the real party in interest, who wanted to use them to attempt to bear a child. The embryos were created under a written agreement with an in vitro fertilization (IVF) provider. The trial court concluded the IVF agreement was valid, clear, and unambiguous. On appeal, petitioner asserted he no longer wanted to father a child with the real party in interest, and he sought to have the embryos destroyed. (Superior Court of Orange County, No. 24D007427, Robert F. Kohler, Temporary Judge.[†])

The Court of Appeal treated petitioner's appeal as a petition for writ of mandate and denied the petition. The court concluded that where, as here, the parties have entered into a valid contract specifying how frozen embryos created by IVF shall be treated in the event of divorce, the contract governs. The contractual approach minimizes misunderstandings and maximizes procreative liberty by reserving to the progenitors the authority to make what is in the first instance a quintessentially personal, private decision. The contractual approach is consistent

with California's articulated public policy. The trial court correctly interpreted the IVF Agreement and properly awarded the embryos to the real party in interest. Petitioner acknowledged in writing that he freely consented to undergo an IVF procedure to attempt to obtain a pregnancy and agreed the resulting frozen embryos would be made available to the real party in interest if she wished, in the event of divorce or legal separation. Petitioner forfeited his argument the IVF agreement would violate his right not to procreate. Petitioner did not demonstrate where he raised this argument in the trial court, and based on the court's review of the record he provided on appeal, it found no indication he sufficiently raised the issue so **[*116]** as to require the court below to rule on it. (Opinion by Gooding, J., with Sanchez, Acting P. J., and Scott, J., concurring.)

Headnotes

CALIFORNIA OFFICIAL REPORTS
HEADNOTES

CA(1) (1)

**Dissolution of Marriage § 48—Disposition of
Frozen Embryos—Governed by Parties'
Contract—Attempt to Obtain Pregnancy.**

Where the parties entered into a valid contract specifying how frozen embryos created by in vitro fertilization (IVF) would be treated in the event of divorce, the parties' contract governed. The trial court correctly interpreted the IVF agreement and properly awarded the embryos to the party who wanted to use them in an attempt to obtain a pregnancy.

[*\[Cal. Forms of Pleading and Practice \(2025\) ch. 412, Paternity and Parentage, § 412.13.\]*](#)

CA(2) (2)

Contracts § 28—Interpretation—Intention of

[†] Pursuant to [California Constitution, article VI, section 21](#) **[***1]** .

Parties—Plain Meaning.

A court interprets a contract so as to give effect to the mutual intention of the contracting parties at the time the contract was formed. The court ascertains that intention solely from the written contract if possible, but also considers the circumstances under which the contract was made and the matter to which it relates. The court considers the contract as a whole and interprets its language in context so as to give effect to each provision, rather than interpret contractual language in isolation. It interprets words in accordance with their ordinary and popular sense, unless the words are used in a technical sense or a special meaning is given to them by usage. If contractual language is clear and explicit and does not involve an absurdity, the plain meaning governs. The parties' undisclosed intent or understanding is irrelevant to contract interpretation.

CA(3) (3)

Contracts § 24—Interpretation—Whether Ambiguous—Independent Review on Appeal—Extrinsic Evidence.

Whether a contract is ambiguous—i.e., reasonably susceptible to more than one interpretation—is a question of law subject to independent review on appeal. Extrinsic evidence is admissible to prove a meaning to which the contract is reasonably susceptible. If the trial court decides, after receiving the extrinsic evidence, the language of the contract is reasonably susceptible to the interpretation urged, the evidence is admitted to aid in interpreting the contract.

CA(4) (4)

Contracts § 24—Interpretation—Resolution of Ambiguity—Independent Review on Appeal—Extrinsic Evidence.

An appellate court independently reviews the trial

court's interpretation of a contract, including [*117] the resolution of any ambiguity, unless the interpretation depends on the trial court's resolution of factual questions concerning the credibility of extrinsic evidence.

CA(5) (5)

Dissolution of Marriage § 48—Disposition of Frozen Embryos—Contractual Approach—Personal Life Choice.

Under a contractual approach, a court first looks to whether there is an enforceable agreement between the parties for the disposition of frozen embryos upon divorce; if there is, the court enforces the parties' agreement. This approach allows the progenitors—not the state and not the courts—to make this deeply personal life choice.

CA(6) (6)

Dissolution of Marriage § 48—Disposition of Frozen Embryos—Contractual Approach—Making Decision in Advance.

Where the parties have entered into a valid contract specifying how frozen embryos shall be treated in the event of divorce or legal separation, the contractual approach governs. The contractual approach minimizes misunderstandings and maximizes procreative liberty by reserving to the progenitors the authority to make what is in the first instance a quintessentially personal, private decision. There are also significant benefits to making this decision in advance, rather than at the moment of disposition. Preexisting agreements promote serious discussions between the parties prior to participating in in vitro fertilization; and manifest choices made before disputes erupt. This minimizes misunderstandings that might arise in the future, provides certainty for progenitors and fertility clinics, and decreases the likelihood of litigation.

CA(7) (7)**Dissolution of Marriage § 48—Disposition of Frozen Embryos—Written Directives—Making Available to Female or Male Partner.**

California law requires a health care provider that is providing fertility treatments to give a form to the male and female partner, or the individual without a partner, as applicable, that sets forth advanced written directives regarding the disposition of embryos, including certain choices in the event the partners separate or divorce (*Health & Saf. Code, § 125315, subd. (b)*). When the parties separate or divorce, the choices for disposition of the embryos include making them available to the female partner or the male partner (*§ 125315, subd. (b)(3)(A)–(B)*).

CA(8) (8)**Appellate Review § 32—Presenting and Preserving Questions in Trial Court—As-applied Constitutional Challenge.**

An as-applied constitutional challenge is forfeited unless previously raised.

CA(9) (9)**Appellate Review § 106—Briefs—Failure to Support Point—Waiver.**

When an appellant fails to raise a point, or asserts it but fails to support [*118] it with reasoned argument and citations to authority, the appellate court treats the point as waived.

Counsel: Hoang Long Ngoc Pham, in pro. per., for Petitioner.

No appearance for Respondent.

Nozomi Kon, in pro. per., for Real Party in Interest.

Judges: Opinion by Gooding, J., with Sanchez,

Acting P. J., and Scott, J., concurring.

Opinion by: Gooding, J.

Opinion

[**207] **GOODING, J.**—In this case of apparent first impression in California appellate courts, we are called upon to resolve a dispute between a couple regarding what will happen to two frozen embryos—which they created under a written agreement with an in vitro fertilization (IVF) provider—now that their marriage is ending. The issue arose in the course of a marital dissolution action between Hoang Long Ngoc Pham and Nozomi Kon. Pham appeals an order awarding the embryos to Kon, who wishes to use them to attempt to bear a child. Asserting he no longer wants to father a child with Kon, Pham seeks to have the embryos discarded.

At the center of the dispute is the written agreement Pham and Kon entered into with their IVF provider when they embarked on the IVF process. The agreement is entitled “Informed [***2] Consent In Vitro Fertilization (IVF)” (IVF Agreement). (Some capitalization omitted.) Among other things, it identified specific options for the disposition of the couple’s frozen embryos created during the IVF process if specified “adverse event[s]” should occur. For the adverse event of legal separation or divorce, Pham and Kon were offered the option to thaw and discard the embryos. They did not select that option. They also did not select the options to donate the embryos for research purposes or to donate them to another specified person or couple. Instead, Pham and Kon selected the option “[m]ade available to the partner if he/she wishes.” The trial court concluded the IVF Agreement was valid, clear, and unambiguous, and it awarded the embryos to Kon.

CA(1) (1) Although the order is not appealable, in the unpublished portion of this opinion, we exercise our discretion to treat the appeal as a petition for

writ of mandate. [HN1](#) In the published portion of this opinion, we conclude that where, as here, the parties have entered into a valid contract specifying how frozen embryos created by IVF shall be treated in the event of divorce, the [*119] parties' contract governs. We conclude the trial court [***3] correctly interpreted the IVF [**208] Agreement and awarded the embryos to Kon. We deny the petition.

FACTUAL AND PROCEDURAL BACKGROUND

Based on the limited record provided to us on appeal, Pham filed a petition for marital dissolution in October 2024. In January 2025, he filed a motion to discard two embryos being retained by an IVF provider, and Kon filed a request for order (RFO) seeking immediate rights to the frozen embryos.¹

On March 21, 2025, the trial court held an evidentiary hearing on Pham's motion and Kon's RFO. Pham testified he agreed to participate in the IVF process with Kon but asserted he has "the legal, moral right to change [his] mind and withdraw the consent before any embryos are creatively used." Kon wishes to have the embryos made available to her.

The trial court admitted the IVF Agreement as an exhibit. Pham testified he recognized the document and acknowledged he signed it. The beginning of the IVF Agreement stated Kon and Pham "freely consent to undergo an IVF procedure to attempt to obtain a pregnancy." The IVF Agreement included, among other things, a section entitled "ADVERSE

EVENT: LEGAL SEPARATION OR DIVORCE," which listed under that heading the following four options: [***4] (1) "[m]ade available to the partner if he/she wishes"; (2) "[d]onated to another person or couple (specify name)"; (3) "[t]hrowed and discarded"; and (4) "[d]onated for research."² The box next to the first option ("[m]ade available to the partner if he/she wishes") is checked, and there are two sets of initials next to that option. Pham testified one set of initials is his. Kon testified the other set of initials is hers and that she also signed the contract.

At the conclusion of the hearing, Pham requested the embryos be destroyed, whereas Kon requested the embryos be awarded to her. In a March [*120] 21, 2025 minute order, the trial court found the contract to be valid and unambiguous and awarded the embryos to Kon effective upon the signing of the order after hearing. The court's March 21, 2025 minute order directed Kon to prepare the order after hearing. On April 30, 2025, the court entered its findings and order after hearing, finding the IVF Agreement "valid, clear, and unambiguous" and awarding the embryos to Kon.

On May 1, 2025, Pham filed a notice of appeal.³

[**209] DISCUSSION

I.

² The IVF Agreement includes two other adverse event provisions, each of which also provided specific options for how to proceed if the event occurred. One adverse event was the death of one partner with frozen embryos; the option "[m]ade available to the other partner if she/he wishes" was checked, with two sets of initials placed next to it. The other adverse event was the death of both partners with frozen embryos; the option "[d]onate to another person or couple (specify name)" was checked, with the name of Pham's daughter written in and two sets of initials placed next to it.

³ Pham's notice of appeal stated he was appealing from the judgment or order dated March 21, 2025, which was the date of the trial court's minute order. [HN2](#) "A minute order that directs the preparation of a formal written order is not itself appealable." (*Estate of Sapp* (2019) 36 Cal.App.5th 86, 101 [248 Cal. Rptr. 3d 244].) We construe the appeal to be taken from the court's April 30, 2025 findings and order after hearing.

¹ Neither Pham's motion, Kon's RFO, nor any of the related briefing in the trial court is included in the record on appeal. We note the title of Pham's motion indicates there are two embryos at issue and a prior motion to dismiss filed by Kon in this court also refers to two cryopreserved embryos. Both parties confirmed at oral argument only two frozen embryos are at issue. We further note some courts use the term "pre-embryos," instead of embryos, when "refer[ing] to eggs that have been fertilized using the IVF process but not implanted in a uterus." (See *In re Marriage of Rooks* (2018) 2018 CO 85 [429 P.3d 579, 582] (Rooks).) Because both the parties and the trial court used the term embryos to refer to the two frozen embryos at issue here, we do the same.

APPEALABILITY* [NOT CERTIFIED FOR PUBLICATION]

II.

THE TERMS OF THE PARTIES' IVF AGREEMENT CONTROL

A. *Standard of Review* [***5]

HN3 CA(2) (2) “We interpret a contract so as to give effect to the mutual intention of the contracting parties at the time the contract was formed.” ([Dowling v. Farmers Ins. Exchange \(2012\) 208 Cal.App.4th 685, 695 \[145 Cal. Rptr. 3d 748\]](#); see also [Civ. Code, § 1636](#).) “We ascertain that intention solely from the written contract if possible, but also consider the circumstances under which the contract was made and the matter to which it relates. [Citations.] We consider the contract as a whole and interpret its language in context so as to give effect to each provision, rather than interpret contractual language in isolation. [Citation.] We interpret words in accordance with their ordinary and popular sense, unless the words are used in a technical sense or a special meaning is given to them by usage. [Citation.] If contractual language is clear and explicit and does not involve an absurdity, the plain meaning governs.” ([Dowling, at p. 695](#).) “The parties’ undisclosed intent or understanding is irrelevant to contract interpretation.” ([Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc. \(2003\) 109 Cal.App.4th 944, 956 \[135 Cal. Rptr. 2d 505\]](#).)

HN4 CA(3) (3) Whether a contract is ambiguous—i.e., reasonably susceptible to more than one interpretation—“is a question of law subject to independent review on appeal.” ([Scheenstra v. California Dairies, Inc. \(2013\) 213 Cal.App.4th 370, 389 \[153 Cal. Rptr. 3d 21\]](#).) “Extrinsic evidence is admissible to prove a meaning to which the contract is reasonably susceptible. [Citations.] If

the [***6] trial court decides, after receiving the extrinsic evidence, the language of the contract is reasonably susceptible to the interpretation urged, the evidence is admitted to aid in interpreting the contract.” ([Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc., supra, 109 Cal.App.4th at p. 955](#).)

HN5 CA(4) (4) “We independently review the trial court’s interpretation of a contract, including the resolution of any ambiguity, unless the interpretation depends on the trial court’s resolution of factual questions concerning the credibility of extrinsic evidence.” ([Dowling v. Farmers Ins. Exchange, supra, 208 Cal.App.4th at p. 694](#); see also [Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc., supra, 109 Cal.App.4th at p. 955](#) [“When no extrinsic evidence is introduced, or when the competent extrinsic evidence is not in conflict, the appellate court independently construes the contract”].)

Here, Pham has not cited any extrinsic evidence, much less shown with record citations that conflicting extrinsic evidence was presented to the court. We therefore independently review the contract interpretation issue.

[**210] B. *The Trial Court Correctly Interpreted and Applied the IVF Agreement*

The trial court determined the IVF Agreement was valid and unambiguous, and it awarded the embryos to Kon. We conclude the court correctly interpreted and applied the IVF Agreement.

Pham argues “the agreement did not expressly authorize [Kon] to use the embryos without [***7] [Pham’s] future consent, particularly in the event of divorce or separation.” He argues the phrase “‘made available to the partner if he/she wishes’ is inherently ambiguous and does not expressly waive the right to object post-divorce.” According to Pham, the phrase “‘made available’” “can mean transfer of custody for safekeeping, or conditional

* See footnote, *ante*, page 115.

availability subject to mutual consent.”

Pham’s arguments are unavailing. Considering the IVF Agreement as a whole, the disposition of the embryos in the event of legal separation or [*122] divorce is clear and unambiguous. The IVF Agreement set out three “ADVERSE EVENT” scenarios, each with multiple options for what the parties wanted to happen to the embryos if such an adverse event happened.⁴ Under the adverse event “LEGAL SEPARATION OR DIVORCE,” Pham and Kon selected and initialed the option “[m]ade available to the partner if he/she wishes.” They did not select “[t]hrowed and discarded.”

We conclude the phrase “[m]ade available to the partner if he/she wishes” is unambiguous in this context, and the only reasonable interpretation is the embryos are to be made available to Kon, if she wishes, so she may use them for the stated purpose of the IVF Agreement—i.e., [***8] to attempt to obtain a pregnancy. We conclude Pham’s alternative interpretation—that this clause only permitted Kon to take custody of the embryos for safekeeping and required further mutual consent for Kon to use the embryos to attempt to have a child—is not reasonable.⁵

⁴The IVF Agreement also addresses adverse events concerning the death of one or both partners. Both of those sections begin with the phrase “[w]e (I) wish the frozen embryos be” and then list the options for disposition. We recognize the section addressing the adverse event of legal separation or divorce does not include the same prefatory language. Pham has not argued the lack of this clause makes the adverse event section for legal separation or divorce ambiguous or unclear; nor does he dispute that the disposition of the frozen embryos is the subject of that section. Reading the contract as a whole, as we must (see [Civ. Code, § 1641](#)), it is clear the options set forth in the paragraph concerning the adverse event of legal separation or divorce were intended to express the parties’ wishes concerning the disposition of the frozen embryos under that particular scenario.

⁵At oral argument, Pham suggested we could not make any determination regarding disposition of the embryos under the IVF Agreement because the adverse event clause governing legal separation or divorce has not been triggered because the court has not yet entered an order dissolving the marriage. The record on appeal does not show Pham raised this issue in the court below, and he certainly did not raise it in his opening or reply briefs on appeal.

Having concluded the trial court correctly interpreted the contract, we turn to [**211] Pham’s arguments why the IVF Agreement should not control.

Pham asserts use of the frozen embryos to attempt to achieve a pregnancy requires contemporaneous mutual consent. In his view, embryos cannot be used “for reproductive purposes unless both parties affirmatively consent at the time of use—regardless of any prior written agreements.” Pham, however, cites no California authority supporting this proposition. Nor does he discuss [*123] the other approaches to this issue that other jurisdictions have adopted. There appear to be three leading approaches—the contractual approach, the balancing approach, and the contemporaneous mutual consent approach—to determine the disposition of frozen embryos upon divorce. (See [Bilbao v. Goodwin \(2019\) 333 Conn. 599 \[217 A.3d 977, 984\] \(Bilbao\)](#); see also, e.g., [Freed v. Freed \(Ind.Ct.App. 2024\) 227 N.E.3d 954, 965–967.](#))

HN6 CA(5) (5) Under the contractual approach, a court first looks to whether there is an enforceable agreement between the parties [***9] for the disposition of the embryos upon divorce; if there is, the court enforces the parties’ agreement. (See [Bilbao, supra, 217 A.3d at p. 984](#) [“Under the contractual approach, an agreement between progenitors governing disposition of the pre-embryos is presumed valid and enforceable in a dispute between them”]; [Kass v. Kass \(Ct. App. 1998\) 91 N.Y.2d 554 \[696 N.E.2d 174, 180, 673 N.Y.S.2d 350\]](#) [“Agreements between progenitors, or gamete donors, regarding disposition of their

The argument is therefore forfeited. (See [Coastline JX Holdings LLC v. Bennett \(2022\) 80 Cal.App.5th 985, 1012 \[296 Cal. Rptr. 3d 437\]](#) [argument not raised in trial court was forfeited]; [Karton v. Ari Design & Construction, Inc. \(2021\) 61 Cal.App.5th 734, 753 \[276 Cal. Rptr. 3d 46\]](#) [party’s new argument raised during oral argument was forfeited].) In any event, Pham made clear at oral argument that he filed the dissolution action and fully intends to obtain an order of dissolution. We note such an order can be sought by either party at any time, independent of any determination regarding division of assets and liabilities. (See [Fam. Code, § 2337.](#))

pre-zygotes should generally be presumed valid and binding, and enforced in any dispute between them”].) As one court explained, “[p]roponents of the contractual approach primarily argue that this approach allows ‘the progenitors—not the [s]tate and not the courts ... [to] make this deeply personal life choice.’ [Citation.] They also note that, by validating and enforcing a contract based rule, the approach promotes serious discussion between the progenitors in advance of divorce, gives progenitors and storage facilities a measure of certainty to plan for the future, and helps avoid costly and emotionally taxing litigation.” (*Bilbao*, at p. 984.) That court, however, also noted “[c]ritics of this approach focus on the fact that pre-embryos can be stored indefinitely and that progenitors might change their minds about disposition as time passes.” [***10] (*Ibid.*)

Under the balancing approach, courts weigh the parties’ respective interests. (See *Rooks*, supra, 429 P.3d at pp. 581, 593; see also *Bilbao*, supra, 217 A.3d at p. 985.) For example, the Colorado Supreme Court has articulated several nonexhaustive factors to consider, including “the intended use of the party seeking to preserve the disputed pre-embryos” and the ability “of the party seeking to implant the disputed pre-embryos to have biological children through other means.” (*Rooks*, at p. 593.) Some courts use the balancing approach only where there is no enforceable agreement between the parties. (See *id.* at pp. 581, 592–593; see also *Bilbao*, at p. 985 [“most courts use the balancing approach as a second step, only to be employed after it is determined that no enforceable agreement between the progenitors exists and, thus, that the contractual approach does not resolve the issue”].)

Under the contemporaneous mutual consent approach, both parties must agree, at the time of disposition of the embryos, to what will be done with them, and if they cannot agree, the status quo is maintained. (*In re Marriage of [*124] Witten* (*Iowa* 2003) 672 N.W.2d 768, 783.) Pham asserts “[t]he overwhelming majority of courts that have

confronted embryo disputes endorse the mutual contemporaneous consent model.” But he cites only two cases adopting that approach. (See *Witten*, [**212] at pp. 781–783; see also *A.Z. v. B.Z.* (2000) 431 Mass. 150 [725 N.E.2d 1051, 1057–1058 & fn. 22] [noting [***11] “even had the husband and the wife entered into an unambiguous agreement between themselves regarding the disposition of the frozen preembryos, we would not enforce an agreement that would compel one donor to become a parent against his or her will” but expressing no view on the enforceability of an agreement over a contemporaneous objection when the agreement specifically contemplated destruction or donation of the preembryos].)⁶

Here, neither party has cited a published California appellate decision directly addressing the applicable approach under California law for determining the disposition of frozen embryos upon divorce; nor have we found one.⁷ The precise issue before us appears to be one of first impression in the appellate courts of this state.

CA(6) (6) HN7 We conclude that where, as here, the parties have entered into a valid contract specifying how the frozen embryos shall be treated

⁶ Pham also cites *J.B. v. M.B.* (2001) 170 N.J. 9 [783 A.2d 707]. In that case, the New Jersey Supreme Court stated it would “enforce agreements entered into at the time in vitro fertilization is begun, subject to the right of either party to change his or her mind about disposition up to the point of use or destruction of any stored preembryos” (*id.* at p. 719), but it noted a form of the balancing approach would apply if the parties disagree. (*Ibid.* [“if there is disagreement as to disposition because one party has reconsidered his or her earlier decision, the interests of both parties must be evaluated”].)

