

IN THE SUPREME COURT OF TEXAS

No. 97-1135

SCOTT BRADLEY, PETITIONER

v.

THE STATE OF TEXAS ON THE RELATION OF DALE WHITE, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE SECOND DISTRICT OF TEXAS

Argued on September 28, 1998

JUSTICE ABBOTT, concurring.

The Court holds that the Westlake Board of Aldermen violated Texas Rule of Civil Evidence 605 when board members who sat as judges in Bradley's removal court also testified as witnesses against him. In so doing, the Court sidesteps a more fundamental flaw in the removal: the statute governing removal proceedings is unconstitutionally vague and thus denies Bradley due process and due course of law. *See* U.S. CONST. amend. XIV, § 1; TEX. CONST. art. I, § 19. Because I would hold the statute used to remove Bradley is void for vagueness, I concur in the Court's judgment.

I

The statute providing for removal of a mayor in a general-law municipality such as Westlake states that "a majority of the aldermen constitutes a court to try and determine the case against the

mayor,” and the removal proceeding “is subject to the rules governing a proceeding or trial in a justice court.” TEX. LOC. GOV’T CODE § 21.002(g), (h). Bradley asserts that a removal proceeding is a civil proceeding, and civil justice court rules provide for, among other things, venue change,¹ empaneling of juries,² a right to appeal,³ and a right to move for new trial.⁴ Bradley further argues that Rules of Civil Procedure and Evidence apply through Texas Rule of Civil Procedure 523, which states that “[a]ll rules governing the district and county courts shall also govern the justice courts, insofar as they can be applied, except where otherwise specifically provided by law or these rules.” TEX. R. CIV. P. 523. Bradley contends that these applicable rules provide for recusal of judges,⁵ prohibit judges from testifying in cases in which they sit,⁶ and allow the right to full cross-examination and impeachment of witnesses.⁷

The State responds that “to graft onto § 21.002 all of the rules of civil procedure would render the statute virtually meaningless” and “would lead to an absurd result.” Following the State’s logic, the court of appeals concluded that justice court rules should apply when they are “not in conflict with” the intended structure of removal proceedings. 956 S.W.2d 725, 738.

Both approaches are flawed. Bradley’s contention founders upon the clear text of the statute. Although section 21.002(h) states that a removal proceeding is subject to the rules governing a

¹ See TEX. R. CIV. P. 528.

² See TEX. R. CIV. P. 544.

³ See TEX. R. CIV. P. 573.

⁴ See TEX. R. CIV. P. 567.

⁵ See TEX. R. CIV. P. 18b.

⁶ See TEX. R. CIV. EVID. 605 (currently TEX. R. EVID. 605).

⁷ See TEX. R. CIV. EVID. 607 (currently TEX. R. EVID. 607); TEX. R. CIV. EVID. 611(b) (currently TEX. R. EVID. 611 (b)).

justice court trial, several justice court rules directly contravene requirements of section 21.002. For example, Bradley requested a venue change and jury trial that justice court rules provide for, but both requests conflict with the statute's express statement that "[a] majority of the aldermen constitutes a court to try and determine the case against the mayor." TEX. LOC. GOV'T CODE § 21.002(g). This specific textual provision of the statute precludes Bradley's proposal to apply all justice court rules and all rules of civil procedure. See TEX. GOV'T CODE § 311.026 (codifying the common-law doctrine for statutes *in pari materia*, which states that when an irreconcilable conflict occurs between a general and a special statutory provision, the special provision prevails as an exception to the general provision). As the State contends, application of all the justice court rules and rules of civil procedure would lead to an "absurd result."

The interpretation of the statute that the State urges suffers from its own flaws. The State's argument leaves it to the caprice of the aldermen — many of whom are untrained in the rules of procedure and evidence — to pick and choose which rules may apply to a removal proceeding, and to choose which rules may not apply because they are "in conflict with" the structure of removal proceedings. A mayor subject to these removal proceedings would not know exactly which rules apply until the aldermen make that decision — a decision that may not be made until the proceedings are already underway. In effect, the State asks the Court to swap the "absurd result" that follows from Bradley's contentions for the arbitrariness that follows from its own proposal.

The Court should not be constrained to choose the lesser of the evils presented by the parties. Instead, the statute's unavoidable incongruities and ambiguities lead me to conclude, as Bradley argues in the alternative, that it is unconstitutionally vague.

II

Under the United States Constitution, “[i]t is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values.” *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). They “may trap the innocent by not providing fair warning” and they “impermissibly delegate[] basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.” *Id.* at 108-09. In order to avoid these dangers, the Due Process Clause requires that laws be reasonably clear. As the Supreme Court explained, due process:

ensures that state power will be exercised only on behalf of policies reflecting an authoritative choice among competing social values, reduces the danger of caprice and discrimination in the administration of the laws, enables individuals to conform their conduct to the requirements of law, and permits meaningful judicial review.

