IN THE COURT OF APPEALS
FOR THE THIRD JUDICIAL DISTRICT OF TEXAS
AT AUSTIN, TEXAS

Case No. 03-02-00005-CV

BENJAMIN ROBERT MAULDIN,

Appellant,

v.

TEXAS STATE BOARD OF PLUMBING EXAMINERS, and ROBERT L. MAXWELL,

Appellees.

ON APPEAL FROM A JUDGMENT RENDERED BY
THE TRAVIS COUNTY, TEXAS DISTRICT COURT
HON. SUZANNE COVINGTON, PRESIDING

REPLY BRIEF OF APPELLANT MAULDIN

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ARGUMENT IN REPLY

In *Johnson v. State Hearing Examiner's Office*, 838 P.2d 158, 172 (Wyo. 1992), the Supreme Court of Wyoming was confronted with an equal protection challenge to a statute which penalized those under 19 years of age to driver license suspension if convicted of an alcohol related offense, even if such offense was not committed while driving. That court declared the offending statute unconstitutional because classifying the subjects of the law merely by age was irrational. But what is important about this particular case is a certain observation made, admittedly dicta, by the court in its opinion. It equated "driver's license suspension for child support nonpayment" as being no different from license suspension for a drinking offense unrelated to driving, a very common sense observation. If this action was pending in Wyoming, Mauldin's success with the issue he is raising here would be almost certain.

Mauldin does not contest the obvious fact that Texas, like other States, confronts the difficult problem posed by deadbeats[1] who refuse to pay child support even when their children receive welfare benefits. There are a little more than 1 million child support cases being handled by the Attorney General's child support division, of which 40% require locating an absent, dead beat parent (C.R. 210). The child support division is thus trying to locate approximately 400,000 dead beats. But it must be noted that 30% of these cases,

[1] Mauldin's counsel has used in the briefs to this court this colloquial expression which originates from the print media. But during a deposition, defense counsel suggested better terms: delinquent child support obligors or absent parents, which are probably better terms for this court to use.

according to the Attorney General himself, does not "involve clients who ... received public assistance" (C.R. 298). A fair approximation of the number of dead beats which Texas may be trying to locate would be between 300,000 and 400,000, out of an approximate population of 20 million.

A dead beat is located by the Attorney General's child support division through the use of its computer, which obtains "data elements" of all licensees from all Texas licensing agencies, and then compares those elements with known data elements of the delinquent parent. These data elements include the names, addresses, dates of birth, etc., of all licensees, and it is known that these elements do assist locating dead beats. The SSN appears in some ill-defined and immeasurable way to increase the ability to locate these parties; however, no survey, study or report exists which demonstrates the precise gain achieved in locating dead beats by using SSNs as opposed to the other data elements.

Many private entities and businesses have almost identical problems. Creditors like banks must find debtors who owe them money, and they seek such delinquents "the old fashioned" way: they look, using a variety of investigative tools available to them. But in 1995, the Attorney General, being a public official, secured help from the Texas legislature, which adopted Family Code §231.302. This law casts a wide net over 100% of the licensed Texas public, requiring them to supply their SSNs to every licensing agency. The millions of times SSNs are provided to Texas agencies translates into something practical: 11,700 petitions for license suspension were filed in 1996 by the child support division (C.R. 211).

Perhaps by now, there are a few more, but it is doubtful that even today there could be more than 20,000 such petitions.

This statutory scheme for collecting SSNs exists solely as an administrative convenience for the Attorney General. Of course, the same result could be achieved in another way. SSNs could be collected from all litigants seeking divorces in Texas courts. The same information could be obtained by actions of the Attorney General himself rather than being imposed by statute. He could direct attorneys in the child support division to collect SSNs via discovery when they file actions to secure support from delinquents. These two other methods of collecting SSNs would be less burdensome, and it cannot be proven that these methods would be less effective than the method imposed via Family Code §231.302.

But most licensed Texans cannot help resolution of the dead beats problem. Probably 90% of the public are not dead beats and possession of their SSNs by the Attorney General does not help him find delinquents. Mauldin is within this class and most likely will remain in this class for the rest of his life. Having Mauldin's SSNs will never help the Attorney General locate any dead beat.