⁷ California appellate courts have addressed certain other issues related to embryos. (See, e.g., *In re Marriage of Buzzanca* (1998) 61 Cal.App.4th 1410, 1412 [72 Cal. Rptr. 2d 280] [addressing who are the lawful parents where genetically unrelated embryo is implanted in a surrogate]; see also *Robertson v. Saadat* (2020) 48 Cal.App.5th 630, 632, 645 & fn. 12 [262 Cal. Rptr. 3d 215] [addressing whether the plaintiff was entitled to use her deceased husband’s sperm but explicitly “express[ing] no opinion regarding the donors’ respective rights if the gametic material at issue was the product of two donors, such as a preembryo”].)

in the event of divorce or legal separation, the contractual approach governs. The contractual approach “‘minimize[s] misunderstandings and maximize[s] procreative liberty by reserving to the progenitors the authority to make what is in the first instance a quintessentially personal, private decision.’” [***12] (*Rooks, supra*, 429 P.3d at p. 592.) There are also “significant benefits to making this decision in advance, rather than at the moment of disposition. Preexisting agreements ‘promote serious discussions between the parties prior to participating in in vitro fertilization’; [citation]; and manifest choices ‘made before disputes erupt’ [Citation.] This ‘minimize[s] misunderstandings’ that might arise in the future, provides certainty for progenitors and fertility clinics, and decreases the likelihood of litigation.” (*Bilbao, supra*, 217 A.3d at p. 986.)

[*125]

CA(7) (7) HN8 Moreover, the contractual approach is consistent with California’s articulated public policy. California law requires a health care provider that is providing fertility treatments to give “a form to the male and female partner, or the individual without a partner, as applicable, that sets forth advanced written directives regarding the disposition of embryos,” including certain choices in the event the partners separate or divorce. (*Health & Saf. Code*, § 125315, subd. (b).)⁸ Even if that statute is [***213] not dispositive of the issue here, it strongly supports the contractual approach.

Pham also argues that, even if the IVF Agreement can properly be read to give control of the embryos to Kon, enforcing it would violate public policy. We [***13] cannot agree. As discussed above, *Health and Safety Code section 125315, subdivision (b)* supports a conclusion that California public policy favors the contractual

approach. In the face of a legislative requirement that IVF providers give their patients forms to specify in advance how frozen embryos would be treated in the event of separation or divorce, it would be nonsensical for us to conclude it would be contrary to the policy of this state to enforce the parties’ resulting advance directives. Here, Pham acknowledged in writing that he “freely consent[ed] to undergo an IVF procedure to attempt to obtain a pregnancy” and agreed the resulting frozen embryos would be made available to Kon, if she wished, in the event of divorce or legal separation.⁹ We find no policy in California that is antithetical to the enforcement of such an agreement.

Additionally, Pham argues “California’s constitutional privacy right under *[a]rticle I, [s]ection 1* strongly supports” his position. According to Pham, enforcing the IVF Agreement would violate his right not to procreate, and “[b]ecause the right not to procreate is a fundamental right, any infringement by the state must survive strict scrutiny.” Pham contends “[t]he trial court failed to conduct any constitutional balancing [***14] or apply strict scrutiny,” and he asserts there is no compelling state interest and the order is not narrowly tailored.

[*126]

CA(8) (8) Pham has forfeited this argument. Pham does not demonstrate where he raised this argument in the trial court, and based on our review of the record he provided on appeal, we find no indication he sufficiently raised the issue so as to require the

⁸ Under *Health and Safety Code section 125315, subdivision (b)*, one of those circumstances is the “separation or divorce of the partners,” and the choices for disposition include “[m]ade available to the female partner” and “[m]ade available to the male partner.” (*Id.*, subd. (b)(3)(A)–(B).)

⁹ Pham cites *Tunkl v. Regents of University of California* (1963) 60 Cal.2d 92 [32 Cal. Rptr. 33, 383 P.2d 441] and *Civil Code section 1668*, but neither supports Pham’s argument. *Civil Code section 1668* states “[a]ll contracts which have for their object, directly or indirectly, to exempt any one from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law.” (*Ibid.*) *Tunkl* concerned an exculpatory provision of a contract that fell within the proscription of *Civil Code section 1668*. (*Tunkl*, at pp. 94–95.) *Civil Code section 1668* is not implicated by the enforcement of the IVF Agreement.

court below to rule on it.¹⁰ [HN9](#) (See [Coastline JX Holdings LLC v. Bennett, supra](#), 80 Cal.App.5th at p. 1012; [People v. Patton \(2019\) 41 Cal.App.5th 934, 946 \[255 Cal. Rptr. 3d 1\]](#) [“as-applied constitutional challenge is forfeited unless previously raised”].) Moreover, although Pham generally argues on appeal his right not to procreate is infringed and strict scrutiny applies, he has forfeited this argument by failing to provide developed argument, with applicable case authority, to support this claim.¹¹ [HN10 CA\(9\) \(9\) \(L.O. v. \[**214\] Kilrain \(2023\) 96 Cal.App.5th 616, 620 \[314 Cal. Rptr. 3d 470\]](#) [“[w]hen an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived”].)

DISPOSITION

The appeal is treated as a petition for writ of mandate and the petition is denied. Real Party in Interest Nozomi Kon shall recover costs on appeal.

Sanchez, Acting P. J., and Scott, J., concurred.

¹⁰ At most, the record on appeal reflects that, when the trial court asked at the hearing if Pham had any final arguments, he asserted he “feel[s] [it is] [his] constitutional right to choose to be a father when [he] want[s] to be, not forcefully to procreate with somebody that [he] choose[s] not to be a life partner with or to spend the rest of [his] life with.” Pham’s general concluding argument about what he “feel[s]” is his constitutional right, without citation to any applicable authority, was insufficient to preserve the issue for appeal. (See [Mendoza v. Trans Valley Transport \(2022\) 75 Cal.App.5th 748, 770 \[290 Cal. Rptr. 3d 702\]](#) [argument raised in a “cursory manner” in a brief and otherwise undeveloped is insufficient to preserve issue for appeal].)

¹¹ The cases Pham cites on appeal in support of his strict scrutiny assertion are both inapposite. (See [Hill v. National Collegiate Athletic Assn. \(1994\) 7 Cal.4th 1, 35, 39–40 \[26 Cal. Rptr. 2d 834, 865 P.2d 633\]](#) [holding NCAA’s random, mandatory drug testing program for collegiate athletes does not violate athletes’ state constitutional right to privacy]; [American Academy of Pediatrics v. Lungren \(1997\) 16 Cal.4th 307, 314 \[66 Cal. Rptr. 2d 210, 940 P.2d 797\] \(plur. opn. of George, C. J.\)](#) [holding statute requiring a pregnant minor to obtain [***15] parental consent or judicial authorization to obtain an abortion violates the state constitutional right to privacy].)



Pierce v. Soc'y of Sisters

Supreme Court of the United States

Argued March 16, 17, 1925 ; June 1, 1925

Nos. 583, 584

Reporter

268 U.S. 510 *; 45 S. Ct. 571 **; 69 L. Ed. 1070 ***; 1925 U.S. LEXIS 589 ****; 39 A.L.R. 468

PIERCE, GOVERNOR OF OREGON, ET AL. v.
SOCIETY OF SISTERS; PIERCE, GOVERNOR
OF OREGON, ET AL. v. HILL MILITARY
ACADEMY

appellees had no [amend. XIV](#) rights.

Overview

Appellee private primary schools filed actions against appellant public officials, challenging the constitutionality of the Compulsory Education Act (Act), 1922 Or. Laws § 5259, under [U.S. Const. amend. XIV](#) and seeking to enjoin its enforcement. The Act mandated that all normal children aged 8 to 16 years old attend public school. Appellees asserted that their enrollments were declining as a result of the Act. The district court entered an order enjoining appellants from enforcing the Act and appellants sought review in consolidated appeals. The court affirmed, ruling that the inevitable practical result of enforcing the Act was the destruction of appellees' primary schools and perhaps all other private primary schools for normal children within the state. The Act unreasonably interfered with the liberty of parents and guardians to direct the upbringing and education of their children. Although appellees were corporations, they could claim constitutional protection for their business and property. They sought protection against a present and real threat of injury from the arbitrary, unreasonable, and unlawful interference with their patrons and injunctive relief was proper.

Prior History: [****1] APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON

Disposition: The court affirmed the order enjoining appellant public officials from enforcing an act that required children to attend public schools in appellee private primary schools' actions contesting the constitutionality of the law. The legislation unreasonably interfered with parental rights and appellees' business interests. An injunction was an appropriate remedy to prevent the present threat of irreparable harm to appellees.

Core Terms

teacher, public school, patron, train

Case Summary

Procedural Posture

Appellant public officials challenged an order from the United States District Court for the District of Oregon enjoining them from enforcing the Compulsory Education Act (Act), 1922 Or. Laws § 5259, against appellees, private primary schools, in consolidated actions challenging the constitutionality of the Act under [U.S. Const. amend. XIV](#). They asserted that, as corporations,

Outcome

The court affirmed the order enjoining appellant public officials from enforcing an act that required children to attend public schools in appellee private primary schools' actions contesting the constitutionality of the law. The legislation

unreasonably interfered with parental rights and appellees' business interests. An injunction was an appropriate remedy to prevent the present threat of irreparable harm to appellees.

LexisNexis® Headnotes

Education Law > Departments of
Education > State Departments of
Education > Authority of Departments of
Education

HN1 State Departments of Education, Authority of Departments of Education

See 1922 Or. Laws § 5259.

Constitutional Law > Substantive Due
Process > Scope

HN2 Constitutional Law, Substantive Due Process

Legislation may not unreasonably interfere with the liberty of parents and guardians to direct the upbringing and education of children under their control. Rights guaranteed by the U.S. Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state.

Civil Procedure > Preliminary
Considerations > Equity > General Overview

HN3 Preliminary Considerations, Equity

Prevention of impending injury by unlawful action is a well-recognized function of courts of equity.

Lawyers' Edition Display

Headnotes

Constitutional law -- requiring attendance at public school -- validity. --

Headnote:

Requiring all children between the ages of eight and sixteen years to attend the public schools unconstitutionally interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control.

Constitutional law -- right of corporations to relief.

--

Headnote:

That the owners of private schools whose business and property will be destroyed by the enforcement of a statute requiring all children to attend public schools are corporations does not prevent the granting of relief against such enforcement as an interference with constitutional rights.

Injunction -- against enforcement of unconstitutional statute. --

Headnote:

Injunction lies at the suit of a corporation operating a private school to prevent threatened enforcement of a statute requiring all children to attend public schools, which will destroy its business and property.

Action -- time for bringing -- when not premature. -

-

Headnote:

A suit to enjoin threatened enforcement of a statute requiring all children to attend public schools, to the destruction of the business of complainant, who conducts a private school, is not premature, although the statute does not become effective for

two or three years, where patrons have begun to refuse to enter children in private schools, and to withdraw children already entered, so that, if the suit is not brought before the statute takes effect, the injury will be irreparable.

Syllabus

1. The fundamental theory of liberty upon which all governments of this Union rest excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. P. 535.

2. The Oregon Compulsory Education Act (Oreg. Ls., § 5259) which, with certain exemptions, requires every parent, guardian or other person having control of a child between the ages of eight and sixteen years to send him to the public school in the district where he resides, for the period during which the school is held for the current year, is an unreasonable interference with the liberty of the parents and guardians to direct the upbringing of the children, and in that respect violates the [Fourteenth Amendment](#). P. 534.

3. In a proper sense, it is true that corporations can not claim for themselves the liberty guaranteed by the [Fourteenth Amendment](#), and, in general, no person in any business has such an interest in possible customers as to enable him to restrain exercise of proper power by the State upon the ground that he will be deprived of patronage;

4. But where corporations [****2] owning and conducting schools are threatened with destruction of their business and property through the improper and unconstitutional compulsion exercised by this statute upon parents and guardians, their interest is direct and immediate and entitles them to protection by injunction. [Truax v. Raich, 239 U.S. 33](#). P. 535.

5. The Act, being intended to have general application, can not be construed in its application

to such corporations as an exercise of power to amend their charters. [Berea College v. Kentucky, 211 U.S. 45](#). P. 535.

6. Where the injury threatened by an unconstitutional statute is present and real before the statute is to be effective, and will become irreparable if relief be postponed to that time, a suit to restrain future enforcement of the statute is not premature. P. 536. [296 Fed. 928](#), affirmed.

APPEALS from decrees of the District Court granting preliminary injunctions restraining the Governor, and other officials, of the State of Oregon from threatening or attempting to enforce an amendment to the school law, -- an initiative measure adopted by the people November 7, 1922, to become effective in 1926 -- requiring parents and others [****3] having control of young children to send them to the primary schools of the State. The plaintiffs were two Oregon corporations, owning and conducting schools. dissensions and consequent weakening of the community against foreign dangers.

In *Mayor, etc. of New York v. Miln, supra*, this Court was considering the evil effects upon a State of the immigration of ignorant foreigners, unacquainted with, and lacking sympathy with, American institutions and ideals. In this connection, it should be remembered that the vast majority of children not now attending the public schools of Oregon who will be compelled to do so by the new statute, are either themselves immigrants or the children of immigrants. Surely a State can require of all immigrants admitted to the advantages and opportunities of life in the United States, that their children shall be taught by the State the English language, and the character of American institutions and government. [Meyer v. Nebraska, 262 U.S. 390](#), distinguished.

The compulsory attendance of all children of school age at the public schools during the relatively short hours during which these schools are in session would not deprive the [****4]

parents of any just rights. There would remain an abundance of time and opportunity for supplementary instruction either in religion or in the language, history, and traditions of the land of their ancestors. The objectionable feature about the Nebraska law was that it forbade the teaching of modern languages either in regular schools or in supplementary schools. The dicta in the *Meyer Case* would appear to be somewhat broader than can be supported by the previous decisions of this Court which are cited to support it.

The subject of immigration is one which is exclusively under the control of the Central Government. The States have nothing to say as to the number or class of the immigrants who may be permitted to settle within their limits. It would therefore appear to be both unjust and unreasonable to prevent them from taking the steps which each may deem necessary and proper for Americanizing its new immigrants and developing them into patriotic and law-abiding citizens. At present, the vast majority of the private schools in the country are conducted by members of some particular religious belief. They may be followed, however, by those organized and controlled by [****5] believers in certain economic doctrines entirely destructive of the fundamentals of our government. Can it be contended that there is no way in which a State can prevent the entire education of a considerable portion of its future citizens being controlled and conducted by bolshevists, syndicalists and communists?

The exact question involved in the present case has never been passed upon by any American court. Perhaps the cases which come nearest are those on whether the school authorities have the right to exclusive control over the list of studies to be taken by pupils in the public schools, or whether the parents have a limited right of selection. The decisions on this question are in hopeless conflict. In *New Hampshire (Kidder v. Chelis, 59 N. H. 473)* *Indiana (State v. Webber, 108 Ind. 31,)* and *Iowa (State v. Mizner, 50 Ia. 145,)* the power of the public is held exclusive; while in *Illinois (School*

Trustees v. People, 87 Ill. 303,) *Oklahoma (School Board District v. Thompson, 24 Okla. 1,)* and *Wisconsin (Morrow v. Wood, 35 Wis. 59,)* some right of control has been held to belong to the parent. This Court has twice recently, in [****6] the child labor cases, (*Hammer v. Dagenhart, 247 U.S. 251, and Bailey v. Drexel Furniture Co., 259 U.S. 20,)* held that all questions relative to the care, control and custody of minor children belong exclusively to the State.

The Oregon law does not deny the equal protection of the law. The whole opposition arises from the fact that it is intended to bring about a greater equality in the operation of the school law of Oregon than has previously existed. A law which increases the uniformity of the application of a law cannot by any stretch of the imagination be classed as a law which denies the equal protection of the law. The new Oregon School Law merely removes an exception to the generality of the application of the former law. The right to the equal protection of the laws is not denied when it is apparent that the same law or course of procedure is applicable to every other person in the State under similar circumstances and conditions. *Walston v. Nevin, 128 U.S. 582; Tinsley v. Anderson, 171 U.S. 106; Williams v. Arkansas, 217 U.S. 79.*

If the compulsory school laws of the other States are constitutional, this law must be held so. [****7] If a State may pass a law applying to a certain portion of the things or persons included in a general class, it can pass one applying to all in a general class, unless express exceptions are to be found in the prohibitions in the Federal Constitution. *Fisher v. St. Louis, 194 U.S. 361.* The constitutionality of the Oregon law can be sustained as an exercise of the police power of the State. The scope of this power is very broad. *Chicago, B. & Q. R. Co. v. Illinois, 200 U.S. 561; Bacon v. Walker, 204 U.S. 311; Mayor, etc. of New York v. Miln, 11 Pet. 102.* This law may also be sustained under the powers of the State in connection with its duties to aid the United States in time of war. *Arver v. United States, 245 U.S. 366; Holdman v.*

[United States, 245 U.S. 474](#); [Ruthenberg v. United States, 245 U.S. 480](#); [Cox v. Wood, 247 U.S. 3](#); [Frohwerk v. United States, 249 U.S. 204](#); [Debs v. United States, 249 U.S. 211](#); [McKinley v. United States, 249 U.S. 397](#). The power and duty to be prepared for war is shared by the state government. [Gilbert v. Minnesota, 254 U.S. 325](#); [Halter v. Nebraska \[****8\], 205 U.S. 34](#).

The discretion of the States in the exercise of their powers is broad enough to justify a State in holding that a compulsory system of public school education will encourage the patriotism of its citizens, and train its younger citizens to become more willing and more efficient defenders of the United States in times of public danger. This is particularly true in view of the fact that if the Oregon School Law is declared unconstitutional there will be nothing to prevent the establishment of private schools, the main purpose of which will be to teach disloyalty to the United States, or at least the theory of the moral duty to refuse to aid the United States even in the case of a defensive war. If a State cannot compel certain children to attend the public schools it cannot compel any children to do so. An attempt to do so would be clearly a violation of the "equal protection of the laws" clause of the [Fourteenth Amendment](#).

Mr. John C. Veatch, for appellee in No. 584.

Any restrictions upon the rights of the individual are arbitrary and oppressive unless intended to promote the public welfare and having a reasonable relation to that purpose. [Purity Extract \[****9\] Co. v. Lynch, 226 U.S. 192](#); [McLean v. Arkansas, 211 U.S. 539](#). Where the legislative action is arbitrary and has no reasonable relation to a purpose which it is competent for the Government to effect, the legislature transcends the limits of its power in interfering with the liberty of contract. [C. B. & Q. R. R. Co. v. McGuire, 219 U.S. 549](#); [Atlantic Coast Line v. Goldboro, 232 U.S. 559](#); [House v. Mayes, 219 U.S. 270](#); [Reduction Company v. Sanitary Works, 199 U.S. 306](#); [C. B. & Q. R. R. Co. v. Drainage Commissioners, 200 U.S. 561](#);

[Lochner v. New York, 198 U.S. 45](#). If it is within the power of the State to take away the business of the private schools in the elementary grades, it is equally within that power to take away their business in all grades. [Adams v. Tanner, 244 U.S. 590](#).

This act is not designed and intended to promote compulsory education. It adds nothing to the standard of education, it does not broaden the educational field; the changing of the ages for compulsory school attendance is in no way affected by the clause relating to private schools. [Commonwealth v. Roberts, 159 Mass. 372](#).

While [****10] no rule of law defines the limits of the State's power, the principle, based upon the universal decisions of the courts, is that the power shall not interfere with the rights of the individual, unless such interference is necessary to promote the public welfare and the restrictions placed upon the individual's rights have a real, substantial, and direct relation to the object to be accomplished. [Adkins v. Children Hospital, 261 U.S. 525](#); [Truax v. Corrigan, 257 U.S. 312](#); [Yick Wo v. Hopkins, 118 U.S. 356](#); [Mugler v. Kansas, 123 U.S. 623](#).

By special leave of Court briefs of *amici curiae* were filed by Mr. Louis Marshall for the American Jewish Committee; Mr. Wm. A. Williams, for the North Pacific Union Conference of Seventh Day Adventists; Messrs. Chas. H. Tuttle, Chas. E. Hotchkiss, Alexander J. Field, and Woodson P. Houghton, for The Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the United States.

Counsel: Mr. Willis S. Moore, Assistant Attorney General of Oregon, with whom Mr. I. H. Van Winkle, Attorney General, was on the brief, for appellant Van Winkle.

The [Fourteenth Amendment](#) does not remove [****11] or restrict the power of the State to enact laws necessary to promote the health, safety, peace, morals, education or general welfare of its people.

Munn v. People of Illinois, 94 U.S. 278; Boston Beer Co. v. Massachusetts, 97 U.S. 25; Barbier v. Connolly, 113 U.S. 27, 31; Mugler v. Kansas, 123 U.S. 623, 666; Powell v. Pennsylvania, 127 U.S. 678; Re Kemmler, 136 U.S. 436, 449; Crowley v. Christensen, 137 U.S. 86; Jones v. Brim, 165 U.S. 180, 182; Jacobson v. Massachusetts, 197 U.S. 11; Interstate Consol. Street R. Co. v. Massachusetts, 207 U.S. 79; McLean v. Arkansas, 211 U.S. 539; Middleton v. Texas Power & L. Co., 249 U.S. 152; N. O. Gas Light Co. v. Louisiana Light, etc., Mfg. Co., 115 U.S. 650; Slaughter House Cases, 16 Wall. 22; Stone v. Mississippi, 101 U.S. 814; Sanitary District of Chicago v. United States, 266 U.S. 405.

The provisions of a corporation charter and of any law pursuant to which a corporation may have entered into valid contracts, are subject to modification and annulment under the police power. Boston Beer Co. v. Massachusetts, *supra*; [****12] Stone v. Mississippi, *supra*; The Mayor, etc. v. Miln, 11 Pet. 102; Eagle Insurance Co. v. Ohio, 153 U.S. 449; Chicago B. & Q. Co. v. Nebraska, 170 U.S. 59; Pacific Gas & E. Co. v. Police Court, 251 U.S. 22; Thornton v. Duffy, 254 U.S. 361; Chicago L. Ins. Co. v. Needles, 113 U.S. 574.

As to minors, the State stands in the position of *parens patriae* and may exercise unlimited supervision and control over their contracts, occupation and conduct, and the liberty and right of those who assume to deal with them. State v. Shorey, 48 Ore. 396; Stettler v. O'Hara, 69 Ore. 519; State v. Bunting, 71 Ore. 259; Gibbons v. Gibbons, 75 Ore. 500; Merges v. Merges, 94 Ore. 246; State v. Bailey, 157 Ind. 324; Sturges & Burn Mfg. Co. v. Beauchamp, 231 U.S. 320; Muller v. Oregon, 208 U.S. 412; Starnes v. Albion Mfg. Co., 147 N. C. 566; People v. Ewer, 141 N. Y. 129; Berea College v. Commonwealth, 123 Ky. 209; State v. Jackson, 71 N. H. 552; Commonwealth v. Roberts, 159 Mass. 372; State v. Counort, 69 Wash. 321; Meyer v. Nebraska, [****13] 262 U.S. 390; In re Turner, 49 Kan. 115; Vanwalters v. Board of

Children's Guardians, 132 Ind. 567; State v. Rose, 125 La. 462; Ex parte Powell, 6 Okla. Cr. Pr. 495; Egoff v. Board of Children's Guardians, 170 Ind. 238; United States v. Behrendsohn, 197 Fed. 953; Interstate Company v. Massachusetts, 207 U.S. 79.

