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

OPENING BRIEF OF APPELLANT MAULDIN

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ORAL ARGUMENT REQUESTED

STATEMENT OF THE CASE

On March 24, 2000 in the Travis County District Court, Benjamin Robert Mauldin ("Mauldin") filed his pro se complaint against the Texas State Board of Plumbing Examiners ("Board") and Doretta Conrad ("Conrad"), seeking declaratory and injunctive relief (C.R. 2)[1]. Mauldin later filed an amended complaint on May 16, 2000 (C.R. 18), and another one still later on June 30, 2000 (C.R. 27). The amended complaint which framed the issues for this case (C.R. 27-34) alleged a controversy between the parties suitable for declaratory and injunctive relief via Texas Civil Practice and Remedies Code §37.004(a).

In his amended complaint (C.R. 27-34), Mauldin alleged that he was a plumber licensed by the Board and had been so licensed since 1974. He alleged that commencing in 1996 pursuant to Texas Family Code §231.302, the Board required him to provide his federal Social Security Number ("SSN") as a condition precedent to receiving his annual plumber's license. Because Mauldin objected to providing his SSN to the Board and asserted that Family Code §231.302 was violative of the equal protection provisions of Art. 1, §3 of the Texas Constitution, he instituted this suit seeking declaratory and injunctive relief. For answer, the Board and Conrad made general denials and asserted other defenses not relevant here (C.R. 9-17).

In July, 2000, defendant Conrad resigned as the Executive Director of the Board, and was replaced by Robert L. Maxwell ("Maxwell"). On October 23, 2000, the Board moved to substitute Mr. Maxwell as a defendant in this action (C.R. 37), which motion was granted (C.R. 42).

On October 16, 2001, the Board and Maxwell moved for summary judgment regarding all claims asserted by Mauldin against them in the amended complaint (C.R.

[1] The designation "C.R." means the Clerk's Record prepared for this appeal and filed herein on or about March 29, 2002.

43-175), and hearing was set for November 14, 2001 (C.R. 176). Because of copying errors contained in that motion, the Board filed an amended motion for summary judgment (C.R. 179-313). On November 8, 2001, Mauldin replied to that motion (C.R. __).[2] After hearing on the pending motion, the trial court granted summary judgment in favor of the Board and Maxwell on December 13, 2001 (C.R. 404). Mauldin's notice of appeal was timely filed on January 7, 2002 (C.R. 410).

ISSUE PRESENTED

ISSUE: Did the trial court err in granting summary judgment to the Board and Maxwell because Family Code §231.302 is violative of the equal protection provisions of Art. 1, §3 of the Texas Constitution?

STATEMENT OF THE FACTS

Mauldin was born in Milam County, Texas (C.R. 227) and after attending high school, he joined the U.S. Marine Corp, eventually serving some two years in Viet Nam (C.R. 227). He was honorably discharged from the Marine Corp on October 10, 1970 (C.R. 227). He then returned to the home of his parents in Bell County, Texas, where he met his wife (C.R. 228). They married on May 21, 1971, and have had five (5) children since then (C.R. 233).

Within less than a year after his discharge from the Marines, Mauldin started working as a plumber (C.R. 228). He worked for Forbes Plumbing Company from 1972 until 1976. He was first licensed by the Board as a plumber in 1975, and eventually became a master plumber in 1976 (C.R. 242). Mauldin then started his own plumbing company, Ben Mauldin Plumbing, eventually incorporating that company as The

[2] When the Travis County clerk's office prepared the record for this appeal, certain important pleadings were erroneously omitted, like that most important pleading of Mauldin, his reply to the Board's summary judgment motion. The Travis County clerk's office is preparing, at the time of submission of this brief, another volume for the record in this case. Because this brief is being submitted before that next volume is completed, Mauldin is unable to presently cite to the omitted pleadings.

Plumbing Shop in 1997 (C.R. 233-34).

In February, 1970 while he was serving in Viet Nam, Mauldin became a Christian (C.R. 228-30). In 1971 after his return to Texas, he started attending a Worldwide Church of God congregation in Waco and was baptized in early 1972 (C.R. 230). He has been a member of the church in Waco ever since (C.R. 230-31), which church is now a part of the Central Texas Church of God (C.R. 232). The central tenet of the Central Texas Church of God is "that the word of God [is] supreme and that we ought to live by every word that precedes out of the mouth of God" (C.R. 230).