Mauldin has specific legal reasons to object to the statutory scheme imposed by Family Code §231.302. Being very religious, Mauldin believes that he has "a natural and indefeasible right to worship Almighty God according to the dictates of my own conscience, and that no human authority, including the Texas State Board of Plumbing Examiners,

ought, in any case whatever, to control or interfere with my rights of conscience in matters of religion" (C.R. Supp. I at 102).[2] These religious convictions, as explained in great detail in Mauldin's opening brief, cannot be challenged.[3] Thus, Mauldin has the perfect right to believe that the book of Revelation predicts a time when the Beast's "666" numbering system will be implemented, and he may believe that the present effort to collect SSNs via Family Code §231.302 and possibly 42 U.S.C. §666 demonstrate that these predicted events in Revelation are coming to pass.

Via the First Amendment to the U.S. Constitution, Mauldin not only has the perfect right to believe as shown above, he also has the right to freely exercise his religious beliefs. The First Amendment's valued and fundamental "free speech" right contains Mauldin's right to not speak, or what amounts to a right of freedom of conscience. These and other

[2] This statement is almost identical with the provisions of Art. 1, §6 of the Texas Constitution, which provides in part as follows: "All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences... No human authority ought, in any case whatever, to control or interfere with the rights of conscience in matters of religion..."

[3] See *United States v. Ballard*, 322 U.S. 78, 86, 64 S.Ct. 882 (1944), where the Court declared that men "may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs."

rights are being abridged by the requirement imposed by Family Code §231.302 that Mauldin supply his SSN to the Board.

To protect his fundamental and constitutional rights, Mauldin instituted this suit. To attack §231.302, he framed his cause of action in equal protection terms because this is the precise constitutional defect of this law: it imposes a burden upon a far larger number of people than those who cause this problem, and thus §231.302 is overbroad. Both in the trial court and here on appeal, Mauldin has contended that §231.302 is violative of equal protection regardless of whether the strict scrutiny or rational basis test applies. But to demonstrate that the strict scrutiny test should apply, Mauldin has asserted specific rights which are being abridged by §231.302: his right to work, his right to practice his religious beliefs, and his right to not speak, among others.

In its brief, the Board naturally disagrees with Mauldin. Generally, the Board contends that the proper equal protection analysis which applies to this case is the rational basis test because, in its words, no fundamental rights are burdened by §231.302 (Board's Brief at 8 - 18). But further, it contends that §231.302 is not overbroad because "all license applicants have the potential to become child support evaders" (Board's Brief at 4). Mauldin submits, however, that the Board errs.

A. Mauldin's constitutional right to work.

Art. 1, §19 of the Texas Constitution provides that "No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised,

except by the due course of the law of the land." The "liberty" mentioned in this section of the Bill of Rights includes the right to pursue any lawful business. See *Ex parte Martin*, 127 Tex.Cr.R. 25, 74 S.W.2d 1017, 1018 (Tex.Cr.App. 1934). Art. 1, §29 of the Constitution provides that "[t]o guard against transgressions of the high powers herein delegated, we declare that everything in this 'Bill of Rights' is excepted out of the general powers of government, and shall forever remain inviolate, and all laws contrary thereto, or to the following provisions, shall be void." The Texas legislature, via Art. 1, §29, is thus denied all power to deprive anyone of liberty or privileges, "except by the due course of the law of the land."

This phrase, "due course of the law," is synonymous with principles of due process, which include an equal protection component.[4] It thus seems clear that even privileges cannot be denied to anyone via a law violative of equal protection. But Mauldin wonders whether a "privilege" as mentioned in Art. 1, §19 is itself elevated by this constitutional provision to a status similar to "liberty," at least to the extent that even a deprivation of a privilege is subject to strict scrutiny when an equal protection challenge is made to a law which abridges that privilege?

Nonetheless, Mauldin has an unquestioned right to work and make a living for himself and his family, and he exercises this right when he works as a plumber. This right to be a plumber is governed by the police power, and this occupation is subject to regulation to

[4] See page 17 of Mauldin's opening brief for relevant cases.

promote the health, safety and welfare of the people; see *Ex parte George*, 152 Tex.Cr.R. 465, 215 S.W.2d 170, 172 (1948).[5] However, the "Legislature ... may not ***unreasonably*** interfere with or prevent the carrying on of a lawful and useful occupation or business..." [emphasis added]; see *Ex parte Martin*, 127 Tex.Cr.R. 25, 74 S.W.2d 1017, 1018 (Tex.Cr.App. 1934).