The statute does not interfere with religious liberty. Permoli v. New Orleans, 3 How. 589; Brunswick Co. v. Evans, 228 Fed. 991; People v. Board of Education, 245 Ill. 335; Swafford v. Keaton, 23 Ga. App. 238; State v. Mockus, 113 Atl. 39 (Me.); Reynolds v. United States, 98 U.S. 145; Commonwealth v. Herr, 229 Pa. St. 132; Owens v. State, 6 Okla. Cr. 110; People v. Pierson, 176 N. Y. 201; Scales v. State, 47 Ark. 476; Commonwealth v. Has, 122 Mass. 40; Philips v. Gratz, 2 Pen. & W. 412; Wilkes-Barre v. Garabed, 11 Pa. Super. 355; Smith v. People, 51 Colo. 270.

The American people as a whole have unalterably determined that there shall be an absolute and unequivocal separation of church and state, and that the public [****14] schools shall be maintained and conducted free from influences in favor of any religious organization, sect, creed or belief. Art. I, Const. U.S.; Art. I, § 5, Oregon Const.; Art. VIII, § 3, *Id.*; Knowlton v. Baumhover, 182 Iowa 691; Wilkerson v. Rome, 152 Ga. 762; Evans v. Selma Union High School District (Cal., 1924), 222 Pac. 801; Donahoe v. Richards, 38 Me. 379.

The provisions of subdivision "d" of the act conferring upon county superintendents power to determine that a child is not being properly taught and to order him sent to a public school, do not invalidate the measure, but relate to a proper exercise of administrative power. The fact that the amendment to § 5259, Oregon Laws, contains new provisions in conflict with a succeeding section of the act, which as not amended, does not invalidate the amendment.

Mr. William D. Guthrie, with whom Mr. Bernard Hershkopf was on the brief, for appellee in No. 583.

This bill establishes a case of irreparable injury

imminent to the appellee's business and property. [*International News Service v. Associated Press*, 248 U.S. 215, 236](#); [*Springhead Spinning Co. v. Riley*, L. R. 6 \[****15\] Eq. 551, 558](#); [*Vicksburg Waterworks Co. v. Vicksburg*, 185 U.S. 65, 82](#); [*Terrace v. Thompson*, 263 U.S. 197](#); [*Walla Walla v. Walla Walla Water Co.*, 172 U.S. 1](#); [*School of Magnetic Healing v. McAnnulty*, 187 U.S. 94](#); [*Kennington v. Palmer*, 255 U.S. 100](#).

Courts of the United States have jurisdiction because a federal constitutional right of the plaintiff-appellee was invaded by the enactment in question. If the liberty of parents be unconstitutionally impaired by the enactment in suit, surely it must needs follow, by the same token and with irresistible logic, that the constitutional rights of the appellee are likewise directly and unconstitutionally abridged. [*Truax v. Raich*, 239 U.S. 33, 38](#); [*Nebraska District v. McKelvie*, 262 U.S. 404](#); [*Terrace v. Thompson*, 263 U.S. 197, 215-6](#); [*Packard v. Banton*, 264 U.S. 140, 143](#).

The enactment in suit is not a legitimate exercise of the police power of the State. The courts are entrusted with authority, and it becomes their solemn duty, to review the reasonableness and propriety of any attempted use of that power. [*Child Labor Tax Case*, 259 U.S. 20, 37](#). This Court, like the [****16] court below, must know that the true purpose of the act, as well as its plain and intended practical effect, was the destruction of private primary, preparatory and parochial schools; for they certainly could not survive the denial of the right of parents to have their children thus educated in the primary grades. Such drastic and extraordinary legislation is a portentous innovation in America. Private and religious schools have existed in this country from the earliest times. Indeed, the public or common school, as we know it today, dates only from 1840. For generations all Americans -- including those who fought for liberty and independence in the eighteenth century, and who drafted the Declaration of Independence, the Northwest Ordinance of 1787, and the Constitution of the United States -- were educated in private or

religious schools, and mostly the latter. Perhaps no institution is older or a more intimate part of our colonial and national life than religious schools and colleges, both Catholic and Protestant. The private and religious schools have been the laboratories in which educational methods have been worked out and pedagogic progress accomplished from the very [****17] beginning of our history. Out of them have developed, or to them is due, our greatest colleges and universities, the most important of them to this day being private or religious institutions. In more recent times commonwealth colleges and universities have grown up. The legislation before the court manifestly carries within itself a threat, not merely to the private elementary and preparatory schools which it now practically proscribes, but to every private or religious preparatory school and every private or religious college or university in the land. The statute in suit is so unusual and extraordinary that it must arouse misgivings in the judicial mind upon even the slightest reflection. More than ever must it be borne in mind in judging it, as pointed out by the Chief Justice in [*Wolff Co. v. Industrial Court*, 262 U.S. 522, 534](#), that "restraints must not be arbitrary or unreasonable. Freedom is the general rule, and restraint the exception."

The statute abridges the freedom of four classes closely interrelated: (1) the freedom of the private and parochial schools, (2) the freedom of teachers engaged in those schools, (3) the freedom of parents and guardians, and [****18] (4) the freedom of children. There is nothing in the record which warrants even the suggestion that private and parochial schools in Oregon are in any respect inferior to the public schools. If, however, the contrary were the fact, the case would still be no different; for there would still not exist any valid reason for their total suppression. The State of Oregon has regulatory power adequate to every reasonable and proper need in this relation. Indeed, it has largely exercised it as its statutes demonstrate.

In the brief submitted on behalf of the appellant

Governor, it is urged in justification for the enactment that it was necessary in order to prevent the teaching of disloyalty and subversive radicalism or bolshevism. Assuming, therefore, but only for the purposes of the argument, that there may be in fact such an evil as this appellant conjures up and that it is not a mere chimera, nevertheless, there is no reasonable necessity for any such prohibitory law as is now under discussion. This Court has emphatically held that the States have power to make criminal and forbid the teaching of disloyalty, sedition, or pacifism. [*Gilbert v. Minnesota*, 254 U.S. 325](#). It [****19] has also declared "that this court and other courts have decided that a license or certificate may be required of a . . . school teacher." [*Lehmann v. Board of Accountancy*, 263 U.S. 394, 398](#); [*People v. American Socialist Society*, 202 N. Y. App. Div. 640](#).

Where regulation is so completely adequate, prohibition is unnecessary and constitutes mere arbitrariness and wanton abuse of power. Particularly must this be true, where the subject of the alleged prohibition is an ordinary, innocuous and useful calling, trade, or business. However the matter may stand as to nuisances and businesses tainted with vicious qualities, tendencies, or effects, there is no doubt that this Court has repeatedly and authoritatively refused to countenance destruction of honest and ordinary businesses charged with abuses which were readily remediable by regulation. [*Adams v. Tanner*, 244 U.S. 590](#); [*Meyer v. Nebraska*, 262 U.S. 390](#); [*Nebraska District of Evangelical Lutheran Synod v. McKelvie*, *Id.* 404, 410](#). See [*Hamilton v. Vaughn*, 179 N. W. 553, 558 \(Mich.\)](#); [*Columbia Trust Co. v. Lincoln Institute*, 138 Ky. 804, 812-4](#).

That the assimilation of the foreigner [****20] is not a justification for any such prohibitory statute, was expressly decided in [*Meyer v. Nebraska*, 262 U.S. 390, 402](#). But the fact is, that the whole contention is fallacious and merely a far-fetched extravagance or pretense. Oregon has no substantial unnaturalized immigrant problem. Eighty-five per cent of its population is native-born.

Half of the remainder is naturalized and presumably Americanized. Of the children of the seven and a half per cent. unnaturalized, only a small number attend private schools. The children of poor, ignorant foreigners do not attend private schools where tuition must be paid for; they generally go to the free public schools. The public school is not a "melting pot." Schools are, and obviously must be, located in given districts. If the neighborhood be American, the school there will have a similar character. If, however, it be situated in a poor and foreign quarter, the school will be attended almost entirely by children of the poorer class of foreigners. The child of a foreigner is quite as likely to be assimilated and Americanized in a private or parochial school as in a public school. But there was no claim that as a matter of [****21] fact and truth American history and the aims of our Governments were not being correctly taught in the private and parochial schools of the State, nor was there any suggestion that the children attending such schools were not being properly or adequately instructed in any fundamental principles of freedom and democracy or in reverence and righteousness. The private and parochial schools teach the same subjects as the public schools -- whatever one does to inculcate and foster patriotism, the other can and does do quite as well.

No legislation can proscribe social discrimination, and the statute in the case at bar is singularly inappropriate to that end. Young children do not discriminate against each other; that is a characteristic of maturity. The picking and choosing of friends for reasons based upon money, creed, or social status come, not during elementary school days, but afterwards; and no force thus far vouchsafed to man has ever been equal to the destruction or elimination of social distinctions. How the act in suit could accomplish that result, no one can tell; and, as a reason for annihilating the appellee's useful and honorable business, it amounts to nothing. It [****22] is now intimated that the statute was necessary in order to effectuate compulsory education. But the suggestion is clearly based upon false premises. The notion that

private and public schools cannot exist in peace and harmony side by side, which underlies the act in suit, is not only contradicted by long experience, but is probably held by no competent educator.

Thus, far we have considered the enactment in suit only in reference to the rights of the private and parochial schools and the teachers they employ. But there is involved in the case at bar a far more important group of individual rights, namely, the rights of the parents and guardians who desire to send their children to such schools, and the rights of the children themselves. Reflection should soon convince the court that those rights, which the statute seriously abridges and impairs, are of the very essence of personal liberty and freedom. *Tillman v. Tillman*, 26 L. R. A. (n. s.) 781, 785 (S. Car.). In this day and under our civilization, the child of man is his parent's child and not the State's. "Take away from the parents all care and concern for their children's education, and you make a social life [****23] an impossible and unintelligible notion." Pufendorf's Law of Nature and Nations, book VI, c. II, § 4. It need, therefore, not excite our wonder that to-day no country holds parenthood in so slight esteem as did Plato or the Spartans -- except Soviet Russia.

It is not seriously debatable that the parental right to guide one's child intellectually and religiously is a most substantial part of the liberty and freedom of the parent. *Meyer v. Nebraska*, 262 U.S. 390, 399-400; *Taylor v. Beckham* (No. 1), 178 U.S. 548, 602-3. See also *Wolff Co. v. Industrial Court*, 262 U.S. 522, 534; *Coppage v. Kansas*, 236 U.S. 1, 10, 14; *Smith v. Texas*, 233 U.S. 630, 636; *People v. Gillson*, 109 N. Y. 389, 398-9; *Tillman v. Tillman*, 26 L. R. A. (n. s.) 781, 785 (S. Car.).

The statute in suit trespasses, not only upon the liberty of the parents individually, but upon their liberty collectively as well. It forbids them, as a body, to support private and parochial schools and thus give to their children such education and religious training as the parents may see fit, subject to the valid regulations of the State. In that respect

the enactment violates [****24] the public policy of the State of Oregon and the liberty which parents have heretofore enjoyed in that State. *Liggett v. Ladd*, 17 Ore. 89, 94. See also *Milwaukee Industrial School v. Superiors*, 40 Wis. 328, 332; *People v. Turner*, 55 Ill. 280; *State ex rel. Sheibley v. School District*, 31 Neb. 552, 556; *Trustees v. People*, 87 Ill. 303. In whatever light the act in suit be regarded, it must be manifest that, in the end, it embodies the pernicious policy of state monopoly of education.

The legislative power of a State in relation to education does not involve the power to prohibit or suppress private schools and colleges. The familiar statement that education is a public function means no more than that it is a function that the State may undertake, because it vitally interests and concerns the State that children shall be furnished the means of education and not left to grow up in ignorance. But the power of the State to provide public schools carries with it no power to prohibit and suppress private schools and colleges which are competent and qualified to afford what the State wants, namely, education. Thus, there is no question as to [****25] the power of the State to construct and operate public roads, bridges and other means of transportation; yet it would hardly be seriously contended that the State might under the police power forbid the further operation of all private highways, bridges and railroads. Whenever the State desires the use of any such existing facilities for some distinctly public purpose, it can take them only by the exercise of the power of eminent domain. *Los Angeles v. Los Angeles Gas & Electric Corporation*, 251 U.S. 32, 38; *Green v. Frazier*, 253 U.S. 233; *Adams v. Tanner*, 244 U.S. 590.

The present case is wholly outside the principle that, where a State may enter upon an undertaking which can be conducted profitably and satisfactorily only as a monopoly, it may prevent competition or the continued use of competing facilities by condemning and destroying property under the power of eminent domain and just

compensation. In its essence, the Oregon law is one strangling scientific investigation in private laboratories. The social interests menaced by the suppression of private educational institutions and the denial of liberty to pursue long rooted habits and traditions [****26] among our people are peculiarly of the character that the [Fourteenth Amendment](#) was most immediately designed to protect from state political action. [Laurel Hill Cemetery v. San Francisco](#), 216 U.S. 358, 366. The [Fourteenth Amendment](#) had for its primary object the prevention of state legislation calculated to keep one class in subjection to another in respect of opportunities for economic and social advancement, the pursuit of happiness, and the exercise of fundamental rights comprehended in an essential individual liberty, among men fit for freedom. [Buchanan v. Warley](#), 245 U.S. 60; [Meyer v. Nebraska](#), 262 U.S. 390; [Bartels v. Iowa](#), 262 U.S. 404.

The statute impairs the obligation of the contract embodied in the appellee's corporate charter. [Dartmouth College case](#), 4 [Wheat](#). 518. The corporation laws under which the appellee exists as a corporation (Deady's Code, 1886, pp. 632-4, as amended by General Laws of Oregon for 1903, pp. 176-7) do not contain any provision empowering the State to alter, amend, or repeal the charter; and the constitutional provision which was in force in Oregon when the appellee was organized (§ 2, Art. XI), while permitting [****27] the corporation laws of the State to be altered, amended, or repealed, nevertheless, expressly limited that power by providing that it was not to be exercised "so as to impair or destroy any vested corporate rights." In [Liggett v. Ladd](#), 17 Ore. 89; [Lornsten v. Union Fishermen's Co.](#), 71 Ore. 540, it was held that a corporation had a vested right to its corporate name which subsequent legislation could not impair. If that be so, *a fortiori* the right granted to the plaintiff-appellee upon its incorporation to maintain and conduct schools for pay, is likewise a vested right within the meaning of the Oregon constitutional provision above referred to; and, as such, may not be impaired or destroyed by the

legislature. The enactment in suit is, consequently, void, not only because of this provision of the Oregon constitution, but also because it impairs the obligation of a contract in violation of [section 10 of Article I of the Constitution of the United States](#). [Berea College v. Kentucky](#), 211 U.S. 45, distinguished.

Mr. J. P. Kavanaugh, with whom Messrs. Jay Bowerman, Dan J. Malarkey, Hall S. Lusk, E. B. Seabrook and F. J. Lonergan were on the [****28] brief, for appellee in No. 583.

Messrs. George E. Chamberlain and Albert H. Putney, with whom Mr. P. Q. Nyce was on the brief, for the Governor of Oregon.

The assertion that this law impairs the obligation of contracts is clearly disposed of by [Berea College v. Kentucky](#), 211 U.S. 45. A State cannot contract away any of its fundamental governmental powers.

It is now definitely settled that the [Fourteenth Amendment](#) did not radically alter the relations between the federal and state governments, or make the provisions of the [Bill of Rights](#) in the United States Constitution binding upon the state governments.

The charge that the statute violates the privileges and immunities of citizens of the United States is hardly worthy of serious consideration. [Slaughter House Cases](#), 16 Wall. 36; [Twining v. New Jersey](#), 211 U.S. 78; [Hodges v. United States](#), 203 U.S. 1; [Hudson County Water Co. v. McCarter](#), 209 U.S. 349; [Corfield v. Coryell](#), 4 Wash. 371; [Eadleigh v. Newhall](#), 136 Fed. 941.

The statute does not deprive anyone of property without due process of law. [Mugler v. Kansas](#), 123 U.S. 623; [Kidd v. Pearson](#), [****29] 128 U.S. 1; [Clark Distilling Co. v. Western Maryland R. Co.](#), 242 U.S. 311; [Crane v. Campbell](#), 245 U.S. 304. The principle of the non-liability of government for loss to business incidentally resulting from state

legislation is not confined to business similar to the liquor traffic. [*Madera Waterworks v. City of Madera*, 228 U.S. 454](#); [*Hadacheck v. Sebastian*, 239 U.S. 394](#); [*Tanner v. Little*, 240 U.S. 369](#); [*Hebe Company v. Shaw*, 248 U.S. 297](#); [*Purity Extract and Tonic Co. v. Lynch*, 226 U.S. 192](#).

Cases in which this Court has protected the right to labor, are not precedents in his case. There is a great distinction between the right to work and the right to have a private business protected as against public competition or the exercise of the police powers of the State.

In [*Terrace v. Thompson*, 264 U.S. 197](#), it was held that "The quality and allegiance of those who own, occupy and use the farm lands within its borders are matters of highest importance and affect the safety and power of the State itself." Is "the safety and power of the State" less effected by the control of education than by the control of farm lands?

This [****30] Court has never held that there was a denial of due process of law where a private business was injured or even destroyed by state competition in a field in which a State might lawfully engage. If a State may engage at all in any field, the question of the effect of state competition upon private business is immaterial. The owners of private schools have even less basis for the claim that their property is taken without due process of law through the enactment of a compulsory education law than the owners of property used for saloon purposes had when their business was interfered with by a state prohibition law. In the latter case the entire use of the property for the purpose for which it was intended was prohibited; in the former case the school is only deprived of certain prospective students. A private school might still be continued for students under or over the age limits set by the law. A properly qualified teacher in a private school might easily secure a position as one of the additional teachers who would be required by the public schools. No person in any business has such an interest in possible customers as to enable him to restrain the government from exercising [****31] any proper

power because it might deprive him of such patronage. To state such a contention is to show its absurdity.

The case of the Hill Military Academy is no stronger under the law, than would have been the case of a merchant who had attempted to restrain the operation of the draft act, during the recent war, on the ground that the Government, by taking away certain of his customers, was depriving him of his property without due process of law. See [*Munn v. Illinois*, 94 U.S. 113](#).

The Oregon law does not deprive any person of liberty without due process of law. The appellees are corporations. The liberty protected by the [*Fourteenth Amendment*](#) is that of natural, and not of artificial, persons. [*Northwestern Nat. L. Ins. Co. v. Riggs*, 203 U.S. 243, 255](#); [*Western Turf Ass'n. v. Greenberg*, 204 U.S. 359, 363](#). Nor can the appellees claim to have any such interests in the liberties of the school children of the State, or their parents. No person has the right to test the constitutionality of a law merely because it may affect the liberty of another person in whom he has no recognized legal interest. [*Gusman v. Marrero*, 180 U.S. 81](#). [*Truax v. \[****32\] Raich*, 239 U.S. 33](#), distinguished.

No claim can arise that the school children themselves are deprived, by this law, of liberty without due process of law. It will be admitted by all that children under sixteen years of age cannot be given liberty of choice as to their education; this must be under the control either of the State, or of their parents, or of both the State and their parents. If any persons have been deprived of liberty without due process of law it is the parents of the school children. The determination of this last point brings us to the question of the respective authority of the State and of parents over minor children.

Even in the freest country no person can possess absolutely uncontrolled liberty, either with respect to himself personally, or to his children. A parent cannot have a more complete right of control over

the actions of his child than over his own actions. Liberty of all is subject to reasonable conditions deemed essential by the governing body to the safety, health, peace, good order and morals of the community. [*Crawley v. Christensen*, 137 U.S. 86](#); [*Jacobson v. Massachusetts*, 197 U.S. 11](#).

Under all governments, even [****33] those which are the most free and democratic in their character, the citizen must always owe duties to the State; and it necessarily follows that the State has an interest in making it certain (which can only be done by appropriate legislation) that the citizen is fitted, both in mind and body, to perform these duties. [*Jacobson v. Massachusetts*, supra](#). The discretionary powers of a State are broad enough to permit it to decide that compulsory attendance at public schools is a proper "precautionary measure against the moral pestilence of paupers, vagabonds, and possibly convicts." *Mayor, etc. of New York v. Miln*, 11 Pet. 102.

The voters of Oregon who adopted this law had the right of act on the brief that the fact that the great increase in juvenile crime in the United States followed so closely after the great increase in the number of children in the United States who were not attending public schools, was more than a coincidence. The voters in Oregon might also have based their action in adopting this law upon the alarm which they felt at the rising tide of religious suspicions in this country, and upon their belief that the basic cause of such religious feelings [****34] was the separation of children along religious lines during the most susceptible years of their lives, with the inevitable awakening of a consciousness of separation, and a distrust and suspicion of those from whom they were so carefully guarded. The voters of Oregon might have felt that the mingling together, during a portion of their education, of the children of all races and sects, might be the best safeguard against future internal

Judges: Taft, Holmes, Van Devanter, McReynolds, Brandeis, Sutherland, Butler, Sanford, Stone

Opinion by: McREYNOLDS

Opinion

[*529] [**571] [***1076] MR. JUSTICE McREYNOLDS delivered the opinion of the Court.

These appeals are from decrees, based upon undenied allegations, which granted preliminary [**572] orders restraining [*530] appellants from threatening or attempting to enforce the Compulsory Education Act * adopted November 7,

* *Be it Enacted by the People of the State of Oregon:*

[*HN1*](#) Section 1. That Section 5259, Oregon Laws, be and the same is hereby amended so as to read as follows:

Sec. 5259. *Children Between the Ages of Eight and Sixteen Years --* Any parent, guardian or other person in the State of Oregon, having control or charge or custody of a child under the age of sixteen years and of the age of eight years or over at the commencement of a term of public school of the district in which said child resides, who shall fail or neglect or refuse to send such child to a public school for the period of time a public school shall be held during the current year in said district, shall be guilty of a misdemeanor and each day's failure to send such child to a public school shall constitute a separate offense; provided, that in the following cases, children shall not be required to attend public schools:

(a) *Children Physically Unable --* Any child who is abnormal, subnormal or physically unable to attend school.