In the last approximately 30 years, Mauldin has regularly attended church and studied the scriptures, even taking some Bible study courses through correspondence (C.R. 232). He has studied the prophecies contained in the book of Revelation, particularly those concerning the "Beast", the "Mark of the Beast" and the "Anti-Christ". Mauldin believes that at some time in the future, a "Beast" will come to power and rule vast parts of the world, and he believes that the Biblical reference to "Beast" means government. Arising at the same time will be an "Anti-Christ", who will be a religious leader (C.R. 252). The system over which these two preside will cause all people of the world to be given the "mark," without which nobody can "buy or sell":

> "Social security number in those words is not mentioned in the scripture. What's mentioned in the scripture is that man will be assigned a certain number by what is referred to as a beast power without which he will not be allowed to work or do business. Buy or sell is the words it used. I believe that the social security number is easily a precursor to that mark of the beast. As in this case right now, I cannot pursue my occupation as a plumber and provide for my family unless I'm identified by that number. I'm asking for relief in that." (C.R. 238).

Mauldin further believes:

> "I know that some day a beast's power will arise. What the exact configuration is, I don't know. I don't mean to represent it like I know or think I know. I don't know how it will manifest or what will come about. But I know that at some point men will be required to have allegiance to this beast's power by accepting the number of his name. And what exact form that will take, I don't remember. This

> could be a precursor to it, the social security number. And for that reason, I don't want it tied to my ability to work, to perform my job, perform my living.
>
> "And a watchman on the wall is one who stands there and warns people. And if you do not stand there and warn people when you see an enemy approaching, then their blood is – the blood of those who die in the battle is on your head. But if you warn them, you've done your part. Then if they ignore the warning and they die, then their blood is on their own head. That's the story of Ezekiel 33.
>
> "And I see myself having partially, as I see all Christians, to have that responsibility to stand in the gap, to be the one who opposes unrighteousness or even the potential of evil, as I am in this case. I'm not saying that the social security number is the mark of the beast. I'm saying it can soften us up and lead us to that and allow that to happen to us. And I don't want to swear allegiance to that system. I don't want to swear allegiance to the beast system that numbers people and determines whether or not they can work or not[,] by whether or not they swear allegiance to that power, other than God. My allegiance is to God, and that's whom I serve." (C.R. 252-53).

Mauldin perceives that a requirement conditioning the right to work upon the provision of some number such as the SSN is merely the gradual implementation of the Biblical "mark system." Having religious beliefs that he cannot take the mark on penalty of damnation, his religious beliefs and principles compel him to oppose that which he perceives is the creation of this system: "And I stated that in this suit because I can't in good faith furnish a social security number for the purpose of obtaining a license to do work. It violates my faith to do that. So whatever is not of faith is sin" (C.R. 247).

In 1994 or 1996, the Board started demanding that plumbers submit their SSNs to obtain their annual licenses (C.R. 255). At first, Mauldin did not object and provided his SSN as demanded (C.R. 240). Then he learned that the Board's demand that he provide his SSN to obtain his plumber's license was apparently based upon a federal law, "666,"[3] which made him very "leery" about providing his SSN (C.R. 239). Mauldin perceived that the Board's requirement that he provide his SSN as a condition of securing his license so that he could work directly abridged and burdened his religious beliefs:

[3] The federal requirement that State agencies like the TDPS secure SSNs from all license applicants has a relationship to 42 U.S.C. §666.

> "I've believed that for many years. I probably began to really develop that feeling – And I don't want to appear paranoid. I'm not paranoid. What I want to do is assert my rights. I want to be free to exercise by [sic: my] religion.
>
> "My religion by nature of it requires that sometimes I differ from government authority. One of the first scriptures I ran across was Acts 5:27. I believe it says you ought to obey God rather than man. And I want to be in a position of obeying God rather than man. And when things conflict with my beliefs like having to stand up and raise my right hand or swear when the scriptures plainly says in James swear not at all.
>
> "And I've always been because of the nature of my religion concerned about what government will make me do. I see in the scripture in the book of Revelation when a man won't be allowed to work unless he has a certain mark. I don't know what exact configuration that will take. But it's enforced by a power. I have no intention of being aligned with that power. I want to be in opposition to it. I don't exactly know how it will manifest itself. But I'm opposed to it.
>
> "I'm opposed to government intruding in my personal life. I want to live my life as a Christian. And I want to be left alone as much as possible by government.
>
> "I realize there are many services government does, and I want them to be able to carry out their services. I'm not opposed to it. I'm subject to it; I'm subject to it. If they come and arrest me, I am not going to resist them. I am subject to the government that exists.
>
> "I also want all of my rights that I have. One of the rights I have is to freely exercise my religious [sic: religion]. I cannot in good conscience use my social security number as an identifier, and that's what I want to avoid doing. I don't want to have to give my social security number in order that I can work and provide for my family. But I have to do it, just like I have to come here and affirm when I don't really want to. My rights are being trampled on." (C.R. 237-38).