[5] This case concerned the validity of laws regulating the occupation of plumbers.

Here, the statutory scheme created via §231.302 directly affects Mauldin's right to work:[6] if he fails to comply with this law, he will be deprived of the ability to work. Yet, the requirement to supply a SSN to retain a plumber's license cannot be considered in any way a "reasonable" regulation of that occupation as possession and delivery of Mauldin's SSN to the Board has absolutely no relationship to his abilities to be a plumber. See *People v. Lindner*, 127 Ill.2d 174, 535 N.E.2d 829, 833 (1989)("Keeping off the roads drivers who have committed offenses not involving vehicles is not a reasonable means of ensuring that the roads are free of drivers who operate vehicles unsafely or illegally. To the contrary, the means chosen are arbitrary ... because the offenses ... have no connection to motor vehicles"); and *People v. Lawrence*, 206 Ill.App.3d 622, 565 N.E.2d 322, 323 (1990)("To prohibit persons from driving merely because they have committed an offense which did not even involve the use of a motor vehicle is not a reasonable way to insure that motor vehicles will be owned and operated safely and legally").

This right to work as the basis for application of the strict scrutiny test in this case is supported by *Smith v. Decker*, 158 Tex. 416, 312 S.W.2d 632, 633-34 (1958). In *Decker*,

[6] If the scheme implemented via §231.302 should be considered to regulate the marital relationship and the right to procreate, clearly an equal protection challenge would be governed by the strict scrutiny test. See *Skinner v. State of Oklahoma*, 316 U.S. 535, 62 S.Ct. 1110 (1942), and *Loving v. Virginia*, 388 U.S. 1, 12, 87 S.Ct. 1817 (1967)("Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival").

some bailbondsmen instituted suit against a sheriff to challenge a regulation of their occupation, the bondsmen contending that the law was special legislation in that it applied only to counties with cities having populations between 73,000 and 100,000. Here, the Supreme Court declared that the bondsmen had "a vested property right in making a living, subject only to valid and subsisting regulatory statutes, ... [but they were] prevented from performing their business otherwise lawful but for the statute." It further found that the act "constitutes an arbitrary classification ... by reason of the fact that such classification bears no reasonable relationship to the objects sought to be accomplished."

The decision in *Decker* has direct application here. If Mauldin refused to supply his SSN to the Board, he would be denied the right to work. Yet this denial could not possibly be considered as any valid or reasonable regulation of the plumbing occupation. Family Code §231.302 thus directly abridges a fundamental right of Mauldin, requiring use of the strict scrutiny test here, contrary to the Board's assertion.

B. Mauldin's fundamental right not to speak.

The Board in its brief confuses Mauldin's "right to not speak" with Mauldin's right to freely exercise his religious beliefs. The right not to speak is separate and distinct from the right of free exercise, although litigants who raise free exercise claims at times also assert "not to speak" claims.

Perhaps one of the most recent cases addressing the "right to not speak" is *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 573, 115 S. Ct.

2338, 2344 (1995), where some Irish parade organizers objected to the inclusion in their parade of homosexuals. Here, the U.S. Supreme Court determined, based upon the same decisional authorities which are the basis of Mauldin's right to not speak, that the parade organizers could not be forced to either associate with or "speak" the message of the homosexuals:

> "[O]ne important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say,' ... 'the State... may not compel affirmance of a belief with which the speaker disagrees, ... the speaker has the right to tailor the speech, [which] applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid."

The right to not speak is also the basis for the claims of atheists as well as Christians who object to the pledge of allegiance; see *Banks v. Board of Public Instruction of Dade County*, 314 F.Supp. 287 (S.D. Fla. 1970), aff.'d, *Banks v. Board of Public Instruction of Dade County*,450 F.2d 1103 (5th Cir. 1971); *Lipp v. Morris*, 579 F.2d 834 (3d Cir. 1978); and *Newdow v. U.S. Congress*, ___ F.3d ___ (9th Cir. June 26, 2002) (holding that the words "under God" in the pledge were unconstitutional).