(b) *Children Who Have Completed the Eighth Grade --* Any child who has completed the eighth grade, in accordance with the provisions of the state course of study.

(c) *Distance from school --* Children between the ages of eight and ten years, inclusive, whose place of residence is more than one and one-half miles, and children over ten years of age whose place of residence is more than three miles, by the nearest traveled road, from a public school; provided, however, that if transportation to and from school is furnished by the school district, this exemption shall not apply.

(d) *Private Instruction --* Any child who is being taught for a like period of time by the parent or private teacher such subjects as are usually taught in the first eight years in the public school; but before such child can be taught by a parent or a private teacher, such parent or private teacher must receive written permission from the county superintendent, and such permission shall not extend longer than the end of the current school year. Such child must report to the county school superintendent or some person designated by him at least once every three months and take an examination in the work

1922, under the initiative provision of her Constitution by the voters of Oregon. Jud. Code, § 266. They present the same points of law; there are no controverted questions of fact. Rights said to be guaranteed by the federal Constitution were specially set up, and appropriate prayers asked for their protection.

[****35] The challenged Act, effective September 1, 1926, requires every parent, guardian or other person having control or charge or custody of a child between eight and sixteen years to send him "to a public school for the period of time a public school shall be held during the current year" in the district where the child resides; and failure so to do is declared a misdemeanor. There are [*531] exemptions -- not specially important here -- for children who are not normal, or who have completed the eighth grade, or who reside at considerable distances from any public school, or whose parents or guardians hold special permits from the County Superintendent. The manifest purpose is to compel general attendance at public schools by normal children, between eight and sixteen, who have not completed the eighth grade. And without doubt enforcement of the statute would seriously impair, perhaps destroy, the profitable features of appellees' business and greatly diminish the value of their property.

Appellee, the Society of Sisters, is an Oregon corporation, organized in 1880, with power to care

for orphans, educate and instruct the youth, establish and maintain academies or schools, and [****36] acquire necessary real and personal [*532] property. It has long devoted its property and effort to the secular and religious education and care of children, and has acquired the valuable good will of many parents and guardians. It conducts interdependent primary and high schools and junior colleges, and maintains orphanages for the custody and control of children between eight and sixteen. In [***1077] its primary schools many children between those ages are taught the subjects usually pursued in Oregon public schools during the first eight years. Systematic religious instruction and moral training according to the tenets of the Roman Catholic Church are also regularly provided. All courses of study, both temporal and religious, contemplate continuity of training under appellee's charge; the primary schools are essential to the system and the most profitable. It owns valuable buildings, especially constructed and equipped for school purposes. The business is remunerative -- the annual income from primary schools exceeds thirty thousand dollars -- and the successful conduct of this requires long time contracts with teachers and parents. The Compulsory Education Act of 1922 has already [****37] caused the withdrawal from its schools of children who would otherwise continue, and their income has steadily declined. The appellants, public officers, have proclaimed their purpose strictly to enforce the statute.

covered. If, after such examination, the county superintendent shall determine that such child is not being properly taught, then the county super-intendent shall order the parent, guardian or other person, to send such child to the public school the remainder of the school year.

If any parent, guardian or other person having control or charge or custody of any child between the ages of eight and sixteen years, shall fail to comply with any provision of this section, he shall be guilty of a misdemeanor, and shall, no conviction thereof, be subject to a fine of not less than \$ 5, nor more than \$ 100, or to imprisonment in the county jail not less than two nor more than thirty days, or by both such fine and imprisonment in the discretion of the court.

This Act shall take effect and be and remain in force from and after the first day of September, 1926.

After setting out the above facts the Society's bill alleges that the enactment conflicts with the right of parents to choose schools where their children will receive appropriate mental and religious training, the right of the child to influence the parents' choice of a school, the right of schools and teachers therein to engage in a useful business [**573] or profession, and is accordingly repugnant to the Constitution and void. And, further, that unless enforcement of the measure is enjoined the corporation's business and property will suffer irreparable injury.

Appellee, Hill Military Academy, is a private corporation organized in 1908 under the laws of Oregon, engaged [*533] in owning, operating and conducting for profit an elementary, college preparatory and military training school for boys between the ages of five and twenty-one years. The average attendance is one hundred, and the annual fees received for each student amount to some eight hundred dollars. [****38] The elementary department is divided into eight grades, as in the public schools; the college preparatory department has four grades, similar to those of the public high schools; the courses of study conform to the requirements of the State Board of Education. Military instruction and training are also given, under the supervision of an Army officer. It owns considerable real and personal property, some useful only for school purposes. The business and incident good will are very valuable. In order to conduct its affairs long time contracts must be made for supplies, equipment, teachers and pupils. Appellants, law officers of the State and County, have publicly announced that the Act of November 7, 1922, is valid and have declared their intention to enforce it. By reason of the statute and threat of enforcement appellee's business is being destroyed and its property depreciated; parents and guardians are refusing to make contracts for the future instruction of their sons, and some are being withdrawn.

The Academy's bill states the foregoing facts and then alleges that the challenged Act contravenes the corporation's rights guaranteed by the [Fourteenth Amendment](#) and that unless [****39] appellants are restrained from proclaiming its validity and threatening to enforce it irreparable injury will result. The prayer is for an appropriate injunction.

No answer was interposed in either cause, and after proper notices they were heard by three judges (Jud. Code § 266) on motions for preliminary injunctions upon the specifically alleged facts. The court ruled that the [Fourteenth Amendment](#) guaranteed appellees against the [*534] deprivation of their property without due process of

law consequent upon the unlawful interference by appellants with the free choice of patrons, present and prospective. It declared the right to conduct schools was property and that parents and guardians, as a part of their liberty, might direct the education of children by selecting reputable teachers and places. Also, that these schools were not unfit or harmful to the public, and that enforcement of the challenged statute would unlawfully deprive them of patronage and thereby destroy their owners' business and property. Finally, that the threats to enforce the Act would continue to cause irreparable injury; and the suits were not premature.

No question is raised concerning the power [****40] of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.

The inevitable practical result of enforcing the Act under consideration would be destruction of appellees' primary schools, and perhaps all other private [***1078] primary schools for normal children within the State of Oregon. These parties are engaged in a kind of undertaking not inherently harmful, but long regarded as useful and meritorious. Certainly there is nothing in the present records to indicate that they have failed to discharge their obligations to patrons, students or the State. And there are no peculiar circumstances or present emergencies which demand extraordinary measures relative to primary education.

Under the doctrine of [Meyer v. Nebraska, 262 U.S. 390](#), we think it entirely plain that the Act of 1922 [HN2](#) unreasonably interferes with the liberty of parents and [****41] guardians to direct the upbringing and education of children [*535] under

their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

Appellees are corporations and therefore, it is said, they cannot claim for themselves the liberty which the [Fourteenth Amendment](#) guarantees. Accepted in the proper sense, this is true. [Northwestern Life Ins. Co. v. Riggs](#), 203 U.S. 243, 255; [Western Turf Association v. Greenberg](#), 204 U.S. 359, 363. But they have business and property for which they claim protection. These are threatened with destruction through the unwarranted compulsion which appellants are exercising over present [****42] and prospective patrons of their schools. And this court has gone very far to protect against loss threatened by such [**574] action. [Truax v. Raich](#), 239 U.S. 33; [Truax v. Corrigan](#), 257 U.S. 312; [Terrace v. Thompson](#), 263 U.S. 197.

The courts of the State have not construed the Act, and we must determine its meaning for ourselves. Evidently it was expected to have general application and cannot be construed as though merely intended to amend the charters of certain private corporations, as in [Berea College v. Kentucky](#), 211 U.S. 45. No argument in favor of such view has been advanced.

Generally it is entirely true, as urged by counsel, that no person in any business has such an interest in possible customers as to enable him to restrain exercise of proper power of the State upon the ground that he will be deprived [*536] of patronage. But the injunctions here sought are not against the exercise of any *proper* power. Plaintiffs

asked protection against arbitrary, unreasonable and unlawful interference with their patrons and the consequent destruction of their business and property. Their interest is clear and immediate, within the rule approved [****43] in [Truax v. Raich](#), [Truax v. Corrigan and Terrace v. Thompson](#), *supra*, and many other cases where injunctions have issued to protect business enterprises against interference with the freedom of patrons or customers. [Hitchman Coal & Coke Co. v. Mitchell](#), 245 U.S. 229; [Duplex Printing Press Co. v. Deering](#), 254 U.S. 443; [American Steel Foundries v. Tri-City Central Trades Council](#), 257 U.S. 184; [Nebraska District v. McKelvie](#), 262 U.S. 404; [Truax v. Corrigan](#), *supra*, and cases there cited.

The suits were not premature. The injury to appellees was present and very real, not a mere possibility in the remote future. If no relief had been possible prior to the effective date of the Act, the injury would have become irreparable. [HN3](#) Prevention of impending injury by unlawful action is a well recognized function of courts of equity.

The decrees below are

Affirmed.



Questioned

As of: October 18, 2026 7:14 AM Z

Planned Parenthood v. Danforth

Supreme Court of the United States

Argued March 23, 1976 ; July 1, 1976 *

No. 74-1151

* Together with No. 74-1419, *Danforth, Attorney General of Missouri v. Planned Parenthood of Central Missouri et al.*, also on appeal from the same court.

Reporter

428 U.S. 52 *; 96 S. Ct. 2831 **; 49 L. Ed. 2d 788 ***; 1976 U.S. LEXIS 13 ****

PLANNED PARENTHOOD OF CENTRAL MISSOURI ET AL. v. DANFORTH, ATTORNEY GENERAL OF MISSOURI, ET AL.

Prior History: [****1] APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI

Disposition: The court affirmed the part of the judgement holding that certain parts of the state abortion regulation law were unconstitutional and certain parts were constitutional, reversed the part of the judgment holding that the remaining parts were constitutional, and remanded the case for further proceedings.

Core Terms

abortion, pregnancy, woman, fetus, saline, terminate, viability, prostaglandin, patient, maternal, amniocentesis, sentence, license, spouse, life and health, mother's, pregnant, parental consent, written consent, attending physician, marriage, first trimester, infant, viable, womb, order to preserve, first stage, unmarried, privacy, adult

Case Summary

Procedural Posture

Plaintiff family planning organization challenged the United States District Court for the Eastern District of Missouri's decision to uphold part of the Missouri House Committee Substitute for House Bill No. 1211 (Act) as constitutional and denying injunctive relief against the Act's application and enforcement. Defendant attorney general cross-appealed from the district court's judgment holding part of the Act unconstitutional.

Overview

The family planning organization brought a class action against the attorney general and a circuit

attorney, challenging the application and enforcement of House Committee Substitute for House Bill No. 1211 (Act), which imposed control and regulation of abortions in Missouri. The district court upheld sections of the Act as constitutional and denied the organization's request for injunctive relief, but found other parts of the Act unconstitutional and enjoined their enforcement. On appeal, the court affirmed in part and reversed in part. It held that the definition of "viability" in the Act did not circumvent limitations on state regulation of abortion and was constitutional. The court found that the state could not require the consent of a woman's spouse as a condition for abortion, but could require the woman's written consent to assure the awareness of her decision. The state could not impose a blanket condition requiring the consent to abortion for minors during the first 12 weeks of pregnancy. The court concluded that the state's proscription against saline amniocentesis after 12 weeks of pregnancy as an abortion method did not withstand constitutional challenge.

Outcome

The court affirmed the part of the judgement holding that certain parts of the state abortion regulation law were unconstitutional and certain parts were constitutional, reversed the part of the judgment holding that the remaining parts were constitutional, and remanded the case for further proceedings.

LexisNexis® Headnotes

Constitutional Law > Substantive Due Process > Privacy > General Overview

Healthcare Law > Medical Treatment > Abortion > Right to Privacy

Healthcare Law > Medical Treatment > End-of-Life Decisions > General Overview

HN1 Substantive Due Process, Privacy

The right of privacy, whether it is found in the [Fourteenth Amendment's](#) concept of personal liberty and restrictions upon state action, or in the [Ninth Amendment's](#) reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. A woman's right to terminate her pregnancy must be considered against important state interests in regulation.

Civil
Procedure > ... > Justiciability > Standing > General Overview

Criminal Law & Procedure > ... > Homicide, Manslaughter & Murder > Criminal Abortion > General Overview

Healthcare Law > Medical Treatment > Abortion > General Overview

Healthcare Law > Medical Treatment > General Overview

Healthcare Law > Medical Treatment > End-of-Life Decisions > General Overview

HN2 Justiciability, Standing

Physicians clearly have standing to challenge an abortion statute if the physician is the one against whom the statute directly operates in the event he procures an abortion that does not meet the statutory exceptions and conditions. The physicians therefore assert a sufficiently direct threat of personal detriment. They should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.

Constitutional Law > Substantive Due

Process > Privacy > General Overview

HN3 Substantive Due Process, Privacy

It is not the proper function of the legislature or the courts to place viability, which essentially is a medical concept, at a specific point in the gestation period. The time when viability is achieved may vary with each pregnancy, and the determination of whether a particular fetus is viable is, and must be, a matter for the judgment of the responsible attending physician.

Constitutional Law > Substantive Due Process > Privacy > General Overview

Healthcare Law > Medical Treatment > Abortion > General Overview

Healthcare Law > Medical Treatment > General Overview

Healthcare Law > Medical Treatment > End-of-Life Decisions > General Overview

HN4 Substantive Due Process, Privacy

A state may not restrict the decision of the patient and her physician regarding abortion during the first stage of pregnancy. The woman is the one primarily concerned, and her awareness of the decision and its significance may be assured, constitutionally, by the state to the extent of requiring her prior written consent.

Constitutional Law > Substantive Due Process > Privacy > General Overview

Constitutional Law > Equal Protection > Parentage

HN5 Substantive Due Process, Privacy

A state may not constitutionally require the consent of the spouse as a condition for abortion during the

first 12 weeks of pregnancy. The state cannot delegate to a spouse a veto power which the state itself is absolutely and totally prohibited from exercising during the first trimester of pregnancy.

Constitutional Law > Equal
Protection > Parentage

Healthcare Law > Medical Treatment > Patient
Consent > Consent by Guardians & Parents

Constitutional Law > Substantive Due
Process > Privacy > General Overview

Family Law > Parental Duties &
Rights > Consent > General Overview

Family Law > Parental Duties &
Rights > Consent > Abortion

Healthcare Law > Medical Treatment > End-of-
Life Decisions > General Overview

Healthcare Law > Medical
Treatment > Abortion > General Overview

Healthcare Law > Medical Treatment > Patient
Consent > General Overview

HN6 Equal Protection, Parentage

A state may not impose a blanket provision requiring the consent of a parent or person in loco parentis as a condition for abortion of an unmarried minor during the first 12 weeks of her pregnancy.

Constitutional Law > Substantive Due
Process > Privacy > General Overview

HN7 Substantive Due Process, Privacy

A state, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.

Constitutional Law > Substantive Due
Process > Privacy > General Overview

HN8 Substantive Due Process, Privacy

The outright legislative proscription of saline amniocentesis as a method of abortion fails as a reasonable regulation for the protection of maternal health.

Constitutional Law > Substantive Due
Process > Privacy > General Overview

Healthcare Law > Medical Treatment > Patient
Confidentiality > General Overview

HN9 Substantive Due Process, Privacy

Recordkeeping and reporting requirements that are reasonably directed to the preservation of maternal health and that properly respect a patient's confidentiality and privacy are permissible.

Lawyers' Edition Display

Summary

In litigation instituted in the United States District Court for the Eastern District of Missouri, a challenge was made to the validity, under the United States Constitution, of a Missouri statute setting forth conditions and limitations on abortions and establishing criminal offenses for noncompliance with the various conditions and limitations. The specific provisions of the statute attacked were (1) a viability definition provision defining "viability," for purposes of a provision that no abortion not necessary to preserve the life or health of the mother should be performed unless the attending physician would certify with reasonable medical certainty that the fetus is not viable, as that stage of fetal development when the life of the unborn child may be continued indefinitely outside

the womb by natural or artificial life-supportive systems, (2) a pregnant woman's consent provision, requiring that a woman, prior to submitting to an abortion during the first 12 weeks of pregnancy, must certify in writing her consent to the procedure and that her consent is informed, freely given, and not the result of coercion, (3) a spousal consent provision, requiring the prior written consent of the spouse of a woman seeking an abortion during the first 12 weeks of pregnancy, unless the abortion were certified by a physician to be necessary for preservation of the mother's life, (4) a parental consent provision, requiring, with respect to the first 12 weeks of pregnancy where the pregnant woman is unmarried and under 18 years of age, the written consent of a parent or person in loco parentis unless the abortion were certified by a physician as necessary for preservation of the mother's life, (5) a saline amniocentesis prohibition provision, describing the saline amniocentesis technique of abortion as one whereby the amniotic fluid is withdrawn and a saline or other fluid is inserted into the amniotic sac, and prohibiting such method of abortion after the first 12 weeks of pregnancy, (6) recordkeeping and reporting provisions, imposing requirements upon health facilities and physicians concerned with abortions irrespective of the pregnancy stage, and (7) a standard of care provision, declaring, in its first sentence, that no person who performs or induces an abortion shall fail to exercise that degree of professional skill, care, and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted, and providing, in its second sentence, that any physician or person assisting in an abortion who failed to take such measures to encourage or sustain the life of the child would be deemed guilty of manslaughter if the child's death resulted. The District Court upheld the constitutionality of the several challenged provisions of the statute with the exception of the first sentence of the standard of care provision ([392 F Supp 1362](#)).

On direct appeals from the decision of the three-judge District Court, the United States Supreme Court affirmed in part, reversed in part, and remanded. In an opinion by Blackmun, J., it was held: expressing the unanimous view of the court, that (1) the viability definition provision, which reflected the fact that the determination of viability, varying with each pregnancy, was a matter for the judgment of the responsible attending physician, was not unconstitutional, since it did not circumvent the permissible limitations on state regulation of abortions, (2) the pregnant woman's consent provision was not unconstitutional since the state could validly require a pregnant woman's prior written consent for an abortion to assure awareness of the abortion decision and its significance, and (3) the recordkeeping and reporting provisions were not constitutionally offensive in themselves and imposed no legally significant impact or consequence on the abortion decision or on the physician-patient relationship; expressing the view of six members of the court, that (4) the spousal consent provision was unconstitutional, since the state, being unable to regulate or proscribe abortions during the first stage of pregnancy when a physician and patient make such decision, could not delegate authority to any particular person, even a pregnant woman's spouse, to prevent abortion during the first stage of pregnancy, (5) the first sentence of the standard of care provision was unconstitutional, since it impermissibly required a physician to preserve the life and health of a fetus, whatever the stage of the pregnancy, such unconstitutional first sentence not being severable from the second sentence establishing manslaughter for violation of the standard of care, notwithstanding that the Missouri statute contained a severability provision; and, expressing the view of five members of the court, that (6) the parental consent provision was unconstitutional, since the state did not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of a physician and his patient to terminate the patient's pregnancy, regardless of the reason for

withholding the consent, and (7) the saline amniocentesis prohibition provision was unconstitutional since it failed as a reasonable regulation for the protection of maternal health, being instead an unreasonable or arbitrary regulation designed to inhibit the vast majority of abortions after the first 12 weeks of pregnancy.

Stewart, J., joined by Powell, J., concurring, expressed the view that (1) the critical factor upholding the constitutionality of the viability definition provision was that there was little chance that a physician's professional decision to perform an abortion would be chilled since under the Missouri statute a physician could not be punished for erroneously concluding that a fetus was not viable, (2) with respect to the constitutionality of the pregnant woman's consent provision, the state was not precluded from enacting a law aimed at insuring that the abortion decision was made in a knowing, intelligent, voluntary fashion, (3) as to the unconstitutionality of the spousal consent provision, a woman's constitutionally protected right to decide whether to terminate her pregnancy outweighed the constitutionally protected right of a man to father children and enjoy the association of his offspring, (4) the parental consent provision was unconstitutional since it imposed an absolute limitation on a minor's right to obtain an abortion, and (5) the saline amniocentesis prohibition provision was unconstitutional since, at the time the provision was enacted, the prohibition of the technique was almost tantamount to a prohibition of any abortion in the state after the first 12 weeks of pregnancy.

White, J., joined by Burger, Ch. J., and Rehnquist, J., concurred in part, but dissented on the ground that (1) the spousal consent provision was valid as representing the state's permissible judgment that a mother's interest in avoiding the burdens of child rearing did not outweigh a father's interest in participating in bringing up his own child, (2) the parental consent provision was valid since Missouri was entitled to protect a minor unmarried woman from making the important and irreparable abortion

decision by requiring parental consultation and consent, (3) the saline amniocentesis prohibition provision could not be struck down, since there was no evidence that a safer method of abortion was unavailable at any time relevant to the case, and (4) the standard of care provision was constitutional, being plainly intended to require, as the state might permissibly require, that where a fetus had the capability of meaningful life outside the mother's womb, an abortion had to be handled in a way that would preserve that life, notwithstanding the mother's desire to terminate it.

Stevens, J., concurring in part and dissenting in part, expressed the view that (1) the Missouri legislature could, consistent with the Constitution, outlaw one of two abortion procedures equally available to Missouri women which the legislature found to be the less safe, but that the legislature's prohibition of the saline amniocentesis technique was unconstitutional since at the time the provision was enacted the prohibition of such technique was almost tantamount to a prohibition of any abortion in the state after the first 12 weeks of pregnancy, and (2) the parental consent provision was valid, since the state had a sufficient interest in the welfare of its young citizens to support such a requirement.

Headnotes

STATUTES §26 > standing -- abortion statute -- physicians -- > Headnote:

[LEdHN\[1\]](#) [1]

A state-licensed physician who supervises abortions performed in the state and another state-licensed physician who performs abortions in the state both have standing, in a civil action brought to challenge the constitutionality of provisions of the state's abortion statute governing conditions and limitations on abortions which the statute makes it criminal not to comply with; since a physician is the one against whom the state abortion statute

directly operates in the event the physician procures an abortion that does not meet the statutory exceptions and conditions, the physicians assert a sufficiently direct threat of personal detriment and should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.