To protect his rights, Mauldin instituted this suit against the Board and its officials who direct and implement its policy of collecting SSNs from licensed plumbers (C.R. 2).

The Board keeps records regarding every plumber it licenses "such as name, address, date of birth, social security number, employers, [and] education experience" (C.R. 282-83), and this information is stored in the computer used by the Board, which is physically located at a Northropp-Grumman facility (C.R. 284), an apparent contractor.

The Texas Attorney General's child support division obtains computer data regarding licensed Texas plumbers directly from the computer at the Grumman facility (C.R. 289). There are approximately 19,000 licensed plumbers in Texas (C.R. 285). When any of these become delinquent in the payment of child support, the Board suspends that plumber's license when a court order to do so is received by the Board (C.R. 285). In 1999, the licenses of only two plumbers were suspended for this reason (C.R. 254).

The Texas Attorney General operates a computer located at Promontory Point in Austin which is completely devoted to gathering information needed by his child support division (C.R. 267). The Board (C.R. 269) and other Texas agencies periodically send to that computer data regarding all their licensees (C.R. 269-70). The common factual data sent by these agencies include each licensee's name, address, date of birth, SSN, and, sometimes, job title (C.R. 271). The provision of this information to the Attorney General's child support division has a purpose:

> "Q: How much of the computer data that you get from the Texas State Board of Plumbing Examiners gets downloaded and inserted into the A.G.'s computer?
>
> "A: Well, again, it's only if we happen to match on an individual who has a child support case. We will take the data that the plumbers send, and we will update our database with it. But if we don't match on anybody, then, you know, we have no reason to have that – to use that information at that time.
>
> "Q: Okay. How does this matching happen?
>
> "A: Well, we have a computer program written, you know, that takes in the file and using different criteria, matching criteria, such as S.S.N. and name and date of birth, we apply some logic to try to match to see if we have the same person." (C.R. 270).

The data obtained by this child support division is used to assist in the enforcement of the child support laws (C.R. 271). The SSN is merely just one "data element" among others which assist the child support division in locating delinquent child support obligors (C.R. 271). Possession by the child support division of the SSNs of individuals who are not

delinquent child support obligors does not assist in finding those who are delinquent (C.R. 273). Approximately half of the delinquent child support obligors, estimated at half a million people, have had children out of wedlock (C.R. 273-74). Of this number, locating an absent parent via driver license number and address is "fairly successful" (C.R. 275). It is unknown what percentage of these may be located by having just a SSN (C.R. 275).

SUMMARY OF ARGUMENT

The requirement that all plumbers, indeed all licensees of every State agency, provide SSNs to secure licenses is based upon Family Code §231.302. Texas does indeed as do many other States have a "welfare/child support" problem: there are parents who refuse to pay child support, thus forcing custodial parents onto welfare. It may be fairly estimated that of the approximate 20 million Texans, a million are involved in this predicament. To remedy it, Family Code §231.302 requires State agencies to secure SSNs from every licensee.

One of the statutory duties of the Texas Attorney General is to administer a program to find these delinquents and secure child support payments from them, and the Attorney General has established a child support division in his office to perform this task. To assist the effort of locating some of these delinquents (estimated at about half a million), the SSNs of all licensees end up in the Attorney General's computer data base. But there are several types of "data elements" such as names, addresses, driver license numbers, dates of birth, etc., which are used by the child support division's computer to match a delinquent with a particular license he may have and thus assist in locating him. The record in this case contains no definitive evidence disclosing how possession of a SSN improves the child support division's ability to locate these "dead beats," beyond the vague assertion "it helps." But one matter is perfectly clear in this record: possession of the SSN of one who is not in the class of delinquent child support obligors does not assist in locating the delinquents.