Here, Mauldin objects for religious reasons to not speak allegiance to a numbering system which in his view is associated with the Biblical "Beast." Yet the statutory compulsion that he supply the Board with his SSN abridges this right. The Board's position that there is essentially no such right because it is merely a part of a free exercise claim is thus erroneous.

C. Mauldin's right to freely exercise religious beliefs.

Based upon scriptures concerning the Beast of Revelation, Mauldin believes that at some time in the future, a Beast will arise and prevent all from "buying and selling" unless they profess allegiance to the Beast by bearing the "mark." Mauldin correctly believes that if he participates in this beast system, he jeopardizes his soul. Yet in his relationship with the Board, he is confronting what is essentially the beast's system: he cannot practice his occupation and exercise his right to work unless he provides the "mark." The commands of Family Code §231.302 directly abridge this religious belief and prevent its exercise.

The Board responds to Mauldin's "free exercise" concerns by relying upon *Employment Division, D.H.R. of Oregon v. Smith*, 494 U.S. 872, 110 S.Ct. 1595 (1990), and its general rule that a religious believer is subject to the general laws of a State. Mauldin observes, however, that the decision in *Smith* has not been in some instances generally accepted by the American judiciary.[7] The decision in *Smith* has produced various legislative responses, such as a constitutional amendment in Alabama and the adoption of Civil Practice and Remedies Code §106.001 here in Texas. [8]

[7] A number of other courts have expressed disagreement with the rationale of *Smith*; see *Rourke v. N.Y.S. Dep't. of Corr. Services*, 159 Misc.2d 324, 603 N.Y.S.2d 647 (N.Y.Sup.Ct. 1993), aff'd 201 A.D.2d 179, 615 N.Y.S.2d 470 (N.Y.App.Div.3d Dep't. 1994); and *First Covenant Church of Seattle v. City of Seattle*, 120 Wash.2d 203, 840 P.2d 174 (1992). Another just ignored it; see *Society of Jesus of New England v. Boston Landmarks Comm'n.*, 409 Mass. 38, 564 N.E.2d 571, 574 (1990).

[8] See Prof. Thomas Berg's law review article, *The Alabama Religious Freedom Amendment: An Interpretive Guide*, 31 Cum. L. Rev. 47 (2000).

But Mauldin notes that *Smith* is not as broad as the Board asserts, and there is still *Smith's* "hybrid rights" rule[9] which is applicable here:

> "The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press, see *Cantwell v. Connecticut*, 310 U.S., at 304 -307 (invalidating a licensing system for religious and charitable solicitations under which the administrator had discretion to deny a license to any cause he deemed nonreligious); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (invalidating a flat tax on solicitation as applied to the dissemination of religious ideas); *Follett v. McCormick*, 321 U.S. 573 (1944) (same), or the right of parents, acknowledged in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), to direct the education of their children, see *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (invalidating compulsory school-attendance laws as applied to Amish parents who refused on religious grounds to send their children to school). Some of our cases prohibiting compelled expression, decided exclusively upon free speech grounds, have also involved freedom of religion, cf. *Wooley v. Maynard*, 430 U.S. 705 (1977) (invalidating compelled display of a license plate slogan that offended individual religious beliefs); *West Virginia Bd. of Education v. Barnette*, 319 U.S. 624 (1943) (invalidating compulsory flag salute statute challenged by religious objectors). And it is easy to envision a case in which a challenge on freedom of association grounds would likewise be reinforced by Free Exercise Clause concerns. Cf. *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984) ('An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State [if] a correlative freedom to engage in group effort toward those ends were not also guaranteed')," 494 U.S., at 881- 882.

In this case, other fundamental and constitutional rights are also abridged by §231.302: the right to work, and the right not to speak. The existence of these other rights thus requires that Mauldin's free exercise rights be acknowledged here, contrary to the

[9] See *Approaches to the Hybrid-Rights Doctrine in Free Exercise Cases*, 68 Tenn.L.Rev. 119 (2000).

Board's position.

D. The Board's assumption that all Texas licensees are potential child support obligors is unreasonable.

As justification for the overreaching scope of Family Code §231.302, the Board tenders an unrealistic hypothetical example: "The statute addresses all state citizens who have any type of license because all citizens are *potential* child support obligors" (Board's Brief at 21, emphasis in original). According to the Board, the Texas legislature in 1995 conclusively presumed that since all Texas citizens are potential child support obligors, §231.302 had to be designed to capture the SSNs of all these people. There are several major problems with this theory.