COURTS §236.5 > STATUTES §26 > standing -- abortion statute -- physicians -- > Headnote:
[LEdHN\[2A\]](#) [2A][LEdHN\[2B\]](#) [2B]

A state-licensed physician who supervises abortions in the state and another state-licensed physician who performs abortions in the state do not have standing to challenge in a civil action the constitutionality of that portion of the state's abortion statute which declares that an infant who survives an attempted abortion which was not performed to save the life or health of the mother is an abandoned ward of the state under the jurisdiction of the juvenile court, and which deprives the mother, and also the father if he consented to the abortion, of parental rights, since the physicians did not contend that the provision imposed any obligation on them or that its operation otherwise injured them in fact and did not claim any interest in the question of who receives custody that is sufficiently concrete to satisfy the case or controversy requirement of a federal court's jurisdiction under Article III of the United States Constitution.

ERROR §1340 > review in Supreme Court -- abortion statute -- constitutionality -- standing -- > Headnote:
[LEdHN\[3A\]](#) [3A][LEdHN\[3B\]](#) [3B]

On appeal from a decision of a Federal District Court upholding the constitutionality of a state abortion statute provision--which provision declares an infant who survives an attempted

abortion which was not performed to save the life or health of the mother to be an abandoned ward of the state under the jurisdiction of the juvenile court, and which deprives the mother, and also the father if he consented to the abortion, of parental rights--in an action brought by state-licensed physicians, who performed or supervised abortions performed in the state, and a not-for-profit corporation in the state, which maintained facilities for the performance of abortions, to challenge the constitutionality of the state's abortion statute, the United States Supreme Court, upon finding that the physicians do not have standing to challenge such provision, will not consider the standing of the not-for-profit corporation to attack the provision, and will not decide the issue of such provision's constitutionality, but will leave the question of the corporation's standing to the District Court for reconsideration on remand, where the District Court did not decide whether the corporation had standing to challenge the statute or any portion of it because of its view that the physicians had standing to challenge the entire statute.

ABORTION §1 > state statute -- definition of viability -- > Headnote:
[LEdHN\[4\]](#) [4]

That provision of a state abortion statute--which statute makes it a crime for any person to knowingly perform or aid in the performance of an abortion contrary to the statute's provisions, one of which requires an attending physician's certification that a fetus is not viable before an abortion not necessary to preserve the life or health of the mother may be performed--defining "viability" as that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supportive systems, does not circumvent the permissible limitations on state regulation of abortions and is not unconstitutional; it is not the proper function of the legislature or the courts to place viability, which

varies in each pregnancy and which must be determined by a responsible attending physician, at a specific point in the gestation period, and it is not necessary that a statute fix a specified number of weeks in pregnancy as the point of viability.

ABORTION §1 > state statute -- consent of pregnant woman -- > Headnote:

[LEdHN\[5\]](#) [5]

A state statutory provision requiring that a woman, prior to submitting to an abortion during the first 12 weeks of pregnancy, certify in writing her consent to the procedure and that her consent is informed, freely given, and not the result of coercion, is not unconstitutional as imposing an extra burden of regulation on the abortion decision; it is desirable and imperative that the decision to abort, which is an important and often stressful one, be made with full knowledge of its nature and consequences, and to assure that the pregnant woman, who is the one primarily concerned in such decision, is aware of the decision and its significance, the state may constitutionally require her prior written consent.

ABORTION §1 > state restriction -- > Headnote:

[LEdHN\[6\]](#) [6]

The state may not restrict the decision of a pregnant woman and her physician regarding abortion during the first stage of pregnancy.

ABORTION §1 > SURGEONS §1 > consent for surgery -- state requirement -- > Headnote:

[LEdHN\[7\]](#) [7]

There is no constitutional defect in a state's requiring prior written consent for certain types of

surgery as, for example, an intracardiac procedure, or where the surgical risk is elevated above a specified mortality level, or for abortions.

ABORTION §1 > state statute -- consent of spouse --

> Headnote:

[LEdHN\[8\]](#) [8]

A provision in a state statute requiring the prior written consent of the spouse of a woman seeking an abortion during the first 12 weeks of pregnancy, unless the abortion is certified by a licensed physician to be necessary in order to preserve the life of the mother, is unconstitutional; since the state cannot regulate or proscribe abortion during the first stage of pregnancy, when the physician and his patient make that decision, the state cannot delegate authority to any particular person, even the spouse, to prevent abortion during that same period.

PRIVACY §1 > meaning -- right of individual --

> Headnote:

[LEdHN\[9A\]](#) [9A][LEdHN\[9B\]](#) [9B]

The right of privacy gives an individual, married or single, the right to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

ABORTION §1 > state statute -- parental consent --

> Headnote:

[LEdHN\[10\]](#) [10]

A provision in a state abortion statute setting forth conditions and limitations for abortions which requires the written consent of a parent or person in loco parentis of an unmarried woman under the age

of 18 years who seeks an abortion during the first 12 weeks of pregnancy, unless the abortion is certified by a physician as necessary for the preservation of the mother's life, is unconstitutional; the state does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent.

LAW §8 > minors' rights -- > Headnote:

[LEdHN\[11\]](#) [11]

Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority; minors, as well as adults, are protected by the Constitution and possess constitutional rights.

ABORTION §1 > state statute -- saline amniocentesis prohibition -- > Headnote:

[LEdHN\[12\]](#) [12]

A provision of a state statute setting forth conditions and limitations upon abortions which prohibits, as a method or technique of abortion, the use of saline amniocentesis--a method of abortion described in the provision as one whereby the amniotic fluid is withdrawn and a saline or other fluid is inserted into the amniotic sac--after the first 12 weeks of pregnancy, on the ground that the technique is deleterious to maternal health, is unconstitutional, where (1) the state, through the provision, would prohibit the use of an abortion method shown to be the one most commonly used nationally by physicians after the first trimester and which was safer, with respect to maternal mortality, than even the continuation of pregnancy until normal childbirth, (2) no evidence had been offered that the potentially safer prostaglandin technique of

abortion was available in the state, (3) the provision appeared to prescribe the intra-amniotic injection of prostaglandin itself and other methods that might be developed in the future and that might be highly effective and completely safe, and (4) the provision, by not prohibiting techniques that were many times more likely than the saline amniocentesis technique to result in maternal death, had, as a practical matter, forced a woman and her physician to terminate pregnancy by methods more dangerous to the pregnant woman's health than the method outlawed; the outright legislative prescription of the saline amniocentesis technique fails as a reasonable regulation for the protection of maternal health, and instead is an unreasonable or arbitrary regulation designed to inhibit the vast majority of abortions after the first 12 weeks.

ABORTION §1 > state statute -- recordkeeping --

> Headnote:

[LEdHN\[13\]](#) [13]

Recordkeeping provisions of a state's statute governing conditions and limitations on abortions--one providing for health facilities and physicians concerned with abortions to be supplied with forms, the purpose and function of which is the preservation of maternal health and life and the monitoring of abortions to assure that they are done in accordance with the law, such provision also stating that information on the forms is confidential and to be used only for statistical purposes but allowing for the inspection of records and health data acquired by public health officers, and the other providing that records are to be kept for seven years in the permanent files of a health facility where an abortion is performed--are not constitutionally offensive in themselves and impose no legally significant impact or consequence on the abortion decision or on the physician-patient relationship, since recordkeeping of the sort provided for in the provisions, if not abused or overdone, can be useful to the state's interest in

protecting the health of its female citizens and may be a resource relevant to decisions involving medical experience and judgment, and since the provisions contain requirements for confidentiality and for record-retention for a period not unreasonable in length.

ABORTION §1 > first stage of pregnancy -- state restrictions -- > Headnote:

[LEdHN\[14\]](#) [14]

The state may not impose restrictions or regulations governing the medical judgment of a pregnant woman's attending physician with respect to the termination of her pregnancy during the first stage of pregnancy.

ABORTIONS §1 > recordkeeping and reporting -- > Headnote:

[LEdHN\[15\]](#) [15]

A state's recordkeeping and reporting requirements with respect to abortions are permissible where they are reasonably directed to the preservation of maternal health and properly respect a patient's confidentiality and privacy.

ABORTIONS §1 > state statute -- standard of care -- > Headnote:

[LEdHN\[16\]](#) [16]

A provision governing the standard of care for abortions set forth in a state statute dealing with abortions--which provision, in its first sentence, provides that no person who performs or induces an abortion shall fail to exercise that degree of professional skill, care, and diligence to preserve the life and health of the fetus which such person

would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted, and which, in its second sentence, provides that any physician or person assisting in an abortion who fails to take such measures to encourage or to sustain the life of the child, resulting in the death of the child, is deemed guilty of manslaughter--is unconstitutional, since the provision, requiring a physician to exercise the prescribed care to preserve the life and health of the fetus but not specifying that such care need be taken only after the stage of viability has been reached, impermissibly requires a physician to preserve the life and health of the fetus, whatever the stage of the pregnancy, and the fact that the second sentence of the provision refers to a criminal penalty where the physician fails to take such measures to encourage or sustain the life of the "child," resulting in the death of the "child," does not modify the duty imposed by the previous sentence or limit that duty to pregnancies that have reached the stage of viability.

STATUTES §40 > standard of care -- abortion -- severability -- > Headnote:

[LEdHN\[17\]](#) [17]

The unconstitutional first sentence of a provision in a state statute governing abortion, which sentence sets forth a standard of care for the preservation of the life and health of a fetus required of persons who perform or induce abortions, is not severable from the second sentence of the provision which declares that any physician or person assisting in an abortion is guilty of manslaughter if the person fails to follow the required standard of care and death results, notwithstanding that the state abortion statute contains a severability provision, where the terms of the provision are inextricably bound together, and a physician's or other person's criminal failure to protect a liveborn infant would be subject to prosecution in the state under its criminal statute.

Syllabus

Two Missouri-licensed physicians, one of whom performs abortions at hospitals and the other of whom supervises abortions at Planned Parenthood, a not-for-profit corporation, brought suit, along with that organization, for injunctive and declaratory relief challenging the constitutionality of the Missouri abortion statute. The provisions under attack are: § 2 (2), defining "viability" as "that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supportive systems"; § 3 (2), requiring that before submitting to an abortion during the first 12 weeks of pregnancy a woman must consent in writing to the procedure and certify that "her consent is informed and freely given and is not the result of coercion"; § 3 (3), requiring, for the same period, the written consent of the spouse of a woman seeking an abortion unless a licensed physician certifies that the abortion is necessary to preserve the mother's life; § 3 (4), requiring, for the [****2] same period, and with the same proviso, the written consent of a parent or person *in loco parentis* to the abortion of an unmarried woman under age 18; § 6 (1), requiring the physician to exercise professional care to preserve the fetus' life and health, failing which he is deemed guilty of manslaughter and is liable in an action for damages; § 7, declaring an infant who survives an attempted abortion not performed to save the mother's life or health an abandoned ward of the State, and depriving the mother and a consenting father of parental rights; § 9, prohibiting after the first 12 weeks of pregnancy the abortion procedure of saline amniocentesis as "deleterious to maternal health"; and §§ 10 and 11, prescribing reporting and recordkeeping requirements for health facilities and physicians performing abortions. The District Court ruled that the two physicians had "obvious standing" to maintain the suit and that it was therefore unnecessary to determine if Planned Parenthood also had standing. On the merits, the

court upheld the foregoing provisions with the exception of § 6 (1)'s professional-skill requirement, which was held to be "unconstitutionally overbroad" because [****3] it failed to exclude the pregnancy stage prior to viability.

Held:

1. The physician-appellants have standing to challenge the foregoing provisions of the Act with the exception of § 7, the constitutionality of which the Court declines to decide. [Doe v. Bolton](#), 410 U.S. 179. P. 62, and n.2.
2. The definition of viability in § 2 (2) does not conflict with the definition in [Roe v. Wade](#), 410 U.S. 113, 160, 163, as the point at which the fetus is "potentially able to live outside the mother's womb, albeit with artificial aid," and is presumably capable of "meaningful life outside the mother's womb." Section 2 (2) maintains the flexibility of the term "viability" recognized in *Roe*. It is not a proper legislative or judicial function to fix viability, which is essentially for the judgment of the responsible attending physician, at a specific point in the gestation period. Pp. 63-65.
3. The consent provision in § 3 (2) is not unconstitutional. The decision to abort is important and often stressful, and the awareness of the decision and its significance may be constitutionally assured by the State to the extent of requiring the woman's prior [****4] written consent. Pp. 65-67.
4. The spousal consent provision in § 3 (3), which does not comport with the standards enunciated in [Roe v. Wade](#), *supra*, at 164-165, is unconstitutional, since the State cannot "delegate to a spouse a veto power which the [S]tate itself is absolutely and totally prohibited from exercising during the first trimester of pregnancy." Pp. 67-72.
5. The State may not constitutionally impose a blanket parental consent requirement, such as § 3 (4), as a condition for an unmarried minor's

abortion during the first 12 weeks of her pregnancy for substantially the same reasons as in the case of the spousal consent provision, there being no significant state interests, whether to safeguard the family unit and parental authority or otherwise, in conditioning an abortion on the consent of a parent with respect to the under-18-year-old pregnant minor. As stressed in *Roe*, "the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician." [410 U.S., at 164](#). Pp. 72-75.

6. Through § 9 the State would prohibit the most commonly used abortion procedure in the country and one that [****5] is safer, with respect to maternal mortality, than even the continuation of pregnancy until normal childbirth and would force pregnancy terminations by methods more dangerous to the woman's health than the method outlawed. As so viewed (particularly since another safe technique, prostaglandin, is not yet available) the outright legislative proscription of saline amniocentesis fails as a reasonable protection of maternal health. As an arbitrary regulation designed to prevent the vast majority of abortions after the first 12 weeks, it is plainly unconstitutional. Pp. 75-79.

7. The reporting and recordkeeping requirements, which can be useful to the State's interest in protecting the health of its female citizens and, may be of medical value, are not constitutionally offensive in themselves, particularly in view of reasonable confidentiality and retention provisions. They thus do not interfere with the abortion decision or the physician-patient relationship. It is assumed that the provisions will not be administered in an unduly burdensome way and that patients will not be required to execute spousal or parental consent forms in accordance with invalid provisions of the Act. [****6] Pp. 79-81.

8. The first sentence of § 6 (1) impermissibly requires a physician to preserve the *fetus'* life and health, whatever the stage of pregnancy. The second sentence, which provides for criminal and

civil liability where a physician fails "to take such measures to encourage or to sustain the life of the *child*, and the death of the *child* results," does not alter the duty imposed by the first sentence or limit that duty to pregnancies that have reached the stage of viability, and since it is inseparably tied to the first provision, the whole section is invalid. Pp. 81-84.

[392 F. Supp. 1362](#), affirmed in part, reversed in part, and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which BRENNAN, STEWART, MARSHALL, and POWELL, JJ., joined, in all but Parts IV-D and IV-E of which STEVENS, J., joined, and in all but Parts IV-C, IV-D, IV-E, and IV-G of which BURGER, C.J., and WHITE and REHNQUIST, JJ., joined. STEWART, J., filed a concurring opinion, in which POWELL, J., joined, *post*, p. 89. WHITE, J., filed an opinion concurring in part and dissenting in part, in which BURGER, C.J., and REHNQUIST, J., joined, *post*, p. 92. STEVENS, [****7] J., FILED AN OPINION CONCURRING IN PART AND DISSENTING IN PART, *POST*, P. 101.

Counsel: *Frank Susman* argued the cause for appellants in No. 74-1151 and for appellees in No. 74-1419. With him on the brief was *Judith Mears*.

John C. Danforth, pro se, Attorney General of Missouri, argued the cause for appellees in No. 74-1151 and for appellant in No. 74-1419. With him on the brief were *D. Brook Bartlett*, First Assistant Attorney General, and *Karen M. Iverson* and *Christopher R. Brewster*, Assistant Attorneys General. +

+ *Rhonda Copelon* and *Nancy Stearns* filed a brief in both cases for the Center for Constitutional Rights et al. as *amici curiae* urging reversal in No. 74-1151.

Briefs of *amici curiae* were filed in both cases by *Eugene Krasicky*, *George E. Reed*, and *Patrick F. Geary* for the United States Catholic Conference; and by *Harriet F. Pilpel* for Planned

[****8]

Judges: Burger, Brennan, Stewart, White, Marshall, Blackmun, Powell, Rehnquist, Stevens.

Opinion by: BLACKMUN

Opinion

[*55] [***797] [**2834] MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case is a logical and anticipated corollary to *Roe v. Wade*, 410 U.S. 113 (1973), and *Doe v. Bolton*, 410 U.S. 179 [**2835] (1973), for it raises issues secondary to those that were then before the Court. Indeed, some of the questions now presented were forecast and reserved in *Roe* and *Doe*. 410 U.S., at 165 n. 67.

I

After the decisions in *Roe* and *Doe*, this Court remanded for reconsideration a pending Missouri federal case in which the State's then-existing abortion legislation, [*56] *Mo. Rev. Stat. §§ 559.100*, 542.380, and 563.300 (1969), was under constitutional challenge. *Rodgers v. Danforth*, 410 U.S. 949 (1973). A three-judge federal court for the Western District of Missouri, in an unreported decision, thereafter declared the challenged Missouri statutes unconstitutional and granted injunctive relief. On appeal here, that judgment was summarily affirmed. *Danforth v. Rodgers*, 414 U.S. 1035 (1973). [****9]

In June 1974, somewhat more than a year after *Roe* and *Doe* had been decided, Missouri's 77th General Assembly, in its Second Regular Session, enacted House Committee Substitute for House Bill No. 1211 (hereinafter Act). The legislation was

approved by the Governor on June 14, 1974, and became effective immediately by reason of an emergency clause contained in § A of the statute. The Act is set forth in full as the Appendix to this opinion. It imposes a structure for the control and regulation of abortions in Missouri during all stages of pregnancy.

II

Three days after the Act became effective, the present litigation was instituted in the United States District Court for the Eastern District of Missouri. The plaintiffs are Planned Parenthood of Central Missouri, a not-for-profit Missouri corporation which maintains a facility in Columbia, Mo., for the performance of abortions; David Hall, M.D.; and Michael Freiman, M.D. Doctor Hall is a resident of Columbia, is licensed as a physician in Missouri, is chairman of the Department and Professor of Obstetrics and Gynecology at the University of Missouri Medical School at Columbia, and supervises abortions at the Planned [****10] Parenthood facility. He was described by the three-judge court in the 1973 case as one of four plaintiffs who were "eminent, Missouri-licensed obstetricians and gynecologists." Jurisdictional [*57] Statement, App. A7, in *Danforth v. Rodgers*, No. 73-426, O.T. 1973. [***798] Doctor Freiman is a resident of St. Louis, is licensed as a physician in Missouri, is an instructor of Clinical Obstetrics and Gynecology at Washington University Medical School, and performs abortions at two St. Louis hospitals and at a clinic in that city.

The named defendants are the Attorney General of Missouri and the Circuit Attorney of the city of St. Louis "in his representative capacity" and "as the representative of the class of all similar Prosecuting Attorneys of the various counties of the State of Missouri." Complaint 10.

The plaintiffs brought the action on their own behalf and, purportedly, "on behalf of the entire class consisting of duly licensed physicians and surgeons presently performing or desiring to

Parenthood Federation of America, Inc., et al. Briefs of *amici curiae* were filed in No. 74-1151 by John J. Donnelly for Lawyers for Life, Inc., et al., and by Jerome M. McLaughlin for Missouri Nurses for Life.

perform the termination of pregnancies and on behalf of the entire class consisting of their patients desiring the termination of pregnancy, all within the State of Missouri." [****11] *Id.*, at 9. Plaintiffs sought declaratory relief and also sought to enjoin enforcement of the Act on the ground, among others, that certain of its provisions deprived them and their patients of various constitutional rights: "the right to privacy in the physician-patient relationship"; the physicians' "right to practice medicine according to the highest standards of medical practice"; the female patients' right to determine whether to bear children; the patients' "right to life due to the inherent risk involved in childbirth" or in medical procedures alternative to abortion; the physicians' "right to give and plaintiffs' patients' right to receive safe and adequate [**2836] medical advice and treatment, pertaining to the decision of whether to carry a given pregnancy to term and the method of termination"; the patients' right under the [Eighth Amendment](#) to be free from cruel and unusual punishment "by forcing [*58] and coercing them to bear each pregnancy they conceive"; and, by being placed "in the position of decision making beset with... inherent possibilities of bias and conflict of interest," the physician's right to due process of law guaranteed by the [Fourteenth \[****12\] Amendment](#). *Id.*, at 10-11.

The particular provisions of the Act that remained under specific challenge at the end of trial were § 2 (2), defining the term "viability"; § 3 (2), requiring from the woman, prior to submitting to abortion during the first 12 weeks of pregnancy, a certification in writing that she consents to the procedure and "that her consent is informed and freely given and is not the result of coercion"; § 3 (3), requiring, for the same period, "the written consent of the woman's spouse, unless the abortion is certified by a licensed physician to be necessary in order to preserve the life of the mother"; § 3 (4), requiring, for the same period, "the written consent of one parent or person in loco parentis of the woman if the woman is unmarried and under the age of eighteen years, unless the abortion is

certified by a licensed physician as necessary in order to preserve the life of the mother"; § 6 (1), requiring the physician to exercise professional care "to preserve the life and health of the fetus" and, failing such, deeming him guilty of manslaughter and making him liable in an action for damages; § 7, declaring an infant, who survives "an attempted [****13] abortion which was [***799] not performed to save the life or health of the mother," to be "an abandoned ward of the state under the jurisdiction of the juvenile court," and depriving the mother, and also the father if he consented to the abortion, of parental rights; § 9, the legislative finding that the method of abortion known as saline amniocentesis "is deleterious to maternal health," and prohibiting that method after the first 12 weeks of pregnancy; and §§ 10 [*59] and 11, imposing reporting and maintenance of record requirements for health facilities and for physicians who perform abortions.

The case was presented to a three-judge District Court convened pursuant to the provisions of 28 U.S.C. §§ 2281 and [2284](#). [392 F. Supp. 1362 \(1975\)](#). The court ruled that the two physician-plaintiffs had standing inasmuch as § 6(1) provides that the physician who fails to exercise the prescribed standard of professional care due the fetus in the abortion procedure shall be guilty of manslaughter, and § 14 provides that any person who performs or aids in the performance of an abortion contrary to the provisions of the Act shall be guilty of a misdemeanor. [392 F. Supp., at 1366-1367](#). [****14] Due to this "obvious standing" of the two physicians, *id.*, at [1367](#), the court deemed it unnecessary to determine whether Planned Parenthood also had standing.