Here in Texas, Family Code §231.302 imposes a burden upon 100% of the licensed public. Yet, it is only less than 4% of the public who cause or contribute to the problem which the SSN requirement allegedly helps remedy. Clearly under these circumstances, casting a net over 100% of a group to catch only a small percentage thereof is, in equal protection jurisprudence, "overbroad." But further, there are other ways to remedy this problem without imposing a burden upon everyone. While it is empirically impossible to determine precisely how possession of SSNs increases the ability to locate "dead beats," a substantial solution to this problem would be to collect SSNs from litigants when they enter the Texas domestic relations system.

In this case, Mauldin protests the collection of his SSN and making it a condition precedent to securing his annual plumber's license. He argues in this appeal that Family Code §231.302 is violative of the equal protection provisions of Art. 1, §3 of the Texas Constitution. Since the command of §231.302 that Mauldin provide his SSN to the Board abridges several of Mauldin's constitutional and statutory rights, review of the constitutionality of §231.302 is governed by the strict scrutiny test. Here, it is clear that SSNs are collected solely to assist the Attorney General's Office in locating delinquent child support obligors and the SSN is merely a tool or data element which helps locate these people. Thus the collection of SSNs is a mere administrative convenience, not for the agencies collecting the SSNs, but for the Attorney General. But, administrative convenience is not sufficient justification for ignoring important constitutional rights of Mauldin. For this reason, Family Code §231.302 must be held overbroad and unconstitutional.

ARGUMENT

I. Standard of Review.

In Mauldin's amended complaint, he plainly challenged the constitutionality of the offending statute:

> "A. That Family Code §231.302 is unconstitutional as violative of Art. 1, §3 of the Texas Constitution" (C.R. at 7).

When the Board and Maxwell moved for summary judgment in their favor, Mauldin replied by attacking the constitutionality of Family Code §231.302 on equal protection grounds. The nature of the trial court's order of December 14, 2001 (C.R. 404) granting summary judgment to the defendants demonstrates that the trial court upheld §231.302's constitutionality. The sole issue for this appeal concerns whether §231.302(c) is unconstitutional as violative of equal protection.

To decide this appeal requires a determination of the appropriate standard of review for an equal protection claim. In *Williams v. Rhodes*, 393 U.S. 23, 30, 89 S.Ct. 5 (1968), the U.S. Supreme Court described three factors utilized in the analysis of equal protection claims: "In determining whether or not a state law violates the Equal Protection Clause, we must consider the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification."[4] This rationale was followed by this court in *State v. Morales*, 826 S.W.2d 201, 204-05 (Tex.App.-Austin 1992) ("To evaluate the constitutionality of [a statute], we must review what objectives the State asserts and whether those objectives are compelling enough to override appellee's right or privacy. The burden of proof rests with the State to demonstrate a compelling governmental objective"). In *Parvin v. Dean*, 7 S.W.3d 264, 272 (Tex.App. - Ft. Worth 1999), that court likewise defined the standard of review for equal protection claims in the following fashion:

> "In deciding on the appropriate level of review, we must consider all the facts and

[4] Equal protection principles under the Texas Constitution are similar to the federal. See *Texas Optometry Bd. v. Lee Vision Center, Inc.*, 515 S.W.2d 380, 386 (Tex. Civ. App.-Eastland 1974)("Texas courts when confronted with questions involving the Due Course of Law and Equal Rights Clause of the Texas Constitution consistently apply the reasoning and rationale announced by the United States Supreme Court on questions of due process and equal protection").

> circumstances of the law, the interests that the state's statutory classification claims to be protecting, and the interests of those who claim to be disadvantaged by its application."

In *Mahone v. Addicks Utility District of Harris County*, 836 F.2d 921, 933 (5th Cir. 1988), that court identified three elements which must be shown to establish an equal protection violation:

> "An equal protection challenge, therefore, focuses on three separate elements. First, the classification. Second, the purpose which the classification is designed to serve. And third, the 'fit' between the classification and the purpose; that is, whether the state could rationally determine that by distinguishing among persons as it has, the state could accomplish its legitimate purpose."

