# SUPREME COURT OF LOUISIANA

**No. 98-C-0611**

**Senator Cleo Fields, et al.**

**Versus**

**State of Louisiana**
**Through Department of Public Safety and Corrections and**
**Richard L. Stalder,**
**Secretary of Louisiana Department of Public Safety and Corrections**

**CALOGERO, C.J., dissenting.**

The majority concludes that the Act before us is constitutional, finding that (1) the vehicle owner's due process rights are adequately protected by post-deprivation remedies provided for in the Act, (2) the lack of notice of noncompliance to the owner under circumstances in which the operator and the owner are not one and the same does not render the Act constitutionally deficient, and (3) the Act is not unconstitutionally vague. While I agree that the post-deprivation remedies adequately protect an owner's due process rights where the owner has received a timely notice of noncompliance, I believe that the majority erred in its conclusions with regard to the latter two findings. Thus, for the reasons that follow, I respectfully dissent.

In my view, the Act fails to provide adequate protection to the owner of a vehicle that is impounded under the circumstances in which the operator of the vehicle is not also the owner. Under the Act, the owner of the vehicle has three days from the issuance of the notice of noncompliance to present proof of insurance coverage in order to avoid having the license plate destroyed and the registration of the vehicle revoked. Moreover, it is the owner--and not the operator--who is solely responsible for the various fees and penalties arising from the impoundment. However, the notice of

noncompliance is issued only to the operator of the vehicle, with no provision under the Act for such notice to be also issued to the owner of the vehicle, where the operator and owner are not one and the same.

The majority glosses over this defect by concluding that "in the majority of cases, the operator who receives the notice of noncompliance [will also be] the owner [of the vehicle]." Slip op. at p. 21. The majority further speculates that "[i]n the vast majority of remaining cases, it is . . . reasonable to assume the owner explicitly or implicitly gave permission or authority to the operator to use the motor vehicle . . . [and that, i]n such a case, . . . the operator is by operation of law the owner's representative for service of the notice of noncompliance and notice of the impoundment itself." *Id.* The majority then concedes that there is "the potential for the rare situation where an unauthorized or authorized operator [will fail] to promptly inform the owner of the impoundment of the vehicle," but concludes that this "rare potential" does not offend procedural due process. I disagree both with the majority's speculative and unsupported conclusions regarding the potential frequency in which an owner who is not also the operator might fail to receive timely notice of the impoundment and with the majority's conclusion that the potential for such failures does not violate the constitutional guarantees of procedural due process.

In my view, the lack of a notice requirement to the owner of the vehicle is a fatal defect to the constitutionality of the Act. The fact that other statutory provisions might provide notice to the owner that his vehicle has been impounded does not remedy the unconstitutionality of the Act's failure to so provide the required notice.

I also take issue with the majority's finding that the provision which grants the officer the unfettered discretion to determine which vehicles will be impounded does not render the Act unconstitutionally vague. Under LSA-RS 32:863.1(G)(4), even

where the operator of the vehicle is unable to provide documentary proof of insurance, the law enforcement officer making the stop may elect not to impound the vehicle if he "has a reasonable belief that the motor vehicle is covered by a valid and current policy of liability insurance." The statute fails to set forth any guidance for determining just what an operator must do or have in his possession to result in the investigating officer's having a reasonable belief that the vehicle is insured.

In ***State v. Muskrat***, 706 So. 2d 429, 432 (La. 1998), this Court explained that "the most important aspect of the vagueness doctrine is the requirement that a legislature establish minimal guidelines to govern law enforcement." The Court went on to instruct as follows: "Where the legislature fails to provide such minimal guidelines, a criminal statute may permit a standardless sweep [that could] allow[] policemen, prosecutors, and juries to pursue their personal predilection." *Id.* This is the very danger that is present under the above-quoted statutory provision that grants the investigating officer the unfettered discretion to enforce the impoundment law against some operators who fail to provide the necessary documentary showing, while exempting others who fail to do the same. Thus, because the offending statute, in the instant case, fails to set forth minimal (or any) guidelines to govern the standard for determining whether an operator without documentary proof has nonetheless met the burden of proving that the vehicle is insured, I would find the Act as written to be unconstitutionally vague under the standards set forth in this Court's decision in ***Muskrat, supra***.[1]

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[1] In *State v. Schirmer*, 646 So. 2d 890 (La. 1994), one of the issues being decided by this Court was whether R.S. 18:1462(A)(2), which made "it a crime for any person to remain within 600 feet of a polling place 'after having been directed, in writing, by an election commissioner or law enforcement officer to leave the premises or area of a polling place,'" was constitutional. In deciding that the statute was unconstitutionally vague, this Court reasoned that "[t]he current subsection (2) of the statute, while criminalizing the refusal to leave a polling site after being instructed to do so by designated authorities, offers no guidelines to election commissioner or law enforcement officers regarding when it is proper to instruct a person to leave the vicinity of a polling site. Thus, the criminality of such conduct is a matter solely within the discretion of the

For the reasons given above, I dissent.

official on the scene." *Id*. at 903. This Court further stated that "[w]hile the legislature may of course act to define criminal conduct, 'it cannot constitutionally do so through the enactment and enforcement of a statute whose violation may entirely depend upon whether or not a policeman is annoyed.'" *Id.* (citing *Coates v. Cincinnati*, 402 U.S. 611 (1971).