On the issues as to the constitutionality of the several challenged sections of the Act, the District Court, largely by a divided vote, ruled that all except the first sentence of § 6(1) withstood the attack. That sentence was held to be constitutionally impermissible because it imposed upon the physician the duty to exercise at all stages of pregnancy "that degree of professional skill, care

and diligence to preserve the life and health of the fetus" that "would be required... to preserve the life and health of any fetus intended to be born." Inasmuch as this failed to exclude the stage of pregnancy prior to viability, the provision was "unconstitutionally overbroad." [392 F. Supp., at 1371](#).

One judge concurred in part and dissented in part. [Id., at 1374](#). He agreed with the majority as to the constitutionality of §§ 2(2), 3(2), 10, and 11, respectively relating to the definition of "viability," the woman's prior written consent, maintenance of records, [*60] and retention of records. He also agreed with [****15] the majority that § 6(1) was unconstitutionally overbroad. He dissented from the majority opinion upholding the constitutionality of §§ 3(3), 3(4), [**2837] 7, and 9, relating, respectively, to spousal consent, parental consent, the termination of parental rights, and the proscription of saline amniocentesis.

In No. 74-1151, the plaintiffs appeal from that part of the District Court's judgment upholding sections of the Act as constitutional and denying injunctive relief against their application and enforcement. In No. 74-1419, the defendant Attorney General cross-appeals from that part of the judgment holding § 6(1) unconstitutional and enjoining enforcement thereof. We granted the plaintiffs' application for stay of enforcement of the Act pending appeal. 420 U.S. 918 (1975). Probable jurisdiction of both appeals thereafter was noted. 423 U.S. 819 (1975).

[***800] For convenience, we shall usually refer to the plaintiffs as "appellants" and to both named defendants as "appellees."

III

In *Roe v. Wade* the Court concluded that [HN1](#) the "right of privacy, whether it be founded in the [Fourteenth Amendment's](#) concept of personal liberty and restrictions upon state [****16] action, as we feel it is, or, as the District Court determined, in the [Ninth Amendment's](#) reservation of rights to the people, is broad enough to encompass a

woman's decision whether or not to terminate her pregnancy." [410 U.S., at 153](#). It emphatically rejected, however, the proffered argument "that the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses." *Ibid.* Instead, [*61] this right "must be considered against important state interests in regulation." [Id., at 154](#).

The Court went on to say that the "pregnant woman cannot be isolated in her privacy," for she "carries an embryo and, later, a fetus." [Id., at 159](#). It was therefore "reasonable and appropriate for a State to decide that at some point in time another interest, that of health of the mother or that of potential human life, becomes significantly involved. The woman's privacy is no longer sole and any right of privacy she possesses must be measured accordingly." *Ibid.* The Court stressed the measure of the State's interest in "the light of present medical knowledge." [Id., at 163](#). It concluded [****17] that the permissibility of state regulation was to be viewed in three stages: "For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician," without interference from the State. [Id., at 164](#). The participation by the attending physician in the abortion decision, and his responsibility in that decision, thus, were emphasized. After the first stage, as so described, the State may, if it chooses, reasonably regulate the abortion procedure to preserve and protect maternal health. *Ibid.* Finally, for the stage subsequent to viability, a point purposefully left flexible for professional determination, and dependent upon developing medical skill and technical ability,¹ the State may regulate an abortion to protect the life of the fetus and even may proscribe abortion except where it is

¹"Viability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks." [Roe v. Wade, 410 U.S., at 160](#).

necessary, in appropriate medical judgment, for the preservation of the life or health of the mother. *Id.*, at 163-165.

[****18] [*62] IV

LEdHN[1] [1]LEdHN[2A] [2A]LEdHN[3A] [3A]With the exception specified in n. 2, *infra*, we agree with the District Court that HN2 the physician-appellants clearly have standing. This was established in *Doe v. Bolton*, 410 U.S., at 188. Like the Georgia statutes challenged in that case, "[t]he physician is the one against whom [the Missouri [***801] Act] directly operate[s] in the event he procures an abortion that does not meet the statutory exceptions and conditions. [**2838] The physician-appellants, therefore, assert a sufficiently direct threat of personal detriment. They should not be required to await and undergo a criminal prosecution as the sole means of seeking relief." ² *Ibid*.

LEdHN[2B] [2B] LEdHN[3B] [3B]

² This is not so, however, with respect to § 7 of the Act pertaining to state wardship of a live-born infant. Section 7 applies "where a live born infant results from an attempted abortion which was not performed to save the life or health of the mother." It then provides that the infant "shall be an abandoned ward of the state" and that the mother - and the father, too, if he consented to the abortion -- "shall have no parental rights or obligations whatsoever relating to such infant."

The physician-appellants do not contend that this section of the Act imposes any obligation on them or that its operation otherwise injures them in fact. They do not claim any interest in the question of who receives custody that is "sufficiently concrete" to satisfy the "case or controversy" requirement of a federal court's Art. III jurisdiction. *Singleton v. Wulff*, *post*, at 112. Accordingly, the physician-appellants do not have standing to challenge § 7 of the Act.

The District Court did not decide whether Planned Parenthood has standing to challenge the Act, or any portion of it, because of its view that the physician-appellants have standing to challenge the entire Act. 392 F.Supp. 1362, 1366-1367 (1975). We decline to consider here the standing of Planned Parenthood to attack § 7. That question appropriately may be left to the District Court for reconsideration on remand. As a consequence, we do not decide the issue of § 7's constitutionality.

[****19] Our primary task, then, is to consider each of the [*63] challenged provisions of the new Missouri abortion statute in the particular light of the opinions and decisions in *Roe* and in *Doe*. To this we now turn, with the assistance of helpful briefs from both sides and from some of the *amici*.

A

LEdHN[4] [4]The definition of viability. Section 2(2) of the Act defines "viability" as "that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supportive systems." Appellants claim that this definition violates and conflicts with the discussion of viability in our opinion in *Roe*. 410 U.S., at 160, 163. In particular, appellants object to the failure of the definition to contain any reference to a gestational time period, to its failure to incorporate and reflect the three stages of pregnancy, to the presence of the word "indefinitely," and to the extra burden of regulation imposed. It is suggested that the definition expands the Court's definition of viability, as expressed in *Roe*, and amounts to a legislative [****20] determination of what is properly a matter for medical judgment. It is said that the "mere possibility of momentary survival is not the medical standard of viability." Brief for Appellants 67.

In *Roe*, we used the term "viable," properly we thought, to signify the point at which the fetus is "potentially able to live outside the mother's womb, albeit with artificial aid," and presumably capable of "meaningful life outside the mother's womb," 410 U.S., at 160, 163. We noted that this point "is usually placed" at about seven months or 28 weeks, but may occur earlier. *Id.*, at 160.

We agree with the District Court and conclude that the definition of viability in the Act does not conflict [***802] with what was said and held in *Roe*. In fact, we believe that § [*64] 2(2), even when read in conjunction with § 5 (proscribing an

abortion "not necessary to preserve the life or health of the mother... unless the attending physician first certifies with reasonable medical certainty that the fetus is not viable"), the constitutionality of which is not explicitly challenged here, reflects an attempt on the part of the Missouri General Assembly to comply with our [****21] observations and discussion in *Roe* relating to viability. Appellant Hall, in his deposition, had no particular difficulty with the statutory definition.³ As noted above, we recognized in *Roe* that viability was a matter of medical [**2839] judgment, skill, and technical ability, and we preserved the flexibility of the term. Section 2(2) does the same. Indeed, one might argue, as the appellees do, that the presence of the statute's words "continued indefinitely" favor, rather than disfavor, the appellants, for, arguably, the point when life can be "continued indefinitely outside the womb" may well occur later in pregnancy than the point where the fetus is "potentially able to live outside the mother's womb." *Roe v. Wade*, 410 U.S., at 160.

In any event, we agree with the District Court that *HN3* it is not the proper function of the [****22] legislature or the courts to place viability, which essentially is a medical concept, at a specific point in the gestation period. The time when viability is achieved may vary with each pregnancy, and the determination of whether a particular fetus is viable is, and must be, a matter for the judgment of the responsible attending physician. The definition of viability in § 2(2) merely reflects this fact. The appellees do not contend otherwise, for they insist [*65] that the determination of viability rests with the physician in the exercise of his professional judgment.⁴

³"[A]lthough I agree with the definition of 'viability,' I think that it must be understood that viability is a very difficult state to assess." Tr. 369.

⁴"The determination of when the fetus is viable rests, as it should, with the physician, in the exercise of his medical judgment, on a case-by-case basis." Brief for Appellee Danforth 26. "Because viability may vary from patient to patient and with advancements in

[****23] We thus do not accept appellants' contention that a specified number of weeks in pregnancy must be fixed by statute as the point of viability. See *Wolfe v. Schroering*, 388 F. Supp. 631, 637 (WD Ky. 1974); *Hodgson v. Anderson*, 378 F. Supp. 1008, 1016 (Minn. 1974), dismissed for want of jurisdiction *sub nom.* *Spannaus v. Hodgson*, 420 U.S. 903 (1975).⁵

We conclude that the definition in § 2(2) of the Act does not circumvent the limitations on state regulation outlined in *Roe*. We therefore hold that the Act's definition of "viability" comports with *Roe* and withstands [***803] the constitutional [****24] attack made upon it in this litigation.

B

LEdHN[5] [5]The woman's consent. Under § 3(2) of the Act, a woman, prior to submitting to an abortion during the first 12 weeks of pregnancy, must certify in writing her consent to the procedure and "that her consent is informed and freely given and is not the result of coercion." Appellants argue that this requirement is violative of [*66] *Roe v. Wade*, 410 U.S., at 164-165, by imposing an extra layer and burden of regulation on the abortion decision. See *Doe v. Bolton*, 410 U.S., at 195-200. Appellants also claim that the provision is overbroad and vague.

The District Court's majority relied on the propositions that the decision to terminate a pregnancy, of course, "is often a stressful one," and

medical technology, it is essential that physicians make the determination in the exercise of their medical judgment." *Id.*, at 28. "Defendant agrees that 'viability' will vary, that it is a difficult state to assess... and that it must be left to the physician's judgment." *Id.*, at 29.

⁵The Minnesota statute under attack in *Hodgson* provided that a fetus "shall be considered potentially 'viable'" during the second half of its gestation period. Noting that the defendants had presented no evidence of viability at 20 weeks, the three-judge District Court held that that definition of viability was "unreasonable and cannot stand." 378 F. Supp., at 1016.

that the consent requirement of § 3(2) "insures that the pregnant woman retains control over the discretions of her consulting physician." [392 F. Supp., at 1368, 1369](#). The majority also felt that the consent requirement "does not single out the abortion procedure, but merely includes it within the category of medical operations for which consent is required." [****25] ⁶ [**2840] *Id.*, at [1369](#). The third judge joined the majority in upholding § 3(2), but added that the written consent requirement was "not burdensome or chilling" and manifested "a legitimate interest of the state that this important decision has in fact been made by the person constitutionally empowered to do so." [392 F. Supp., at 1374](#). He went on to observe that the requirement "in no way interposes the state or third parties in the decision-making process." *Id.*, at [1375](#).

[LEdHN\[6\]](#) [6]We do not disagree with the result reached by the District Court as to § 3(2). It is true that *Doe* and *Roe* clearly establish that [HN4](#) the State may not restrict the [****26] decision of the patient and her physician regarding abortion during the first stage of pregnancy. Despite the fact that apparently no other Missouri statute, with the exceptions referred to in n. 6, *supra*, requires a [*67] patient's prior written consent to a surgical procedure, ⁷ the imposition by § 3(2) of such a requirement for termination of pregnancy even during the first stage, in our view, is not in itself an unconstitutional requirement. The decision to abort, indeed, is an important, and often a stressful one, and it is desirable and imperative that it be made with full knowledge of its nature and consequences. The woman is the one primarily

concerned, and her awareness of the decision and its significance may be assured, constitutionally, by the State to the extent of requiring her prior written consent.

[****27] [LEdHN\[7\]](#) [7]We could not say that a requirement imposed by the State that a prior written consent for any surgery would be unconstitutional. As a [****804] consequence, we see no constitutional defect in requiring it only for some types of surgery as, for example, an intracardiac procedure, or where the surgical risk is elevated above a specified mortality level, or, for that matter, for abortions. ⁸

[****28] C

[LEdHN\[8\]](#) [8]The spouse's consent. Section 3(3) requires the prior written consent of the spouse of the woman seeking an abortion during the first 12 weeks of pregnancy, unless [*68] "the abortion is certified by a licensed physician to be necessary in order to preserve the life of the mother." ⁹

The appellees defend § 3(3) on the ground that it was enacted in the light of the General Assembly's "perception of marriage as an institution," Brief for Appellee Danforth 34, and that any major change in family status is a decision to be made jointly by the marriage partners. Reference is made to an abortion's possible effect on the woman's childbearing potential. It is said that marriage always has entailed some legislatively imposed limitations: Reference is made [****29] to adultery and bigamy as criminal offenses; to

⁶ Apparently, however, the only other Missouri statutes concerned with consent for general medical or surgical care relate to persons committed to the Missouri State chest hospital, [Mo. Rev. Stat. § 199.240](#) (Supp. 1975), or to mental or correctional institutions, § 105.700 (1969).

⁷ There is some testimony in the record to the effect that taking from the patient a prior written consent to surgery is the custom. That may be so in some areas of Missouri, but we definitely refrain from characterizing it extremely as "the universal practice of the medical profession," as the appellees do. Brief for Appellee Danforth 32.

⁸ The appellants' vagueness argument centers on the word "informed." One might well wonder, offhand, just what "informed consent" of a patient is. The three Missouri federal judges who composed the three-judge District Court, however, were not concerned, and we are content to accept, as the meaning, the giving of information to the patient as to just what would be done and as to its consequences. To ascribe more meaning than this might well confine the attending physician in an undesired and uncomfortable straitjacket in the practice of his profession.

⁹ It is of some interest to note that the condition does not relate, as most statutory conditions in this area do, to the preservation of the life or *health* of the mother.

Missouri's general requirement, [Mo. Rev. Stat. § 453.030.3](#) (1969), that for an adoption of a child born in wedlock the consent of both parents is necessary; to similar joint-consent requirements imposed by a number of States with respect to artificial insemination and the legitimacy of children so conceived; to the laws of two States requiring spousal consent for voluntary sterilization; and to the long-established requirement of spousal consent for the effective disposition of an interest in real property. It is argued that "[r]ecognizing **[**2841]** that the consent of both parties is generally necessary... to begin a family, the legislature has determined that a change in the family structure set in motion by mutual consent should be terminated only by mutual consent," Brief for Appellee Danforth 38, and that what the legislature did was to exercise its inherent policy-making power "for what was believed to be in the best interests of all the people of Missouri." *Id.*, at 40.

The appellants, on the other hand, contend that § 3(3) obviously is designed to afford the husband the right unilaterally to prevent or veto an **[****30]** abortion, whether or **[*69]** not he is the father of the fetus, and that this not only violates *Roe* and *Doe* but is also in conflict with other decided cases. See, e.g., [Poe v. Gerstein](#), 517 F. 2d 787, 794-796 (CA5 1975), appeal docketed, No. 75-713; [Wolfe v. Schroering](#), 388 F. Supp., at 636-637; [Doe v. Rampton](#), 366 F. Supp. 189, 193 (Utah 1973). They also refer to the situation where the husband's consent cannot be obtained because he cannot be located. And they assert that § 3(3) is vague and overbroad.

In *Roe* and *Doe* we specifically **[***805]** reserved decision on the question whether a requirement for consent by the father of the fetus, by the spouse, or by the parents, or a parent, of an unmarried minor, may be constitutionally imposed. [410 U.S., at 165 n. 67](#). We now hold that [HN5](#) the State may not constitutionally require the consent of the spouse, as is specified under § 3(3) of the Missouri Act, as a condition for abortion during the

first 12 weeks of pregnancy. We thus agree with the dissenting judge in the present case, and with the courts whose decisions are cited above, that the State cannot "delegate to a spouse **[****31]** a veto power which the state itself is absolutely and totally prohibited from exercising during the first trimester of pregnancy." [392 F. Supp., at 1375](#). Clearly, since the State cannot regulate or proscribe abortion during the first stage, when the physician and his patient make that decision, the State cannot delegate authority to any particular person, even the spouse, to prevent abortion during that same period.

[LEdHN\[9A\]](#) [9A]We are not unaware of the deep and proper concern and interest that a devoted and protective husband has in his wife's pregnancy and in the growth and development of the fetus she is carrying. Neither has this Court failed to appreciate the importance of the marital relationship in our society. See, e.g., [Griswold v. Connecticut](#), 381 U.S. 479, 486 (1965); [Maynard v. Hill](#), 125 U.S. [\[*70\]](#) 190, 211 (1888).¹⁰ Moreover, we recognize that the decision whether to undergo or to forgo an abortion may have profound effects on the future of any marriage, effects that are both physical and mental, and possibly deleterious. Notwithstanding these factors, we cannot hold that the **[****32]** State has the constitutional authority to give the spouse unilaterally the ability to prohibit the wife from terminating her pregnancy, when the State itself lacks that right. See [Eisenstadt v. Baird](#), 405 U.S. 438, 453 (1972).¹¹

¹⁰ "We deal with a right of privacy older than the [Bill of Rights](#) - older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions." [Griswold v. Connecticut](#), 381 U.S., at 486.

¹¹ As the Court recognized in *Eisenstadt v. Baird*, "the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is

[LEdHN\[9B\]](#) [9B]

[****33] [*71] It [***806] [**2842] seems manifest that, ideally, the decision to terminate a pregnancy should be one concurred in by both the wife and her husband. No marriage may be viewed as harmonious or successful if the marriage partners are fundamentally divided on so important and vital an issue. But it is difficult to believe that the goal of fostering mutuality and trust in a marriage, and of strengthening the marital relationship and the marriage institution, will be achieved by giving the husband a veto power exercisable for any reason whatsoever or for no reason at all. Even if the State had the ability to delegate to the husband a power it itself could not exercise, it is not at all likely that such action would further, as the District Court majority phrased it, the "interest of the state in protecting the mutuality of decisions vital to the marriage relationship." [392 F. Supp., at 1370](#).

We recognize, of course, that when a woman, with the approval of her physician but without the approval of her husband, decides to terminate her pregnancy, it could be said that she is acting unilaterally. The obvious fact is that when the wife and the husband disagree on [****34] this decision, the view of only one of the two marriage

the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." [405 U.S., at 453](#) (emphasis in original).

The dissenting opinion of our Brother WHITE appears to overlook the implications of this statement upon the issue whether § 3(3) is constitutional. This section does much more than insure that the husband participate in the decision whether his wife should have an abortion. The State, instead, has determined that the husband's interest in continuing the pregnancy of his wife always outweighs any interest on her part in terminating it irrespective of the condition of their marriage. The State, accordingly, has granted him the right to prevent unilaterally, and for whatever reason, the effectuation of his wife's and her physician's decision to terminate her pregnancy. This state determination not only may discourage the consultation that might normally be expected to precede a major decision affecting the marital couple but also, and more importantly, the State has interposed an absolute obstacle to a woman's decision that *Roe* held to be constitutionally protected from such interference.

partners can prevail. Inasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor. Cf. [Roe v. Wade, 410 U.S., at 153](#).

We conclude that § 3(3) of the Missouri Act is inconsistent with the standards enunciated in [Roe v. Wade, 410 U.S., at 164-165](#), and is unconstitutional. It is therefore unnecessary for us to consider the appellants' [*72] additional challenges to § 3(3) based on vagueness and overbreadth.

D

[LEdHN\[10\]](#) [10]Parental Consent. Section 3(4) requires, with respect to the first 12 weeks of pregnancy, where the woman is unmarried and under the age of 18 years, the written consent of a parent or person *in loco parentis* unless, again, "the abortion is certified by a licensed physician as necessary in order to preserve the life of the mother." It is to be observed that only one parent need consent.

The appellees defend the statute in several ways. They point out that the law properly may subject [****35] minors to more stringent limitations than are permissible with respect to adults, and they cite, among other cases, [Prince v. Massachusetts, 321 U.S. 158 \(1944\)](#), and [McKeiver v. Pennsylvania, 403 U.S. 528 \(1971\)](#). Missouri law, it is said, "is replete with provisions reflecting the interest of the state in assuring the welfare of minors," citing statutes relating to a guardian *ad litem* for a court proceeding, to the care of delinquent and neglected children, to child labor, and to compulsory education. Brief for Appellee Danforth 42. Certain decisions are considered by the State to be outside the scope of a minor's ability to act in his own best interest or in the interest of the public, citing statutes [***807] proscribing the sale of firearms and deadly weapons to minors without parental consent, and other statutes relating to minors' exposure to certain types of literature, the purchase by pawnbrokers of

property from minors, and the sale of cigarettes and alcoholic beverages to minors. It is pointed out that the record contains testimony to the effect that children of tender years (even ages 10 and 11) have sought **[**2843]** abortions. Thus, a State's **[****36]** permitting a child to obtain an abortion without the counsel of an adult "who has **[*73]** responsibility or concern for the child would constitute an irresponsible abdication of the State's duty to protect the welfare of minors." *Id.*, at 44. Parental discretion, too, has been protected from unwarranted or unreasonable interference from the State, citing *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Wisconsin v. Yoder*, 406 U.S. 205 (1972). Finally, it is said that § 3(4) imposes no additional burden on the physician because even prior to the passage of the Act the physician would require parental consent before performing an abortion on a minor.

The appellants, in their turn, emphasize that no other Missouri statute specifically requires the additional consent of a minor's parent for medical or surgical treatment, and that in Missouri a minor legally may consent to medical services for pregnancy (excluding abortion), venereal disease, and drug abuse. Mo. Rev. Stat. §§ 431.061-431.063 (Supp. 1975). The result of § 3(4), it is said, "is the ultimate supremacy of the parents' desires over those **[****37]** of the minor child, the pregnant patient." Brief for Appellants 93. It is noted that in Missouri a woman under the age of 18 who marries with parental consent does not require parental consent to abort, and yet her contemporary who has chosen not to marry must obtain parental approval.

The District Court majority recognized that, in contrast to § 3(3), the State's interest in protecting the mutuality of a marriage relationship is not present with respect to § 3(4). It found "a compelling basis," however, in the State's interest "in safeguarding the authority of the family relationship." 392 F. Supp., at 1370. The dissenting judge observed that one could not seriously argue

that a minor must submit to an abortion if her parents insist, and he could not see "why she would not be entitled to the same right of self-determination now **[*74]** explicitly accorded to adult women, provided she is sufficiently mature to understand the procedure and to make an intelligent assessment of her circumstances with the advice of her physician." *Id.*, at 1376.