Thus, analysis of Mauldin's equal protection challenge to the offending statute focuses upon (1) the objective and purpose of the law in question, (2) the classifications contained in that law, and (3) the relationship of those classifications to achieving the law's objective.[5] It must be remembered that "the classifications must be tailored so that the exclusion of appellant and members of his class ***is 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].

Applying these factors here, a successful attack upon the constitutionality of Family Code §231.302 must demonstrate the following:

1. That Family Code §231.302(c) contains a classification of individuals;

2. That such classification is made for the purpose of achieving some particular and lawful objective of the State, here that objective being the remedying of the delinquent child support obligor problem which confronts Texas; and

3. That such classification contained in Family Code §231.302(c) is neither

[5] See *State v. Lee*, 356 So.2d 276, 279 (Fla. 1978)("The classic criterion for assessing the validity of a statutory classification is whether that classification rests upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike").

reasonable nor rational,[6] and is instead arbitrary, irrational and unreasonable in that "the exclusion [i.e., denial of licenses] of [Mauldin] and members of his class is **[not]** necessary to achieve the articulated state goal" of eliminating the problem created by delinquent child support obligors.

As discussed below, Mauldin submits that the undisputed evidence in this case proves these three elements. Consequently, §231.302(c) is unconstitutional.

II. The Purpose of Family Code §231.302.

On April 20, 1995, the Texas legislature adopted Family Code §231.302(c), to become effective on September 1, 1995. Within the terms of this law, its purpose was clearly expressed:

> "To assist in the administration of laws relating to child support enforcement under Parts A and D of Title IV of the federal Social Security Act (42 U.S.C. Sections 601-617 and 651-669): (1) each licensing authority shall request and each applicant for a license shall provide the applicant's social security number."

The phrase, "[t]o assist in the administration of laws relating to child support enforcement," clearly reveals this law's purpose. Considering this purpose alone, it seems logical that the class of individuals affected by this law would have some relationship with that purpose, *i.e.*, those having some involvement with the child support problem. However, this law does not limit its effect to this particular class and instead, it impacts every "applicant for a license" regardless of his connection to or involvement with "child support enforcement."

[6] Of course, these various elements have been extensively discussed by American courts, which have defined them in intimate detail. See, for example, *Barbour County Comm. v. Employees of Barbour Co. Sheriff's Dept.*, 566 So.2d 493, 497 (Ala. 1990)(Legislative classes "(1) must be germane to the purpose of the law; (2) must bring within its influence all who are under the same conditions and apply equally to each person or member of the class, or each person or member who may become one of such class; (3) must not be so restricted and made to rest upon existing circumstances only as not to include proper additions to the number included within the class; (4) must be based on substantial distinctions which make one class different from another; and (5) must be reasonable under the facts of the case, and not oppressive and prohibitive").

A similar federal law also exists which may be relevant to this case. Apparently, the use of SSNs by Texas to "assist in the administration of laws relating to child support enforcement" was brought to the attention of Congress, which on August 22, 1996, adopted the Personal Responsibility and Work Opportunity Reconciliation Act, P.L. 104-193, 110 Stat. 2105. Via §317 of this act (110 Stat. at 2220), 42 U.S.C. §666 (entitled "Requirement of statutorily prescribed procedures to improve effectiveness of child support enforcement") was amended to read as follows:

> "(a) Types of procedures required
> "In order to satisfy section 654(20)(A) of this title, each State must have in effect laws requiring the use of the following procedures, consistent with this section and with regulations of the Secretary, to increase the effectiveness of the program which the State administers under this part:
> .....
> "(13) Recording of Social Security Numbers in certain family matters. Procedures requiring that the social security number of –
>
> "(A) any applicant for a professional license, commercial driver's license, recreational license, occupational license, or marriage license be recorded on the application;
>
> "(B) any individual who is subject to a divorce decree, support order, or paternity determination or acknowledgment be placed in the records relating to the matter; and
>
> "(C) any individual who has died be placed in the records relating to the death and be recorded on the death certificate.
>
> "For purposes of subparagraph (A), if a State allows the use of a number other than the social security number 'to be used on the face of the document while the social security number is kept on file at the agency', the State shall so advise any applicants."