If all citizens are ***potential*** obligors, then the class included within §231.302, only licensees, is underinclusive. See *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 113 S.Ct. 2217 (1993). If the "dead beat" problem is really caused by everyone and requires that everyone become involved in its solution, a limitation of the act to just those who obtain licenses from Texas agencies simply cannot solve this problem. Thus §231.302 should include other classes, such as babies, school children (particularly those between ages 13 to 15), invalids, gypsies, those confined in asylums, illegal aliens, as well as those without licenses. There is no rational reason to exclude these other groups if everyone is a potential child support evader.

But there is another problem with this broad justification. Not only is it unrealistic,

but there is no method permitted by these child support and licensing laws which allows anyone to challenge and disprove this baseless conclusive presumption. Long ago, statutes creating conclusive presumptions were found unconstitutional as violative of due process. In *Heiner v. Donnan*, 285 U.S. 312, 52 S.Ct. 358 (1932), the U.S. Supreme Court considered the constitutionality of an estate tax law which created a conclusive presumption that gifts made within two years of death were presumed to have been made in contemplation of death, and which consequently would include those gifts within an estate for estate tax purposes. Some parties involved with an estate challenged this law as unconstitutional because it created a conclusive presumption. The Supreme Court agreed:

> "[A] statute which imposes a tax upon an assumption of fact which the taxpayer is forbidden to controvert is so arbitrary and unreasonable that it cannot stand under the Fourteenth Amendment," Id., at 325.
>
> "The earlier revenue acts created a prima facie presumption, which was made irrebuttable by the later act of 1926. A rebuttable presumption clearly is a rule of evidence which has the effect of shifting the burden of proof, *Mobile, J. & K. C. R. Co. v. Turnipseed*, 219 U.S. 35, 43 , 31 S. Ct. 136, 32 L. R. A. (N. S.) 226, Ann. Cas. 1912A, 463; and it is hard to seen how a statutory rebuttable presumption is turned from a rule of evidence into a rule of substantive law as the result of a later statute making it conclusive. In both cases it is a substitute for proof; in the one open to challenge and disproof, and in the other conclusive. However, whether the latter presumption be treated as a rule of evidence or of substantive law, it constitutes an attempt, by legislative fiat, to enact into existence a fact which here does not, and cannot be made to, exist in actuality, and the result is the same, unless we are ready to overrule the *Schlesinger* Case, as we are not; for that case dealt with a conclusive presumption, and the court held it invalid without regard to the question of its technical characterization. This court has held more than once that a statute creating a presumption which operates to deny a fair opportunity to rebut it violates the due process clause of the Fourteenth Amendment. For example, *Bailey v. Alabama*, 219 U.S. 219 , 238, et seq., 31 S. Ct. 145; *Manley v. Georgia*, 279 U.S. 1 , 5-6, 49 S. Ct. 215. 'It is apparent,' this court said in the *Bailey* Case (219 U.S. 239 , 31 S. Ct. 145,

> 151) 'that a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment. The power to create presumptions is not a means of escape from constitutional restrictions.'
>
> "If a legislative body is without power to enact as a rule of evidence a statute denying a litigant the right to prove the facts of his case, certainly the power cannot be made to emerge by putting the enactment in the guise of a rule of substantive law," Id., at 329.

See also, among many others, *Schlesinger v. State of Wisconsin*, 270 U.S. 230, 46 S.Ct. 260 (1926); *Tot v. United States*, 319 U.S. 463, 468-469, 63 S.Ct. 1241 (1943)("But the due process clauses of the Fifth and Fourteenth Amendments set limits upon the power of Congress or that of a state legislature to make the proof of one fact or group of facts evidence of the existence of the ultimate fact on which guilt is predicated"); *Vlandis v. Kline*, 412 U.S. 441, 93 S.Ct. 2230, 2233 (1973)("Statutes creating permanent irrebuttable presumptions have long been disfavored under the Due Process Clauses of the Fifth and Fourteenth Amendments"); *United States v. Bowen*, 414 F.2d 1268, 1273 (3rd Cir. 1969)("We believe the regulation to be unconstitutional as violative of the due process clause of the Fifth Amendment insofar as it purports to establish such an irrebuttable presumption ... No administrative agency, nor even a legislature, may make the proof of one fact conclusive proof of another fact in any proceeding, civil or criminal, to the detriment of a private party"); *United States v. Simmons*, 476 F.2d 33, 37 (9th Cir. 1973); *United States v. Perry*, 474 F.2d 983, 984 (10th Cir. 1973); *United States v. Lake*, 482 F.2d 146 (9th Cir. 1973); and *United States v. Belgrave*, 484 F.2d 915 (3rd Cir. 1973).