Of course, much of what has been said above, with respect to § 3(3), applies with equal force to § 3(4). Other courts that **[****38]** have considered the parental-consent issue in the light of *Roe* and *Doe*, have concluded that a statute like § 3(4) does not withstand constitutional scrutiny. See, e.g., *Poe v. Gerstein*, 517 F. 2d, at 792; *Wolfe v. Schroering*, 388 F. Supp., at 636-637; *Doe v. Rampton*, 366 F. Supp., at 193, 199; *State v. Koome*, 84 Wash. 2d 901, 530 P. 2d 260 (1975).

We agree with appellants and with the courts whose decisions have just been cited that **HN6** the State may not impose a blanket provision, such as **[***808]** as § 3(4), requiring the consent of a parent or person *in loco parentis* as a condition for abortion of an unmarried minor during the first 12 weeks of her pregnancy. Just as with the requirement of consent from the spouse, so here, the State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent.

LEdHN[11] [11]Constitutional rights do not mature and come into being magically only **[****39]** when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights. See, e.g., *Breed v. Jones*, 421 U.S. 519 (1975); *Goss v. Lopez*, 419 U.S. 565 (1975); *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969); *In re Gault*, 387 U.S. 1 (1967). The Court indeed, however, long has recognized

that the State has somewhat broader authority to regulate the activities of children than of adults. [*75] Prince v. Massachusetts, 321 U.S., at 170; [**2844] Ginsberg v. New York, 390 U.S. 629 (1968). It remains, then, to examine whether there is any significant state interest in conditioning an abortion on the consent of a parent or person *in loco parentis* that is not present in the case of an adult.

One suggested interest is the safeguarding of the family unit and of parental authority. 392 F. Supp., at 1370. It is difficult, however, to conclude that providing a parent with absolute power to overrule a determination, made by the physician and his minor patient, to terminate the patient's pregnancy will serve to strengthen the family unit. Neither [****40] is it likely that such veto power will enhance parental authority or control where the minor and the nonconsenting parent are so fundamentally in conflict and the very existence of the pregnancy already has fractured the family structure. Any independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant.

We emphasize that our holding that § 3(4) is invalid does not suggest that every minor, regardless of age or maturity, may give effective consent for termination of her pregnancy. See *Bellotti v. Baird*, post, p. 132. The fault with § 3(4) is that it imposes a special-consent provision, exercisable by a person other than the woman and her physician, as a prerequisite to a minor's termination of her pregnancy and does so without a sufficient justification for the restriction. It violates the strictures of *Roe* and *Doe*.

E

LEdHN[12] [12]Saline amniocentesis. Section 9 of the statute prohibits the use of saline amniocentesis, as a method or technique of abortion, [****41] after the first 12 weeks of pregnancy. [*76] It describes the method as one

whereby the amniotic fluid is withdrawn and "a saline or other fluid" is inserted into the amniotic sac. The statute imposes [****809] this proscription on the ground that the technique "is deleterious to maternal health," and places it in the form of a legislative finding. Appellants challenge this provision on the ground that it operates to preclude virtually all abortions after the first trimester. This is so, it is claimed, because a substantial percentage, in the neighborhood of 70% according to the testimony, of all abortions performed in the United States after the first trimester are effected through the procedure of saline amniocentesis. Appellants stress the fact that the alternative methods of hysterotomy and hysterectomy are significantly more dangerous and critical for the woman than the saline technique; they also point out that the mortality rate for normal childbirth exceeds that where saline amniocentesis is employed. Finally, appellants note that the perhaps safer alternative of prostaglandin instillation, suggested and strongly relied upon by the appellees, at least at the time [****42] of the trial, is not yet widely used in this country.

We held in *Roe* that after the first stage, HN7 "the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health." 410 U.S., at 164. The question with respect to § 9 therefore is whether the flat prohibition of saline amniocentesis is a restriction which "reasonably relates to the preservation and protection of maternal health." *Id.*, at 163. The appellees urge that what the Missouri General Assembly has done here is consistent with that guideline and is buttressed by substantial supporting medical evidence in the record to which this Court should defer.

[*77] The District Court's majority determined, on the basis of the evidence before it, that the maternal mortality rate in childbirth does, indeed, exceed the mortality rate where saline amniocentesis is used. Therefore, the majority acknowledged, § 9 could be upheld only if there

were safe alternative methods of inducing abortion after the **[**2845]** first 12 weeks. [392 F. Supp., at 1373](#). Referring to such methods as hysterotomy, hysterectomy, "mechanical **[****43]** means of inducing abortion," and prostaglandin injection, the majority said that at least the latter two techniques were safer than saline. Consequently, the majority concluded, the restriction in § 9 could be upheld as reasonably related to maternal health.

We feel that the majority, in reaching its conclusion, failed to appreciate and to consider several significant facts. First, it did not recognize the prevalence, as the record conclusively demonstrates, of the use of saline amniocentesis as an accepted medical procedure in this country; the procedure, as noted above, is employed in a substantial majority (the testimony from both sides ranges from 68% to 80%) of all post-first-trimester abortions. Second, it failed to recognize that at the time of trial, there were severe limitations on the availability of the prostaglandin technique, which, although promising, was used only on an experimental basis until less than two years before. See [Wolfe v. Schroering, 388 F. Supp., at 637](#), where it was said that at that time (1974), "there were no physicians in Kentucky competent in the technique of prostaglandin amnio infusion." **[**810]** And appellees offered no evidence **[****44]** that prostaglandin abortions were available in Missouri. ¹² Third, the statute's

¹²In response to MR. JUSTICE WHITE'S criticism that the prostaglandin method of inducing abortion was available in Missouri, either at the time the Act was passed or at the time of trial, we make the following observations. First, there is no evidence in the record to which our Brother has pointed that demonstrates that the prostaglandin method was or is available in Missouri. Second, the evidence presented to the District Court does not support such a view. Until January 1974 prostaglandin was used only on an experimental basis in a few medical centers. And, at the time the Missouri General Assembly proscribed saline, the sole distributor of prostaglandin "restricted sales to around twenty medical centers from coast to coast." Brief for Appellee Danforth 68.

It is clear, therefore, that at the time the Missouri General Assembly passed the Act, prostaglandin was not available, in any meaningful sense of that term. Because of this undisputed fact, it was incumbent upon appellees to show that at the time of trial in 1974 prostaglandin

[*78] reference to the insertion of "a saline or other fluid" appears to include within its proscription the intra-amniotic injection of prostaglandin itself and other methods that may be developed in the future and that may prove highly effective and completely safe. Finally, the majority did not consider the anomaly inherent in § 9 when it proscribes the use of saline but does not prohibit techniques that are many times more likely to result in maternal death. See [392 F. Supp., at 1378 n. 8](#) (dissenting opinion).

[**45]** These unappreciated or overlooked factors place the State's decision to bar use of the saline method in a completely different light. The State, through § 9, would prohibit the use of a method which the record shows is the one most commonly used nationally by physicians after the first trimester and which is safer, with respect to maternal mortality, than even continuation of the pregnancy until normal childbirth. Moreover, **[*79]** as a practical matter, it forces a woman and her physician to terminate her pregnancy by methods more dangerous to her health than the method outlawed.

As so viewed, particularly in the light of the present unavailability - as demonstrated by the record -- of the prostaglandin technique, [HN8](#) the outright legislative proscription of saline fails as a reasonable regulation for the protection of maternal health. It comes into focus, instead, as an unreasonable or arbitrary regulation designed to inhibit, and having the effect of inhibiting, the vast majority of abortions after the first 12 weeks. As such, it does not withstand constitutional challenge. See [Wolfe v. Schroering, 388 F. Supp., at 637](#).

[2846]** F

was available. They failed to do so. Indeed, appellees' expert witness, on whose testimony the dissenting opinion relies, does not fill this void. He was able to state only that prostaglandin was used in a limited way until shortly before trial and that he "would think" that it was more readily available at the time of trial. Tr. 335. Such an experimental and limited use of prostaglandin throughout the country does not make it available or accessible to concerned persons in Missouri.

[LEdHN\[13\]](#) [13] [****46] Recordkeeping. Sections 10 and 11 of the Act impose recordkeeping requirements for health facilities and physicians concerned with abortions irrespective of the pregnancy stage. Under § 10, each such facility and physician is to be supplied with forms "the purpose and function of which shall be the preservation of maternal health and life by adding to the sum of medical knowledge through the compilation [***811] of relevant maternal health and life data and to monitor all abortions performed to assure that they are done only under and in accordance with the provisions of the law." The statute states that the information on the forms "shall be confidential and shall be used only for statistical purposes." The "records, however, may be inspected and health data acquired by local, state, or national public health officers." Under § 11 the records are to be kept for seven years in the permanent files of the health facility where the abortion was performed.

Appellants object to these reporting and recordkeeping provisions on the ground that they, too, impose an extra [*80] layer and burden of regulation, and that they apply throughout all stages of pregnancy. All the judges [****47] of the District Court panel, however, viewed these provisions as statistical requirements "essential to the advancement of medical knowledge," and as nothing that would "restrict either the abortion decision itself or the exercise of medical judgment in performing an abortion." [392 F. Supp., at 1374](#).

[LEdHN\[14\]](#) [14] One may concede that there are important and perhaps conflicting interests affected by recordkeeping requirements. On the one hand, maintenance of records indeed may be helpful in developing information pertinent to the preservation of maternal health. On the other hand, as we stated in *Roe*, during the first stage of pregnancy the State may impose no restrictions or regulations governing the medical judgment of the pregnant woman's attending physician with respect to the termination of her pregnancy. [410 U.S., at](#)

[163, 164](#). Furthermore, it is readily apparent that one reason for the recordkeeping requirement, namely, to assure that all abortions in Missouri are performed in accordance with the Act, fades somewhat into insignificance in view of our holding above as to spousal and parental consent requirements.

[****48] [LEdHN\[15\]](#) [15] [HN9](#) Recordkeeping and reporting requirements that are reasonably directed to the preservation of maternal health and that properly respect a patient's confidentiality and privacy are permissible. This surely is so for the period after the first stage of pregnancy, for then the State may enact substantive as well as recordkeeping regulations that are reasonable means of protecting maternal health. As to the first stage, one may argue forcefully, as the appellants do, that the State should not be able to impose any recordkeeping requirements that significantly differ from those imposed with respect to other, [*81] and comparable, medical or surgical procedures. We conclude, however, that the provisions of §§ 10 and 11, while perhaps approaching impermissible limits, are not constitutionally offensive in themselves. Recordkeeping of this kind, if not abused or overdone, can be useful to the State's interest in protecting the health of its female citizens, and may be a resource that is relevant to decisions involving medical experience and judgment.¹³ The added requirements [***812] for confidentiality, [****49] with the sole exception for public health officers, and for retention for seven years, a period not unreasonable in length, assist and persuade us in our determination of the constitutional limits. As so regarded, we see no legally significant impact or consequence on the abortion decision or on the physician-patient relationship. We naturally assume, furthermore, [**2847] that these

¹³We note that in Missouri physicians must participate in the reporting of births and deaths, Mo. Rev. Stat. §§ 193.100 and 193.140 (1969), and communicable diseases, §§ 192.020 and 192.040 (1969), and that their use of controlled substances is rigidly monitored by the State, §§ 195.010-195.545 (1969 and Supp. 1975).

recordkeeping and record-maintaining provisions will be interpreted and enforced by Missouri's Division of Health in the light of our decision with respect to the Act's other provisions, and that, of course, they will not be utilized in such a way as to accomplish, through the sheer burden of recordkeeping detail, what we have held to be an otherwise unconstitutional restriction. Obviously, the State may not require execution of spousal and parental consent forms that have been invalidated today.

[****50] G

[LEdHN\[16\]](#) [16]Standard of care. Appellee Danforth in No. 74-1419 appeals from the unanimous decision of the District [*82] Court that § 6(1) of the Act is unconstitutional. That section provides: S

"No person who performs or induces an abortion shall fail to exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted. Any physician or person assisting in the abortion who shall fail to take such measures to encourage or to sustain the life of the child, and the death of the child results, shall be deemed guilty of manslaughter.... Further, such physician or other person shall be liable in an action for damages."I

The District Court held that the first sentence was unconstitutionally overbroad because it failed to exclude from its reach the stage of pregnancy prior to viability. [392 F. Supp., at 1371](#).

The Attorney General argues that the District Court's interpretation is erroneous and unnecessary. He claims that [****51] the first sentence of § 6(1) establishes only the general standard of care that applies to the person who performs the abortion, and that the second sentence describes the circumstances when that standard of care applies, namely, when a live child results from the

procedure. Thus, the first sentence, it is said, despite its reference to the fetus, has no application until a live birth results.

The appellants, of course, agree with the District Court. They take the position that § 6(1) imposes its standard of care upon the person performing the abortion even though the procedure takes place before viability. They argue that the statute on its face effectively precludes abortion and was meant to do just that.

[*83] We see nothing that requires federal-court abstention on this issue. [Wisconsin v. Constantineau](#), 400 U.S. 433, 437-439 (1971); [Kusper v. Pontikes](#), 414 U.S. 51, 54-55 (1973). And, like the three judges of the District Court, we are unable to accept the appellee's sophisticated interpretation of the [****813] statute. Section 6(1) requires the physician to exercise the prescribed skill, care, and diligence to preserve the life and health [****52] of the *fetus*. It does not specify that such care need be taken only after the stage of viability has been reached. As the provision now reads, it impermissibly requires the physician to preserve the life and health of the fetus, whatever the stage of pregnancy. The fact that the second sentence of § 6(1) refers to a criminal penalty where the physician fails "to take such measures to encourage or to sustain the life of the *child*, and the death of the *child* results" (emphasis supplied), simply does not modify the duty imposed by the previous sentence or limit that duty to pregnancies that have reached the stage of viability.

[LEdHN\[17\]](#) [17]The appellees finally argue that if the first sentence of § 6(1) does not survive constitutional attack, the second sentence does, and, under the Act's severability provision, § B, is severable from the first. The District Court's ruling of unconstitutionality, [392 F. Supp., at 1371](#), made specific reference to the first sentence, but its conclusion of law and its judgment invalidated all of § 6(1). [Id., at 1374](#); Jurisdictional Statement A-

34 in No. 74-1419. [****53] Appellee Danforth's motion to alter or amend the judgment, so far as the second sentence of § 6(1) was concerned, was denied by the District Court. *Id.*, at A-39.

[**2848] We conclude, as did the District Court, that § 6(1) must stand or fall as a unit. Its provisions are inextricably bound together. And a physician's or other person's criminal failure to protect a liveborn infant surely [*84] will be subject to prosecution in Missouri under the State's criminal statutes.

The judgment of the District Court is affirmed in part and reversed in part, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

APPENDIX TO OPINION OF THE COURT H. C. S. HOUSE BILL NO. 1211

AN ACT relating to abortion with penalty provisions and emergency clause.

Be it enacted by the General Assembly of the State of Missouri, as follows:

Section 1. It is the intention of the general assembly of the state of Missouri to reasonably regulate abortion in conformance with the decisions of the supreme court of the United States.

Section 2. Unless the language or context clearly indicates a different meaning is intended, the [****54] following words or phrases for the purpose of this act shall be given the meaning ascribed to them:

(1) "Abortion," the intentional destruction of the life of an embryo or fetus in his or her mother's womb or the intentional termination of the pregnancy of a mother with an intention other than to increase the probability of a live birth or to remove a dead or dying unborn child;

(2) "Viability," that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial lifesupportive systems;

(3) "Physician," any person licensed [***814] to practice medicine [*85] in this state by the state board of registration of the healing arts.

Section 3. No abortion shall be performed prior to the end of the first twelve weeks of pregnancy except:

(1) By a duly licensed, consenting physician in the exercise of his best clinical medical judgment.

(2) After the woman, prior to submitting to the abortion, certifies in writing her consent to the abortion and that her consent is informed and freely given and is not the result of coercion.

(3) With the written consent of the woman's spouse, unless the abortion is [****55] certified by a licensed physician to be necessary in order to preserve the life of the mother.

(4) With the written consent of one parent or person in loco parentis of the woman if the woman is unmarried and under the age of eighteen years, unless the abortion is certified by a licensed physician as necessary in order to preserve the life of the mother.

Section 4. No abortion performed subsequent to the first twelve weeks of pregnancy shall be performed except where the provisions of section 3 of this act are satisfied and in a hospital.

Section 5. No abortion not necessary to preserve the life or health of the mother shall be performed unless the attending physician first certifies with reasonable medical certainty that the fetus is not viable.

Section 6. (1) No person who performs or induces an abortion shall fail to exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person

would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted. Any physician or person assisting in the abortion who [*86] shall fail to take such measures to encourage [****56] or to sustain the life of the child, and the death of the child results, shall be deemed guilty of manslaughter and upon conviction shall be punished as provided in [Section 559.140, RSMo.](#) Further, such physician or other person shall be liable in an action for damages as provided in [Section 537.080, RSMo.](#)

[**2849] (2) Whoever, with intent to do so, shall take the life of a premature infant aborted alive, shall be guilty of murder of the second degree.

(3) No person shall use any fetus or premature infant aborted alive for any type of scientific, research, laboratory or other kind of experimentation either prior to or subsequent to any abortion procedure except as necessary to protect or preserve the life and health of such premature infant aborted alive.

Section 7. In every case where a live born infant results from an attempted abortion which was not performed to save the life or health of the mother, such infant shall be an abandoned ward of the state under the jurisdiction of the juvenile court wherein the abortion occurred, and the mother and father, if he consented to the abortion, of such infant, shall have no parental rights or obligations whatsoever relating [****57] to such infant, as if the parental rights had been terminated pursuant to [section 211.411, RSMo.](#) The attending physician shall forthwith notify said juvenile [***815] court of the existence of such live born infant.

Section 8. Any woman seeking an abortion in the state of Missouri shall be verbally informed of the provisions of section 7 of this act by the attending physician and the woman shall certify in writing that she has been so informed.

Section 9. The general assembly finds that the method or technique of abortion known as saline amniocentesis [*87] whereby the amniotic fluid is

withdrawn and a saline or other fluid is inserted into the amniotic sac for the purpose of killing the fetus and artificially inducing labor is deleterious to maternal health and is hereby prohibited after the first twelve weeks of pregnancy.

Section 10. 1. Every health facility and physician shall be supplied with forms promulgated by the division of health, the purpose and function of which shall be the preservation of maternal health and life by adding to the sum of medical knowledge through the compilation of relevant maternal health and life data and to monitor all abortions [****58] performed to assure that they are done only under and in accordance with the provisions of the law.

2. The forms shall be provided by the state division of health.

3. All information obtained by physician, hospital, clinic or other health facility from a patient for the purpose of preparing reports to the division of health under this section or reports received by the division of health shall be confidential and shall be used only for statistical purposes. Such records, however, may be inspected and health data acquired by local, state, or national public health officers.

Section 11. All medical records and other documents required to be kept shall be maintained in the permanent files of the health facility in which the abortion was performed for a period of seven years.

Section 12. Any practitioner of medicine, surgery, or nursing, or other health personnel who shall willfully and knowingly do or assist any action made unlawful by this act shall be subject to having his license, application for license, or authority to practice his profession as a physician, surgeon, or nurse in the state of Missouri [*88] rejected or revoked by the appropriate state licensing [****59] board.

Section 13. Any physician or other person who fails to maintain the confidentiality of any records

or reports required under this act is guilty of a misdemeanor and, upon conviction, shall be punished as provided by law.

Section 14. Any person who contrary to the provisions of this act knowingly performs or aids in the performance of any abortion or knowingly fails to perform any action required by this act shall be guilty of a misdemeanor and, upon conviction, shall be punished as provided by law.

Section 15. Any person who is not a licensed physician as defined in section 2 of this act who performs or attempts to perform an abortion on another as defined in **[**2850]** subdivision (1) of section 2 of this act, is guilty of a felony, and upon conviction, shall be imprisoned by the department of corrections for a term of not less than two years nor more than seventeen years.

[*816]** Section 16. Nothing in this act shall be construed to exempt any person, firm, or corporation from civil liability for medical malpractice for negligent acts or certification under this act.

Section A. Because of the necessity for immediate state action to regulate abortions **[****60]** to protect the lives and health of citizens of this state, this act is deemed necessary for the immediate preservation of the public health, welfare, peace and safety, and is hereby declared to be an emergency act within the meaning of the constitution, and this act shall be in full force and effect upon its passage and approval.

Section B. If any provision of this Act or the application thereof to any person or circumstance shall be **[*89]** held invalid, such invalidity does not affect the provisions or application of this Act which can be given effect without the invalid provisions or applications, and to this end the provisions of this Act are declared to be severable.

Approved June 14, 1974.

Effective June 14, 1974.

Concur by: STEWART;

Concur

MR. JUSTICE STEWART, with whom MR. JUSTICE POWELL joins, concurring.

While joining the Court's opinion, I write separately to indicate my understanding of some of the constitutional issues raised by this litigation.

With respect to the definition of viability in § 2 (2) of the Act, it seems to me that the critical consideration is that the statutory definition has almost no operative significance. The State has merely required **[****61]** physicians performing abortions to *certify* that the fetus to be aborted is not viable. While the physician may be punished for failing to issue a certification, he may not be punished for erroneously concluding that the fetus is not viable. There is thus little chance that a physician's professional decision to perform an abortion will be "chilled."

I agree with the Court that the patient-consent provision in § 3 (2) is constitutional. While § 3 (2) obviously regulates the abortion decision during all stages of pregnancy, including the first trimester, I do not believe it conflicts with the statement in [*Roe v. Wade*, 410 U.S. 113, 163](#), that "for the period of pregnancy prior to [approximately the end of the first trimester] the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the judgment **[*90]** may be effectuated by an abortion free of interference by the State." That statement was made in the context of invalidating a state law aimed at thwarting a woman's decision to have an abortion. It **[****62]** was not intended to preclude the State from enacting a provision aimed at ensuring that the abortion decision is made in a knowing, intelligent, and voluntary fashion.

As to the provision of the law that requires a

husband's consent to an abortion, § 3 (3), the primary issue that it raises is whether the State [***817] may constitutionally recognize and give effect to a right on his part to participate in the decision to abort a jointly conceived child. This seems to me a rather more difficult problem than the Court acknowledges. Previous decisions have recognized that a man's right to father children and enjoy the association of his offspring is a constitutionally protected freedom. See *Stanley v. Illinois*, 405 U.S. 645; *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535. But the Court has recognized as well that the Constitution protects "a woman's decision whether or not to terminate her pregnancy." *Roe v. Wade*, *supra*, at 153 (emphasis added). In assessing the constitutional validity of § 3 (3) we are called upon to choose between these competing rights. I agree with the Court [**2851] that since "it is the woman who physically [****63] bears the child and who is the more directly and immediately affected by the pregnancy... the balance weighs in her favor." *Ante*, at 71.