In isolation, it might be difficult to determine precisely the purpose of §666. Section 666 is just simply one provision within a broad and complicated federal welfare

scheme.[7] This section is contained within the federal social security laws which are codified at 42 U.S.C., chapter 7 (this chapter commences at §301). Chapter 7, subchapter IV is entitled "Grants to States for aid and services to needy families with children and for child welfare services" (this subchapter commences at §601).[8] Part D of this particular subchapter, entitled "child support and establishment of paternity," contains §§ 651 through 669b. In Part D, §654(20)(A) provides that, "to the extent required by section 666 of this title, ... the State (A) shall have in effect all of the laws to improve child support enforcement effectiveness which are referred to in that section." Thus, §654 simply establishes certain requirements of a "State plan" which must be in place so that a State may received welfare funding. Section 666 lists a plethora of additional requirements which are to be incorporated within these State plans. Therefore, the object and purpose of the collection of SSNs from license applicants as required by §666(a)(13(A) is to just simply assist in the improvement of child support enforcement.[9]

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[7] Federal welfare laws generally provide wide discretion and latitude to the States. See, *e.g.*, 42 U.S.C. §617: "No officer or employee of the Federal Government may regulate the conduct of States under this part or enforce any provision of this part, except to the extent expressly provided in this part."

[8] This subchapter was described in *Blessing v. Freestone*, 520 U.S. 329, 333-34, 117 S.Ct. 1353 (1997) as follows: "Arizona participates in the federal Aid to Families with Dependent Children (AFDC) program, which provides subsistence welfare benefits to needy families. Social Security Act, Title IV-A, 42 U.S.C. §§ 601-617. To qualify for federal AFDC funds, the State must certify that it will operate a child support enforcement program that conforms with the numerous requirements set forth in Title IV-D of the Social Security Act, 42 U. S. C. A. §§651-669b (Nov. 1996 Supp.),and will do so pursuant to a detailed plan that has been approved by the Secretary of Health and Human Services (Secretary). §602(a)(2); see also §652(a)(3). The Federal Government underwrites roughly two thirds of the cost of the State's child support efforts. §655(a). But the State must do more than simply collect overdue support payments; it must also establish a comprehensive system to establish paternity, locate absent parents, and help families obtain support orders. §§651, 654."

[9] These particular federal welfare laws are very complex and a study thereof is not essential for decision of the issues raised in this case. A short summary of these parts of these federal welfare laws is found in *Wehunt v. Ledbetter*, 875 F.2d 1558, 1559-61 (11th Cir. 1989). That court described the program established under this statutory scheme as follows: "The AFDC program is a contractual arrangement by which the federal government and the states work together," *Id.*

This is identical to the purpose of Family Code §231.302(c).

Typically, when the federal government provides funding to the States to subsidize their various welfare programs, it attaches a variety of conditions to that funding. Section 666 exemplifies one such condition. These federal conditions are, however, not independent mandates that directly compel any State to conform to federal policy, irrespective of the State's own policy. See *Blessing v. Freestone*, 520 U.S. 329, 344, 117 S.Ct. 1353 (1997)(the federal government "cannot, by force of [its] own authority, command the State to take any particular action or to provide any services to certain individuals"). For any federal condition to come into play against an individual, the State must affirmatively place itself within the ambit of the federal welfare scheme by enacting some State law that embodies the State's own policy. So, the effective source of any federal condition as it applies to an individual at the State level will actually be the relevant State law, because without the State law the federal condition would have no force or effect. For this reason, Mauldin contends that 42 U.S.C. §666(a)(13) is only tangentially relevant to this case, and that Family Code §231.302(c) must be seen as the true statutory permission for the Board to collect SSNs.

If, however, §666(a)(13) should be construed as itself a compulsory federal requirement for Texas, operating independently of State law,[10] Mauldin asserts that it as well would be unconstitutional for the same reasons as Family Code §231.302(c). The Due Process Clause of the Fifth Amendment to the U.S. Constitution contains an "equal protection" component similar in effect to the Equal Protection Clause of §1 of the Fourteenth Amendment. See *Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693 (1954); *Buckley v. Valeo*, 424 U.S. 1, 93, 96 S.Ct. 612 (1976); and *San Francisco Arts &*

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at 1560.

[10] Such a construction of §666(a)(13) would certainly be ill-advised, as it would invite hordes of welfare recipients to sue the State as was done in *Blessing v. Freestone, supra*.

Athletics v. U.S. Olympic Committee, 483 U.S. 522, 542 n. 21, 107 S.Ct. 2971 (1987). If §666(a)(13) is compulsory, it is no less unconstitutional than Family Code § 231.302(c), and in fact could be seen as the cause of the latter section's unconstitutionality.