Applying the words of the *Heiner* court here is illustrative. Section 231.302 "imposes [a duty to disclose SSNs] upon an assumption of fact which the [licensee] is forbidden to controvert..."[10] According to the Board, the 1995 Texas legislature conclusively presumed that all citizens were potential child support evaders and thus all licensees were drawn within the scope of §231.302 and subjected to its commands without exceptions. But anyone outside the class of dead beats, whether a 75 year old grandmother, a church pastor, or even a religious plumber, is denied the opportunity to object to being classified as a potential child support evader by the State. Included in this class are former President George Bush, Barbara Bush, Ross Perot, Ann Richards, Lady Bird Johnson, Michael Dell, Darrell Royal, Michael Johnson, Drayton McLane, even Ben Mauldin. But the *Heiner* court declared this to be "arbitrary and unreasonable."

Some courts have detected this problem regarding a lack of individualized determinations when confronted with due process or equal protection challenges to statutes based upon conclusive presumptions. In *Vlandis v. Kline*, *supra*, 412 U.S. at 452, the Court determined that "standards of due process require that the State allow such an individual the opportunity to present evidence showing" the disputed fact. Following on the heels of *Vlandis*, Justice Marshall observed, in *U.S. Dep't. of Agriculture v. Murry*, 413 U.S. 508, 93 S.Ct. 2832 (1973), as follows:

[10] This is precisely what the court in *Sullivan v. Univ. Interscholastic League*, 616 S.W.2d 170, 172-73 (Tex. 1981) was addressing when it said "The fact that there is no means of rebutting the presumption ..."

> "In short, where the private interests effected are very important and the governmental interest can be promoted without much difficulty by a well-designed hearing procedure, the Due Process Clause requires the Government to act on an individualized basis, with general propositions serving only as rebuttable presumptions or other burden-shifting devices," Id., at 518.
>
> "Sometimes fairness will require a hearing to determine whether a statutory classification will advance the legislature's purposes in a particular case so that the classification can properly be used only as a burden-shifting device, while at other times the fact that a litigant falls within the classification will be enough to justify its application. There is no reason, I believe, to categorize inflexibly the rudiments of fairness. Instead, I believe that we must assess the public and private interests affected by a statutory classification and then decide in each instance whether individualized determination is required or categorical treatment is permitted by the Constitution," Id., at 519.

In this case where Mauldin challenges §231.302 as being overbroad, the Board asserts that everyone is subject to the requirement to supply SSNs because all are potential child support evaders. But reality is otherwise and this assumption simply does not apply to everyone. To comport with due process, what is needed is a mechanism whereby licensees can contest the assumption and demonstrate that they are neither actual or potential "evaders" of child support. Licensees need an opportunity for "individualized determination", yet the statutory scheme simply provides no such remedy.

But, there is a way to avoid confronting the nasty due process problem which the Board presents to this court with its wildly unrealistic hypothetical example offered as justification for §231.302's arbitrary and unreasonable class. Since this case involves SSNs, it is perhaps beneficial to review the first challenge to a federal social security scheme. In *Railroad Retirement Board v. Alton R. Co.*, 295 U.S. 330, 347 n. 5, 55 S.Ct. 758 (1935), the

court was faced with deciding whether the first federal social security act (which was statutorily connected to Congress' interstate commerce power) was constitutional. In holding that it was not, the court observed in a footnote:

> "When the question is whether legislative action transcends the limits of due process guaranteed by the Fifth Amendment, decision is guided by the principle that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained."

