

SB 108 OPPONENT TESTIMONY

4-3-19

Chairman Eklund, Vice Chairman Manning, Ranking Member Thomas, and members of the Senate Judiciary Committee, I am here to oppose SB 108 primarily because it offers no alternative to the provisions it would repeal.

I am not a lawyer so it may seem presumptuous of me to weigh in on this legal matter. However, I have been reading and applying state laws for my job and for my personal situation as a crime victim for over 20 years, so I have a little experience in trying to figure out what a law says and means.

Frankly, my immediate reaction when SB 307 was introduced last June was “Why?” Then I was struck with the irony that my “why” is very much what that bill and this one are about—the “why” of a bill or law, within its the actual words.

I’ve read ORC 1.49, SB 307 and 108, the sponsor testimony for each, and last week’s Interested Party testimony and would like to share my reactions to those.

1.49 “If a statute is ambiguous...”

Despite training and experience, LSC staff are not infallible; they can make a mistake in grammar, punctuation, or word choice that accidentally results in ambiguity. Legislators are not infallible; an ambiguity can slip past them because they—as all of us do—read what they expect to see. Anyone who has ever tried to proof read his or her own writing has seen this happen: reading what they think is on the page rather than what is actually there. How many of us have tried to proof read our own writing then read it later and cringed when we found the error or ambiguity we missed earlier?

In *Plain Dealer v. Cleveland* in 2005, *Van Dyke v. Public Employment Retirement Board* in 2003, and others, the court gave the specific example of “undefined words and phrases” as something that must be reviewed.

The sponsor wants the court to “apply the plain meaning of the statutory text.” Unfortunately, the meaning isn’t always plain.

1.49 “...the court...may consider...”

It says “may; it does *not* say “shall” or “must.”

1.49 “in determining the intention of the legislature...”

I had always understood that courts exist to determine how a law applies to a specific situation. A law can’t anticipate all future related situations; times change. So, we need a mechanism for determining applicability.

1.49(A) “The object sought to be attained;”

The object, or goal, or purpose is often where sponsor testimony begins. The “object” is relevant.

1.49(B) “The circumstances under which the statute was enacted;”

Times change; social norms change. There is no question that social norms play a factor in writing law. Laws about public smoking and drunk driving are good examples. The old Jim Crow laws are a perfect example. What was acceptable to some people then is now—thank goodness—abhorrent to most of us.

1.49(C) “The legislative history;”

The history gives us the context of the social norms of the time.

“Effective Date: 01-03-1972”

This law has stood for over 47 years. If it is now so unusable that it must be removed, then the courts need a substitute set of criteria to choose from. This bill doesn’t offer a substitute set. And, it could be very helpful, in creating a substitute set, to know the object, circumstances, and history of this section. To have been enacted then stood for almost half a century, it seems safe to assume there were good reasons for enacting then keeping it. Shouldn’t we examine those before making such a bold move as eliminating this with no substitute?

We know laws can have ambiguous language. That’s why the legislature has to go back, occasionally, to correct something in a law after the bill was passed. That’s why committee members ask the sponsor questions about what a provision means or is intended to do.

Sponsor Testimony

In his testimony for SB 108, and for its predecessor SB 307, the sponsor said ORC 1.49 is “an invitation to judicial lawmaking.” Thus, the “object sought to be attained” with SB 108 is to prevent “legislating from the bench.” We all know that this is in the eye of the beholder. When a court interprets a law the way we want, it is a good decision. If the interpretation isn’t what we want, it is “judicial law-making.” I wonder if something so variable as to be in the eye of the beholder is a valid basis to enact or repeal a law.

Interested Party Testimony

Last week’s Interested Party warned that “Permitting judges to scour a statute’s legislative history... invites judges to parse the legislative record selectively.” Both testimonies so far on this bill have quoted Justice Scalia. Neither quoted any other esteemed jurists. Are there *no* other judges in our country with a different view on this, or did these witnesses “parse selectively”?

And, isn’t that what we all do when trying to make a case for or against proposed legislation? We each “parse selectively” from the available information, to give legislators a perspective based on evidence and/or careful reasoning that supports our position. Our selections are then balanced by the selections offered by those with a different position.

We trust judges to make life-altering--even life-and-death--decisions about offenders who appear before them. Can’t we also then trust them to parse thoroughly and objectively?

The Interested Party also quoted the Ohio Supreme Court as saying no legislative history of statutes is maintained. Then he went on to give examples of a maintained history, but claimed none were valid because they are not “comparable to the federal Congressional Record.” Does anything have to be *just* like something else to be valid?

ORC 1.49 allows but does not require judges to consider the factors listed. It offers a variety of factors to consider. And, it does not limit judges to these factors in making a decision. Therefore, I don't see the harm in it.

If there *is* harm great enough to warrant repealing this, I strongly believe an alternative should be given to replace this.

I hope this bill will not be passed and that the goal, the "object," will be attained in a different way, which would include an alternative.

Thank you for the opportunity to give my views on this bill. If you have any questions, I will try to answer them.

Sharon Montgomery
572 Bonnington Way
Gahanna OH 43230
614-475-8588
smontgomery77@yahoo.com