III. The Classification At Issue In This Case.

The classification contained within Family Code §231.302(c) is, like this section's purpose, readily apparent: "each applicant for a license". Properly speaking, the true class in question here may be described as "all applicants for licenses issued by all Texas agencies." But, the social problem to which §231.302 is addressed is not caused by all license applicants and is instead caused by a smaller subset of this class: those who owe child support and whose children receive welfare benefits. In fact, some of these delinquent child support obligors may not even be within the "all license applicants" class. Not only does Mauldin contend herein that this class of "all license applicants" is overbroad when the purpose of this statute is considered, but he further asserts that there is another and even better way to address this problem by redefining the affected class.

Mauldin does not question that delinquent child support obligors who refuse or fail to pay their child support obligations burden various social services programs. Many fathers never marry the mothers of their children, and such mothers often seek welfare benefits. In addition, many husbands who divorce their wives are ordered to pay child support; and some of this group fail to pay, thus forcing their former wives onto the welfare rolls.

The Texas Attorney General's Office has been designated under Family Code §231.001 as the "Title IV-D" agency with responsibility for pursuing delinquent child support obligors.[11] Obviously, attorneys in the child support division of the Attorney General's Office institute suits against recalcitrant unwed fathers, establishing paternity

[11] The Attorney General is required via §231.116 to post on the Internet information about the operation of his office's child support activities. Such may be found at:
"http://www.oag.state.tx.us/".

and securing court-ordered support for their children. This division also pursues those delinquent child support obligors who have not paid existing court-ordered child support obligations as required by divorce decrees. Typically, if a father refuses to pay child support, a garnishment is issued to his employer. In most cases, such garnishments secure payment of support obligations.

However, some "deadbeats" cannot be forced to pay child support even via garnishments. To provide an additional tool for use against these deadbeats, in 1995 the Texas Legislature enacted §231.302(c), which requires all who have licenses of any kind to provide their SSNs to licensing agencies. In theory, the collection of SSNs might enable the State to identify license applicants or holders so that the licenses of deadbeats may be suspended. However, in actual practice this theory has proven to have little validity. For example, in 1999, out of a total of 18,791 licensees, the Board suspended the plumber's licenses of only two "deadbeats" because of their failure to pay court-ordered child support. Given this abysmal record, the question naturally arises: Why collect SSNs from countless innocent and unoffending Texans when the present system apparently does not work, and when there is a more economical and fairer way to secure such numbers?

The self-evidently surest, most accurate, and most carefully tailored method of collecting SSNs so that "deadbeats" can be located and their licenses suspended is to collect such numbers when they enter the Texas domestic relations system. For example, in a divorce case involving children the parents can be required, at a minimum through court-ordered discovery, to identify any licenses they hold, and to supply their SSNs. At any stage of that process, these SSNs may be referred to the licensing authorities, whereupon such information can be incorporated into agency records. If and when the "deadbeat" becomes delinquent in paying court-ordered child support, that information can be relayed to the Board, which can then suspend the delinquent's licenses. By such a procedure, any potential "deadbeats" would be immediately identified, their licenses

disclosed to the courts, their SSNs provided to the Board, and a direct link established between the courts and Board for suspension of those licenses should the need ever arise. *And all this could be accomplished without requiring any other individuals to supply the licensing agency with their SSNs*. For another example, in cases involving unwed fathers, the child support division of the Attorney General's Office sues the "deadbeat " to establish paternity, and eventually secures a court order for child support. Just as in divorce cases, information as to licenses and SSNs could easily be collected from these parents when they enter the system, *without requiring any other innocent individual routinely to supply SSNs to the licensing agency*.

Unfortunately, this simple, efficient, and fair method, which imposes no burden on individuals who are not already identified as potential or actual "deadbeats", is not being used in Texas. Instead of collecting SSNs only from those parents who are involved in divorce proceedings, paternity suits, or other domestic relations litigation, *all* licensees are required to provide their SSNs as a condition of licensure, regardless of the licensees' lack of connection to the "deadbeats" problem. This is the case, even though the vast majority of Texans who hold or will apply for occupational or other licenses are not and will not become "deadbeats". For example, many married men have no children; or their children are already adults. Many married men have never divorced, and never will divorce, their wives. Many divorced men promptly pay and remain current in their child support obligations, or may be under no obligation to pay support at all. And, of course, many men are single, and therefore have no conceivable connection with domestic relations problems.