Roberts v. United States Jaycees, 468 U.S. 609, 629 (1984).

Responding to these concerns, the United States Supreme Court and this Court have long applied the principle that statutory language may not be so vague that persons “of common intelligence must necessarily guess at its meaning and differ as to its application.” *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926), *quoted in Texas Antiquities Comm. v. Dallas County Community College Dist.*, 554 S.W.2d 924, 928 (Tex. 1977) (plurality opinion).

Although the vagueness standard applies most frequently to penal statutes, a civil statute may also be so vague that it violates due process. *See A.B. Small Co. v. American Sugar Ref. Co.*, 267 U.S. 233, 239-40 (1925) (explaining that the rationale of previous vagueness cases is not limited only to criminal cases because “[i]t was not the criminal penalty that was held invalid, but the exaction of obedience to a rule or standard which was so vague and indefinite as really to be no rule

or standard at all”); *Jones v. City of Lubbock*, 727 F.2d 364, 373 (5th Cir. 1984); *Texas Antiquities Comm.*, 554 S.W.2d at 927-28 (plurality decision striking down a civil statute as unconstitutionally vague). The degree of clarity that the vagueness standard requires, however, “varies according to the nature of the statute, and the need for fair notice or protection from unequal enforcement.” *Jones*, 727 F.2d at 373; *see also Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982) (“[Vagueness] standards should not, of course, be mechanically applied. The degree of vagueness that the Constitution tolerates — as well as the relative importance of fair notice and fair enforcement — depends in part on the nature of the enactment.”); *Texas Antiquities Comm.*, 554 S.W.2d at 927 (plurality decision stating that “varying degrees of specific standards” have been required in testing vagueness and breadth of legislative delegations, “[d]epending upon the nature of the power, the agency, and the subject matter”). In the case of this statute, the Court should consider that few actors deserve more clarity than elected officials who can be removed from office at the hands of other competing elected officials.

III

The statute at issue, which provides for removal of a mayor in a general-law municipality, is a civil statute. *See Meyer v. Tunks*, 360 S.W.2d 518, 520-21 (Tex. 1962) (action to remove a county officer is civil in nature). Our vagueness review must therefore apply a more tolerant standard for civil statutes.⁸

The statute fails even under that deferential standard. In *Texas Antiquities Committee*, a

⁸ *See Chavez v. Housing Auth.*, 973 F.2d 1245, 1249 (5th Cir. 1992) (A civil statute that does not implicate the First Amendment is sufficiently unclear to violate due process if it is “so vague and indefinite as really to be no rule or standard at all” or if it is ‘substantially incomprehensible’); *Jones*, 727 F.2d at 373 (same).

plurality of the Court professed that “[t]here has been called to our attention no case in Texas or elsewhere in which . . . powers . . . are more vaguely expressed or less predictable than those permitted by the phrase in question.” *Texas Antiquities Comm.* 554 S.W.2d at 927.⁹ The exercise of powers under this statute is hardly more predictable. In the context of a proceeding to remove a mayor in which his fellow aldermen are directed to sit as a court, the phrase “subject to the rules governing a proceeding or trial in a justice court” may at first glance seem clear. When one is forced to apply the provision, however, the inherent ambiguities become inescapable. The confusion and potential disregard for Bradley’s rights that his petition describes — as well as similar predicaments described by amici¹⁰ — illustrate this lack of a comprehensible standard.

A significant number of civil rules for a justice court either conflict directly with the statute’s scheme for removal proceedings,¹¹ or they provide no relevant guidance to a board of aldermen.¹² Whether other justice court rules apply has been and will continue to be a matter of guesswork for aldermen, mayors, and even reviewing courts, leaving a situation ripe for “resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.” *Grayned*, 408 U.S. at 109. For example, does the successful party recover costs as provided by Civil

⁹ The vague phrase in *Texas Antiquities Committee* was “buildings . . . and locations of historical . . . interest.” *Id.*

¹⁰ Amici Paul Skelton and Marian Hill describe their experiences with removal proceedings in Parker and Seven Points, Texas. Skelton argues that the court of appeals’ construction of the removal statute violates separation of powers and due process guarantees. Hill argues that the removal statute in question is unconstitutionally vague.

¹¹ See TEX. R. CIV. P. 527-32 (relating to motions to transfer and venue changes); TEX. R. CIV. P. 540, 542, 544-56 (relating to juries).

¹² See TEX. R. CIV. P. 524 (justices to keep a civil docket); TEX. R. CIV. P. 533 (requisites for writ or process from justice courts); TEX. R. CIV. P. 543 (dismissal for plaintiff’s failure to appear); TEX. R. CIV. P. 560 (judgment for specific articles of property); TEX. R. CIV. P. 561 (enforcing a judgment for property).