With respect to the state law's requirement of parental consent, § 3 (4), I think it clear that its primary constitutional deficiency lies in its imposition of an absolute limitation on the minor's right to obtain an abortion. The Court's opinion today in *Bellotti v. Baird*, *post*, at 147-148, suggests that a materially different constitutional issue would be presented under a provision requiring parental consent or consultation in most cases [*91] but providing for prompt (i) judicial resolution of any disagreement between the parent and the minor, or (ii) judicial determination that the minor is mature enough to give an informed consent without parental concurrence or that abortion in any event is in the minor's best interest. Such a provision would not impose parental approval as an absolute condition upon the minor's right but would assure in most instances consultation between the parent and child.¹

¹ For some of the considerations that support the State's interest in

[****64] There can be little doubt that the State furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child. That is a grave decision, and a girl of tender years, under emotional stress, may be ill-equipped to make it without mature advice and emotional support. It seems unlikely that she will obtain adequate counsel and support from the attending physician at an abortion clinic, where abortions for pregnant minors frequently take place.²

[****65] [*92] As [***818] to the constitutional validity of § 9 of the Act, prohibiting the use of the saline amniocentesis procedure, I agree fully with the views expressed by MR. JUSTICE STEVENS.

Dissent by: WHITE; STEVENS (In Part)

Dissent

MR. JUSTICE WHITE, with whom THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST join, concurring in part and dissenting in part.

encouraging parental consent, see the opinion of MR. JUSTICE STEVENS, concurring in part and dissenting in part. *Post*, at 102-105.

² The mode of operation of one such clinic is revealed by the record in *Bellotti v. Baird*, *post*, p. 132, and accurately described by appellants in that case:

"The counseling... occurs entirely on the day the abortion is to be performed.... It lasts for two hours and takes place in groups that include both minors and adults who are strangers to one another.... The physician takes no part in this counseling process.... Counseling is typically limited to a description of abortion procedures, possible complications, and birth control techniques....

"The abortion itself takes five to seven minutes.... The physician has no prior contact with the minor, and on the days that abortions are being performed at the [clinic], the physician... may be performing abortions on many other adults and minors.... On busy days patients are scheduled in separate groups, consisting usually of five patients.... After the abortion [the physician] spends a brief period with the minor and others in the group in the recovery room...." Brief for Appellants in No. 75-73, O.T. 1975, pp. 43-44.

In [Roe v. Wade, 410 U.S. 113 \(1973\)](#), this Court recognized a right to an abortion free from state prohibition. The task of policing this limitation on state police power is and will be a difficult and continuing venture in substantive due process. However, even accepting *Roe v. Wade*, there is nothing in the opinion in that case and nothing articulated in the Court's opinion in this case which justifies the invalidation of four provisions of House Committee Substitute for House Bill No. 1211 (hereafter Act) enacted by the Missouri 77th General Assembly in 1974 in response to *Roe v. Wade*. Accordingly, I dissent, in part.

I

[Roe v. Wade, supra, at 163](#), holds that until a fetus becomes viable, **[**2852]** the interest of the State in the life or potential life it represents is outweighed **[****66]** by the interest of the mother in choosing "whether or not to terminate her pregnancy." [410 U.S., at 153](#). Section 3 (3) of the Act provides that a married woman may not obtain an abortion without her husband's consent. The Court strikes down this statute in one sentence. It says that "since the State cannot... proscribe abortion... the State cannot delegate authority to any particular person, **[*93]** even the spouse, to prevent abortion...." *Ante*, at 69. But the State is not -- under § 3 (3) -- delegating to the husband the power to vindicate the State's interest in the future life of the fetus. It is instead recognizing that the husband has an interest of his own in the life of the fetus which should not be extinguished by the unilateral decision of the wife. ¹ It by no means follows, from the fact that the mother's interest in deciding "whether or not to terminate her

pregnancy" outweighs the State's interest in the potential life of the fetus, that the husband's interest is also outweighed and may not be protected by the State. A father's interest in having a child -- perhaps his only child - may be unmatched by any other interest in his life. See [Stanley **\[****67\]** v. Illinois, 405 U.S. 645, 651 \(1972\)](#), and cases there cited. It is truly surprising that the majority finds in the **[***819]** United States Constitution, as it must in order to justify the result it reaches, a rule that the State must assign a greater value to a mother's decision to cut off a potential human life by abortion than to a father's decision to let it mature into a live child. Such a rule cannot be found there, nor can it be found in [Roe v. Wade, supra](#). These are matters which a State should be able to decide free from the suffocating power of the federal judge, purporting to act in the name of the Constitution.

[**68]** **[*94]** In describing the nature of a mother's interest in terminating a pregnancy, the Court in *Roe v. Wade* mentioned only the post-birth burdens of rearing a child, [410 U.S., at 153](#), and rejected a rule based on her interest in controlling her own body during pregnancy. *Id., at 154*. Missouri has a law which prevents a woman from putting a child up for adoption over her husband's objection, [Mo. Rev. Stat. § 453.030](#) (1969). This law represents a judgment by the State that the mother's interest in avoiding the burdens of child rearing do not outweigh or snuff out the father's interest in participating in bringing up his own child. That law is plainly valid, but no more so than § 3 (3) of the Act now before us, resting as it does on precisely the same judgment.

II

Section 3 (4) requires that an unmarried woman under 18 years of age obtain the consent of a parent or a person *in loco parentis* as a condition to an abortion. Once again the Court strikes the provision down in a sentence. It states: "Just as with the requirement of consent from the spouse, so here, the State does not have the constitutional authority

¹ There are countless situations in which the State prohibits conduct only when it is objected to by a private person most closely affected by it. Thus a State cannot forbid anyone to enter on private property with the owner's consent, but it may enact and enforce trespass laws against unauthorized entrances. It cannot forbid transfer of property held in tenancy by the entireties but it may require consent by both husband and wife to such a transfer. These situations plainly do not involve delegations of legislative power to private parties; and neither does the requirement in § 3 (3) that a woman not deprive her husband of his future child without his consent.

to give a third party an absolute, [****69] and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy...." *Ante*, at 74. The Court rejects the notions that the *State* has an interest in strengthening the family unit, or that the *parent* has an "independent interest" in the abortion decision, sufficient to justify § 3 (4) and apparently concludes that the provision is therefore unconstitutional. [**2853] But the purpose of the parental-consent requirement is not merely to vindicate any interest of the parent or of the State. The purpose of the requirement is to vindicate the very right created in *Roe v. Wade, supra* -- the right of the pregnant woman to decide [*95] "whether or not to terminate her pregnancy." 410 U.S., at 153 (emphasis added). The abortion decision is unquestionably important and has irrevocable consequences whichever way it is made. Missouri is entitled to protect the minor unmarried woman from making the decision in a way which is not in her own best interests, and it seeks to achieve this goal by requiring parental consultation and consent. This is the traditional way by which States have sought to protect [****70] children from their own immature and improvident decisions;² and there is absolutely [***820] no reason expressed by the majority why the State may not utilize that method here.

III

Section 9 of the Act prohibits abortion by the method known as saline amniocentesis -- a method used at the time the Act was passed for 70% of abortions performed after the first trimester.

² As MR. JUSTICE STEVENS states in his separate opinion, *post*, at 102:

The State's interest in the welfare of its young citizens justifies a variety of protective measures. Because he may not foresee the consequences of his decision, a minor may not make an enforceable bargain. He may not lawfully work or travel where he pleases, or even attend exhibitions of constitutionally protected adult motion pictures. Persons below a certain age may not marry without parental consent. Indeed, such consent is essential even when the young woman is already pregnant."

Legislative history reveals that the Missouri Legislature viewed [****71] saline amniocentesis as far less safe a method of abortion than the so-called prostaglandin method. The court below took evidence on the question and summarized it as follows: S

"The record of trial discloses that use of the saline method exposes a woman to the danger of severe complications, regardless of the skill of the physician or the precaution taken. Saline may cause one or [*96] more of the following conditions: Disseminated intravascular coagulation or 'consumptive coagulopathy' (disruption of the blood clotting mechanism [Dr. Warren, Tr. 57-58; Dr. Klaus, Tr. 269-270; Dr. Anderson, Tr. 307; Defts' Exs. H & M]), which may result in severe bleeding and possibly death (Dr. Warren, Tr. 58); hypernatremia (increase in blood sodium level), which may lead to convulsions and death (Dr. Klaus, Tr. 268); and water intoxication (accumulated water in the body tissue which may occur when oxytocin is used in conjunction with the injection of saline), resulting in damage to the central nervous system or death (Dr. Warren, Tr. 76; Dr. Klaus, Tr. 270-271; Dr. Anderson, Tr. 310; Defts' Ex. L). There is also evidence that saline amniocentesis causes massive tissue destruction to [****72] the inside of the uterus (Dr. Anderson, Tr. 308)." 392 F.Supp. 1362, 1372-1373 (1975).I

The District Court also cited considerable evidence establishing that the prostaglandin method is safer. In fact, the Chief of Obstetrics at Yale University, Dr. Anderson, suggested that "physicians should be liable for malpractice if they chose saline over prostaglandin after having been given all the facts on both methods." *Id.*, at 1373. The Court nevertheless reverses the decision of the District Court sustaining § 9 against constitutional challenge. It does so apparently because saline amniocentesis was widely used before the Act was passed; because the prostaglandin method was seldom used and was not generally available; and because other abortion techniques more dangerous

than saline amniocentesis were not banned. At bottom the majority's holding -- as well as the concurrence -- rests on its *factual* finding that the prostaglandin method is unavailable to the women of [*97] Missouri. It therefore concludes that the ban on the saline method is "an unreasonable or arbitrary regulation designed to inhibit, and having the effect of inhibiting, [**2854] the vast majority [****73] of abortions after the first 12 weeks," *ante*, at 79. This factual finding was not made either by the majority or by the dissenting judge below. Appellants have not argued that the record below supports such a finding. In [***821] fact the record below does not support such a finding. There is *no* evidence in the record that women in Missouri will be unable to obtain abortions by the prostaglandin method. What evidence there is in the record on this question supports the contrary conclusion.³ The record discloses that the prostaglandin method of abortion was the country's second most common method of abortion during the second trimester, Tr. 42, 89-90; that although the prostaglandin method had previously been available only on an experimental basis, it was, at the time of trial available in "small hospitals all over the country," *id.*, at 342; that in another year or so the prostaglandin method would become -- even in the absence of legislation on the subject - the most prevalent method. Anderson deposition, at 69. Moreover, one doctor quite sensibly testified that if the saline method were banned, hospitals would quickly switch to the prostaglandin method. [****74]

The majority relies on the testimony of one doctor that -- as already noted -- prostaglandin had been available on an experimental basis only until January 1, 1974; and that its manufacturer, the Upjohn Co., restricted its sales to large medical centers for the following six months, after which sales were to be unrestricted. Tr. [*98] 334-335. In what manner this evidence supports the

proposition that prostaglandin is unavailable to the women of Missouri escapes me. The statute involved in this litigation was passed on June 14, 1974; evidence was taken in July 1974; the District Court's decree sustaining the ban on the saline method which this Court overturns was entered in January 1975; and this Court declares the statute unconstitutional in July 1976. There is simply no evidence in the record [****75] that prostaglandin was or is unavailable at any time relevant to this case. Without such evidence and without any factual finding by the court below this Court cannot properly strike down a statute passed by one of the States. Of course, there is no burden on a State to establish the constitutionality of one of its laws. Absent proof of a fact essential to its unconstitutionality, the statute remains in effect.

The only other basis for its factual finding which the majority offers is a citation to *another* case -- [*Wolfe v. Schroering*, 388 F. Supp. 631, 637 \(WD Ky. 1974\)](#) -- in which a different court concluded that the record in its case showed the prostaglandin method to be unavailable in another State -- Kentucky -- at another time - two years ago. This case must be decided on its own record. I am not yet prepared to accept the notion that normal rules of law, procedure, and constitutional adjudication suddenly become irrelevant solely because a case touches on the subject of abortion. The majority's finding of fact that women in Missouri will be unable to obtain abortions after the first trimester if the saline method is banned is wholly unjustifiable.

[****76] In any event, the point of § 9 is to change the practice under which most abortions were performed under the saline amniocentesis method [***822] and to make the safer prostaglandin method generally available. It promises to [*99] achieve that result, if it remains operative, and the evidence discloses that the result is a desirable one or at least that the legislature could have so viewed it. That should end our inquiry, unless we purport to be not only the country's continuous constitutional convention but also its *ex officio* medical board with powers to

³ The absence of more evidence on the subject in the record seems to be a result of the fact that the claim that the prostaglandin method is unavailable was not part of plaintiffs' litigating strategy below.

approve or disapprove medical and operative practices and standards throughout the United States.

IV

Section 6(1) of the Act provides: S

[2855]** "No person who performs or induces an abortion shall fail to exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted. Any physician or person assisting in the abortion who shall fail to take such measures to encourage or to sustain the life of the child, and the death of the **[****77]** child results, shall be deemed guilty of manslaughter.... Further, such physician or other person shall be liable in an action for damages."I

If this section is read in any way other than through a microscope, it is plainly intended to require that, where a "fetus [may have] the capability of meaningful life outside the mother's womb," [Roe v. Wade, 410 U.S., at 163](#), the abortion be handled in a way which is designed to preserve that life notwithstanding the mother's desire to terminate it. Indeed, even looked at through a microscope the statute seems to go no further. It requires a physician to exercise "*that* degree of professional skill... to preserve the? fetus," which he would be required to exercise if the mother wanted a live child. Plainly, **[*100]** if the pregnancy is to be terminated at a time when there is no chance of life outside the womb, a physician would not be required to exercise any care or skill to preserve the life of the fetus during abortion no matter what the mother's desires. The statute would appear then to operate only in the gray area after the fetus *might* be viable but while the physician is still able to certify "with **[****78]** reasonable medical certainty that the fetus is not viable." See § 5 of the Act which flatly prohibits abortions absent such a certification. Since the State has a compelling

interest, sufficient to outweigh the mother's desire to kill the fetus, when the "fetus... has the capability of meaningful life outside the mother's womb," [Roe v. Wade, supra, at 163](#), the statute is constitutional.

Incredibly, the Court reads the statute instead to require "the physician to preserve the life and health of the fetus, whatever the stage of pregnancy," *ante*, at 83, thereby attributing to the Missouri Legislature the strange intention of passing a statute with absolutely no chance of surviving constitutional challenge under [Roe v. Wade, supra](#).

The Court compounds its error by also striking down as unseverable the wholly unobjectionable requirement in the second sentence of § 6(1) that where an abortion produces a **[***823]** live child, steps must be taken to sustain its life. It explains its result in two sentences: S

"We conclude, as did the District Court, that § 6(1) must stand or fall as a unit. Its provisions are inextricably bound together." *Ante*, at **[****79]** 83.I

The question whether a constitutional provision of state law is severable from an unconstitutional provision is *entirely* a question of the intent of the state legislature. There is not the slightest reason to suppose that the Missouri Legislature would not require proper care **[*101]** for live babies just because it cannot require physicians performing abortions to take care to preserve the life of fetuses. The Attorney General of Missouri has argued here that the *only* intent of § 6(1) was to require physicians to support a live baby which resulted from an abortion.

At worst, § 6(1) is ambiguous on both points and the District Court should be directed to abstain until a construction may be had from the state courts. Under no circumstances should § 6(1) be declared

unconstitutional at this point. ⁴

[****80] V

[**2856] I join the judgment and opinion of the Court insofar as it upholds the other portions of the Act against constitutional challenge.

MR. JUSTICE STEVENS, concurring in part and dissenting in part.

With the exception of Parts IV-D and IV-E, I join the Court's opinion.

In [Roe v. Wade](#), 410 U.S. 113, the Court held that a woman's right to decide whether to abort a pregnancy is entitled to constitutional protection. That decision, which is now part of our law, answers the question discussed in Part IV-E of the Court's opinion, but merely poses the question decided in Part IV-D.

If two abortion procedures had been equally accessible to Missouri women, in my judgment the United States Constitution would not prevent the state legislature [*102] from outlawing the one it found to be less safe even though its conclusion might not reflect a unanimous consensus of informed medical opinion. However, the record indicates that when the Missouri statute was enacted, a prohibition of the saline amniocentesis procedure was almost tantamount to a prohibition of any abortion in the State after the first 12 weeks of pregnancy. Such a prohibition is inconsistent [****81] with the essential holding of *Roe v. Wade* and therefore cannot stand.

In my opinion, however, the parental-consent requirement is consistent with the holding in *Roe*. The State's interest in the welfare of its young citizens justifies a variety of protective measures.

Because he may not foresee the consequences of his decision, a minor may not make an enforceable bargain. He may not lawfully work or travel where he pleases, or even attend exhibitions of constitutionally protected adult motion pictures. Persons below a certain age may not marry without [***824] parental consent. Indeed, such consent is essential even when the young woman is already pregnant. The State's interest in protecting a young person from harm justifies the imposition of restraints on his or her freedom even though comparable restraints on adults would be constitutionally impermissible. Therefore, the holding in *Roe v. Wade* that the abortion decision is entitled to constitutional protection merely emphasizes the importance of the decision; it does not lead to the conclusion that the state legislature has no power to enact legislation for the purpose of protecting a young pregnant [****82] woman from the consequences of an incorrect decision.

The abortion decision is, of course, more important than the decision to attend or to avoid an adult motion picture, or the decision to work long hours in a [*103] factory. It is not necessarily any more important than the decision to run away from home or the decision to marry. But even if it is the most important kind of a decision a young person may ever make, that assumption merely enhances the quality of the State's interest in maximizing the probability that the decision be made correctly and with full understanding of the consequences of either alternative.

The Court recognizes that the State may insist that the decision not be made without the benefit of medical advice. But since the most significant consequences of the decision are not medical in character, it would seem to me that the State may, with equal legitimacy, insist that the decision be made only after other appropriate counsel has been had as well. Whatever choice a pregnant young woman makes -- to marry, to abort, to bear her child out of wedlock - the consequences of her decision may have a profound impact on her entire future life. A legislative [****83] determination

⁴ The majority's construction of state law is, of course, not binding on the Missouri courts. If they should disagree with the majority's reading of state law on one or both of the points treated by the majority, the State could validly enforce the relevant parts of the statute -- at least against all those people not parties to this case. Cf. [Dombrowski v. Pfister](#), 380 U.S. 479, 492 (1965).

that such a choice will be made more wisely in most cases if the advice and moral support of a parent play a part in the decisionmaking process is surely not irrational. Moreover, it is perfectly clear that the parental-consent requirement will necessarily involve a parent in the decisional process.

If there is no parental-consent requirement, many minors will submit to the abortion procedure without ever informing their **[**2857]** parents. An assumption that the parental reaction will be hostile, disparaging, or violent no doubt persuades many children simply to bypass parental counsel which would in fact be loving, supportive, and, indeed, for some indispensable. It is unrealistic, in my judgment, to assume that every parent-child relationship is either (a) so perfect that communication and accord will take place routinely or **[*104]** (b) so imperfect that the absence of communication reflects the child's correct prediction that the parent will exercise his or her veto arbitrarily to further a selfish interest rather than the child's interest. A state legislature may conclude that most parents will be primarily interested in the welfare of their children, **[****84]** and further, that the imposition of a parental-consent requirement is an appropriate method of giving the parents an opportunity to foster that welfare by helping a pregnant distressed child to make and to implement a correct decision.

The State's interest is not dependent on an estimate of the impact **[***825]** the parental-consent requirement may have on the total number of abortions that may take place. I assume that parents will sometimes prevent abortions which might better be performed; other parents may advise abortions that should not be performed. Similarly, even doctors are not omniscient; specialists in performing abortions may incorrectly conclude that the immediate advantages of the procedure outweigh the disadvantages which a parent could evaluate in better perspective. In each individual case factors much more profound than a mere medical judgment may weigh heavily in the

scales. The overriding consideration is that the right to make the choice be exercised as wisely as possible.

The Court assumes that parental consent is an appropriate requirement if the minor is not capable of understanding the procedure and of appreciating its consequences and those of **[****85]** available alternatives. This assumption is, of course, correct and consistent with the predicate which underlies all state legislation seeking to protect minors from the consequences of decisions they are not yet prepared to make. In all such situations chronological age has been the basis for imposition of a restraint on the minor's freedom of choice even though **[*105]** it is perfectly obvious that such a yardstick is imprecise and perhaps even unjust in particular cases. The Court seems to assume that the capacity to conceive a child and the judgment of the physician are the only constitutionally permissible yardsticks for determining whether a young woman can independently make the abortion decision. I doubt the accuracy of the Court's empirical judgment. Even if it were correct, however, as a matter of constitutional law I think a State has power to conclude otherwise and to select a chronological age as its standard.

In short, the State's interest in the welfare of its young citizens is sufficient, in my judgment, to support the parental-consent requirement.

References

- 1 Am Jur 2d, Abortion 1.5, 37, 37.5
- 1 Am Jur Pl & Pr **[****86]** Forms (Rev ed), Abortion, Forms 1 et seq.
- 1 Am Jur Proof of Facts 15, Abortion and Miscarriage
- US L Ed Digest, Abortion 1
- ALR Digests, Abortion 1-3
- L Ed Index to Annos, Abortion
- ALR Quick Index, Abortion

Federal Quick Index, Abortion

Annotation References:

Supreme Court's views as to the federal legal aspects of the right of privacy. *43 L Ed 2d 871*.

Supreme Court's view as to what is a "case or controversy" within the meaning of Article III of the Federal Constitution or an "actual controversy" within the meaning of the Declaratory Judgment Act ([28 USCS 2201](#)). *40 L Ed 2d 783*.

Validity, under Federal Constitution, of abortion laws . [35 L Ed 2d 735](#).

Validity, construction, effect, and binding force of declaration in statute or ordinance that invalidity of a portion shall not affect the remainder. [73 L Ed 287](#).

Woman's right to have abortion without consent of, or against objections of, child's father. [62 ALR3d 1097](#).

Right of minor to have abortion performed without parental consent. [42 ALR3d 1406](#).

[****87] Homicide based on killing of unborn child. [40 ALR3d 444](#).