In virtually every equal protection case since *Alton R. Co.*, probably every American court has described equal protection principles as above: "the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained." Some courts have used the phrase "real and substantial relation" to test the validity of hypothetical examples offered as justification for statutory classifications. In *Boraas v. Village of Belle Terre*, 476 F.2d 806 (2nd Cir. 1973), a local zoning ordinance which prevented several unrelated parties from sharing a single family residence was being challenged. The Village offered a hypothetical "state of facts [which] might be conceived ... which would indicate a rational" basis for the scheme. In rejecting the offered "judicial hypothesis", the court stated:

> "In thus being required to focus on the actual rationality of the legislative means under attack, we are asked to do what courts are historically suited to do – apply the law to factual contexts rather than accept one hypothetical legislative justification to the exclusion of others that represent the true rationale of the classification," Id., at 815.

The court used the rational basis test to hold the challenged ordinance invalid:

> "If the classification, upon review of facts bearing upon the foregoing relevant

> factors, is shown to have a substantial relationship to a lawful objective and is not void for other reasons, such as overbreadth, it will be upheld. If not, it denies equal protection," Id., at 814. [11]

See also *Green v. Waterford Bd. of Education*, 473 F.2d 629, 636 (2nd Cir. 1973)(the tendered hypothesis for a rule mandating leave for pregnant teachers "seems insufficiently 'fair and substantial' to pass constitutional muster"); and *Crawford v. Cushman*, 531 F.2d 1114, 1123 (2nd Cir. 1976)(rule requiring discharge of pregnant Marine needed "individualized determination").

In this case, the Board's hypothetical justification for §231.302's broad class is unrealistic. But if this court accepts this proposition, it only faces a due process problem as a result. The solution, then, it to do what other courts have done: consider the reality of the tendered "judicial hypothesis".

E. Mauldin's alleged pleading deficiencies.

The Board asserts in several places in its brief that Mauldin failed to allege certain matters in his amended complaint (Board's Brief at 11 (regarding religious beliefs), 14 (regarding right to privacy and right not to speak), 17 (right to be free from official discrimination) and 18) which thus prevents review here. Without citation to any rule or other authority, the Board contends that Mauldin was required in his amended complaint to specify and plead the various rights he claimed were being abridged by the requirement to

[11] This court also commented that "grossly overinclusive or underinclusive classifications should not be readily tolerated," 476 F.2d at 815 fn. 8.

supply the Board his SSN. This contention is completely without merit.

Perhaps such a rule under the common law method of pleading might prevail, but it does not under modern forms of notice pleading. Mauldin's amended complaint (C.R. 27 - 34) met all pleading requirements. In his opening brief (Brief at 10 - 13), Mauldin carefully defined the various elements for a case raising an equal protection challenge, and review of the amended complaint plainly demonstrates that these elements, in the context of a declaratory judgment action, were plead. For example, the amended complaint alleged (C.R. 32):

> "17. The demand made by the Board and Conrad that Mauldin provide his social security number is based upon Family Code §231.302, yet this law is illegal and unconstitutional because it creates an arbitrary, irrational and capricious classification which violates Mauldin's right to the equal protection of the law mandated by Art. 1, §3 of the Texas Constitution. Section 231.302 is designed to remedy a problem caused by delinquent 'dead beat dads', yet its proscriptions apply to unrelated parties outside this class and is therefore overbroad; see *Sullivan v. Univ. Interscholastic League*, 616 S.W.2d 170 (Tex. 1981).
>
> "18. There currently exists a controversy between Plaintiff Mauldin on the one hand and Defendants Texas State Board of Plumbing Examiners and Conrad on the other regarding Mauldin's rights, duties and obligations to provide Mauldin's federal social security number to the Defendants. While the Defendants maintain that this demand for Mauldin's federal social security number is lawful and valid, Mauldin contends that such demand is illegal and unconstitutional. This controversy may only be resolved by this court's action via the Declaratory Judgments Act."

Mauldin specifically alleged that §231.302 was overbroad, that the parties were confronted with differences of opinion about the validity of the challenged law, and that this controversy could only be resolved via the Declaratory Judgment Act.

The docket sheet for this case (C.R. 414) reveals that Mauldin moved for summary

judgment on his own several times, but withdrew at the request of the Board. Mauldin was deposed by the Board in a deposition which obviously took several hours (C.R. 226 - 259) and that deposition solicited all facts important for this case. Facts regarding Mauldin's exercise of his right to work as well as right to freely exercise his religious beliefs appear within that deposition. Mauldin specifically testified about his objections to having allegiance to the beast system (C.R. 252-53).