Rule 559?¹³ Can the removal “court” order a new trial, as provided by Civil Rules 567-70?¹⁴ If so, could a new trial be ordered by newly elected aldermen taking the place of the aldermen who presided over the original trial?

Texas Rule of Civil Procedure 523, which states that rules governing district and county courts shall also govern justice courts, creates an assortment of other conundrums. Do Evidence Rule 605, prohibiting a judge from testifying as a witness, and Texas Rule of Civil Procedure 18b, providing for recusal of interested judges, apply to aldermen sitting as removal judges? Evidently the Court believes that Civil Procedure Rule 605 applies, and both of these rules would seem to apply under the language of both the statute and Civil Procedure Rule 523. However, these rules stand opposed to the reality that the very aldermen who sit as a court to try the mayor may also be the ones who bring the charge, “may have substantial knowledge of the evidence to be presented,” or may have had past differences with the mayor. *See Quinn v. City of Concord*, 233 A.2d 106, 108 (N.H. 1967); *see also Rutter v. Burke*, 93 A. 842, 849 (Vt. 1915) (holding that a mayor who acted as accuser, prosecutor, and witness was not disqualified from voting, because “the Constitution of the city council, its exclusive jurisdiction as a trier, and the diversity of duties imposed upon it, preclude the idea that impartiality can be made the test” of the right of a board member to sit in a proceeding); *State v. Common Council*, 242 N.W. 2d 689, 698 (Wis. 1976) (“[T]he mere fact that [a council member] had stated under oath . . . that there were grounds to remove [the city clerk] did not disqualify him from subsequently sitting as an impartial adjudicator.”); 4 McQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 12.259.20, at 595 (3rd ed. 1992) (“[I]n a proceeding to remove,

¹³ *See* TEX. R. CIV. P. 559.

¹⁴ *See* TEX. R. CIV. P. 567-70.

members of the council are not disqualified because of the fact that they were members of a committee to investigate and afterwards preferred charges; the fact that they may have formed an opinion concerning the accused is regarded as immaterial.”). Indeed, the aldermen may well be the only people familiar with the facts underlying the removal proceeding. *Cf. id.* § 12.259.25, at 598 (“Particularly, an objection for bias against . . . a member of a hearing tribunal will not be sustained where to do so would destroy the only tribunal with power in the premises.”). Rare would be the occasion when a mayor could be tried by truly disinterested, unbiased, and uninformed aldermen. Yet that is the fiction that the Court forces upon the parties.

Ignoring these probabilities and applying these rules sets the stage for future enigmas. For instance, the statute states that “a majority of the aldermen constitutes a court.” Assuming, as the Court does, that Evidence Rule 605 or Civil Procedure Rule 18b apply, what occurs if at least half of the aldermen must be recused because of bias or the necessity that they testify? The statute provides no guidance — “no rule or standard at all.”¹⁵ Neither does the Court.

IV

Admittedly, courts “will often strain to construe legislation so as to save it against constitutional attack.” *Scales v. United States*, 367 U.S. 203, 211 (1961). Nevertheless, even if the Court assumed the burden of repairing this paradoxical statute, the task would require such a revision of the Legislature’s words that the Court would exceed the bounds of its proper role in our divided government. The “constructions” urged by the parties would require us either to ignore specific words of the statute or to write our own ad hoc exceptions into the statute. As one scholar has

¹⁵ See *Chavez*, 973 F.2d at 1249; *Jones*, 727 F.2d at 373.

recognized, “there is a difference between adopting a saving construction and rewriting legislation altogether.” TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-30, at 1032 (2d ed., 1988). We are invited to do the latter, but I believe we should decline the invitation. See *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 651 (1943) (“It is, of course, beyond our power to rewrite the State’s requirement”) (Frankfurter, J., dissenting); *United States v. Reese*, 92 U.S. 214, 221 (1875) (“To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty.”).

Rewriting a statute rife with traps and uncertainties is the power and duty of the Legislature. As the controversy at hand evinces, the decisions of local governments affect the lives of their citizens as profoundly and concretely as those of any other level of government. Sometimes a mayor’s conduct necessitates removal proceedings. Nevertheless, such proceedings can reverse a majority of the local citizens’ judgment as to who is best to lead them. Consequently, our state government owes a duty not only to the mayor but to his colleagues and constituents to ensure that such proceedings are neither arbitrary nor unfair, and never unconstitutional. This vague and unwieldy statute fails to carry out the task. I urge the Legislature to mend it soon.

GREG ABBOTT
JUSTICE

OPINION DELIVERED: April 8, 1999