When the Board moved for summary judgment (C.R. 179 - 313), it attached the Mauldin deposition to its motion as an exhibit. To oppose that motion, Mauldin only really needed his deposition which was offered not by him, but by the Board. Nonetheless, Mauldin did submit a formal opposition (C.R. Supp. I, 99 - 153). That opposition included a brief,[12] which pointed out the various appropriate facts and then demonstrated that those facts showed the existence of various legal rights of Mauldin, which just so happened to be important in equal protection cases.

Those familiar with equal protection litigation know that two different standards are applicable: strict scrutiny and rational basis. A litigant when faced with a motion for summary judgment filed by the opposing party is free to argue for application of either the strict scrutiny or rational basis standard; he may assert the violation of specific rights to secure strict scrutiny review. This is precisely what Mauldin did. Rights which may be asserted in such a case may not be known in advance of the filing of a complaint and may

[12] It should be noted that the brief submitted to the trial court was virtually the brief Mauldin

depend upon development through discovery. A contrary rule requiring specificity in a complaint of such rights simply is not required for notice type pleadings.

SUMMARY

In this case, several of Mauldin's fundamental and constitutional rights are being abridged by Family Code §231.302: Mauldin's right to work as well as his right not to speak (premised upon the First Amendment's free speech clause), and these rights support his correlative right to freely exercise his religious beliefs. The presence of these fundamental rights compel utilization of the strict scrutiny test here, contrary to the Board's position.

Section 231.302 is clearly overbroad as it imposes duties upon people like Mauldin who are outside the class of delinquent child support obligors. Mauldin simply cannot assist this dead beats problem by providing his SSN to either the Board or the Attorney General, but if he fails to do so there is a serious consequence: he cannot work in his chosen occupation. But excluding him from a plumber's license does nothing to solve the dead beats problem: "the exclusion of appellant and members of his class ***[must be] necessary to achieve the articulated state goal***." See *Kramer v. Union Free School District*, 395 U.S. 621, 632, 89 S.Ct. 1886 (1969) [emphasis added].

This case is important for Mauldin and people like him. The adage, "a legislature must not obstruct our obedience to Him from whose punishments they cannot protect us" particularly applies to Mauldin and he simply asks that he be allowed to freely exercise his

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submitted as his opening brief here.

religious beliefs. Having Mauldin's SSN will never assist the Attorney General's effort to catch any dead beats, so why shouldn't constitutional rights be recognized in circumstances like these? Why shouldn't some administrative mechanism exist which allows individualized determinations for those who object to the SSN requirement?

Furthermore, the Board's contention that everyone, including the judges of this court, is a "potential child support evader" has serious and profound implications. Using this rationale, the Attorney General could request and the legislature could demand that everyone supply to him on a monthly basis their bank statements; surely having everyone's bank statement would help catch dead beats as well as help secure funds to pay the debts owed. Many more requirements could be imposed, all designed to catch these scoundrels, and all of which would constitute tremendous burdens on others. The plea, "it's for the kids," can support virtually any legislative agenda, but where does it stop?

The rationale of "everyone is a potential evader", if accepted in other fields, could radically change our lives. Rationales like "everyone is a potential thief," "everyone is a potential murderer," "everyone is a potential terrorist," even though untrue, could be the excuse for draconian legislation of the worst sort, which would end the freedoms of Americans. Perhaps we need to remember what John Stuart Mill stated in the last paragraph of his essay, *On Liberty*:

> "[A] State which dwarfs its men, in order that they may be more docile instruments in its hands even for beneficial purposes, will find that with small men no great thing can really be accomplished; and that the perfection of machinery to which it has sacrificed everything, will in the end avail it nothing, for want of the vital power

which, in order that the machine might work more smoothly, it has preferred to banish."

CONCLUSION AND PRAYER

Family Code §231.302(c) is unconstitutional as violative of Art. 1, §3 of the Texas Constitution in that it is overinclusive. For this reason, the summary judgment granted by the trial court in favor of the Board and Maxwell must be reversed and this cause remanded.

Respectfully submitted this the 23rd day of July, 2002.

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