Thus, the present system does not take into account that the "deadbeat" and "non-deadbeat" groups are distinct classes of individuals wholly unrelated to each other. Rather, the present system arbitrarily lumps these classes together, by imposing the burden of disclosing SSNs on 100% of licensees, when only a far smaller percentage may be involved in domestic relations situations that could lead to a "deadbeat" problem, and

when the requirement of disclosing SSNs as part of the licensing process is self-evidently not the most effective manner for dealing with the "deadbeat" problem if and when it arises in any particular case.

Clearly, then, what is going on here is that the vast majority of innocent licensees are being subjected to a blatant invasion of their privacy and limitation of their liberties on the Board's plea that such invasion will enable the State to deal with a very small minority of licensees who may be "deadbeats"—when, in fact, the requirement that all licensees supply SSNs is not necessary to achieve the State's goal, and the State has a more efficient, better targeted, and far less intrusive means to deal with the problem of "deadbeats" who hold licenses. In the parlance of equal protection jurisprudence, a faulty classification of this type is called "overinclusive". Here, the State's "classification" arbitrarily lumps all licensees together willy-nilly, the innocent with the guilty. Using such a dragnet "classification" does not perceptibly serve the State's purpose of catching only "deadbeats"—indeed, it is plainly not the rational, let alone the efficient, way to go about achieving that purpose. And the State could easily accomplish its goal without requiring any licensees to provide SSNs as part of the licensing process itself.

Another way of approaching this problem is to observe that, in effect, the State has actually failed to make a classification where it should have done so. The requirement to provide SSNs in connection with occupational and other licenses should have been tailored so as to apply only to those individuals determined to be or likely to become "deadbeats", not to all licensees. So, imposing that requirement on people such as Mauldin is nonrational and arbitrary. Such a nonrational requirement, infringing on Mauldin's freedom of religion, right to work and several other constitutional and statutory rights, violates the equal protection provisions of Art. 1, §3 of the Texas Constitution. But further, §231.302 denies to Mauldin Due Process of Law under the Fourteenth Amendment (as to the State) and the Fifth Amendment (as to the federal

government).[12]

IV. This Classification Violates Equal Protection.

A. General Equal Protection Principles.

Basically, equal protection analysis falls into two categories: Where "fundamental" constitutional rights, such as freedom of religion or the right to work, are involved, the "strict scrutiny" test applies: namely, the law must be shown to serve a compelling state interest, by the means least restrictive of individual liberty. Where no fundamental rights are involved, the law must nevertheless have a rational basis, serve some legitimate governmental interest, and be neither "overinclusive" nor "underinclusive". Whichever category applies to this case, Mauldin must prevail.

In general, the "police power" allows the State to adopt laws to protect the health, safety, and welfare of the people. See *Jay Burns Baking Co. v. Bryan*, 264 U.S. 504, 44 S.Ct. 412 (1924); *Weaver v. Palmer Bros. Co.*, 270 U.S. 402, 46 S.Ct. 320 (1926); *Tyson & Bro.-United Theatre Ticket Offices v. Banton*, 273 U.S. 418, 47 S.Ct. 426 (1927); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 52 S.Ct. 371 (1932); *Spann v. City of Dallas*, 111 Tex. 350, 235 S.W. 513 (1921); *Bruhl v. State*, 111 Tex.Cr.R. 233, 13 S.W.2d 93 (1929) ("one engaged in a legitimate business has the inherent right to do any and all things necessary or incident to the carrying on of such business – which does not trespass on the rights of some other person, or are not injurious to the morals, good order, comfort, convenience or health of the people. Beyond these latter, the so-called police power of the state may not go in its prohibitive or regulative effort"); *Travlers' Ins. Co. v. Marshall*, 124 Tex. 45, 76 S.W.2d 1007 (1934); *Ex parte Martin*, 127 Tex.Cr.R. 25, 74 S.W.2d 1017 (1934); and *Comeau v. City of Brookside Village*, 616 S.W.2d 333 (Tex.App.-Houston 1981). The police power is more than sufficient to provide an

[12] Because in this case the legal analysis is largely equivalent under both equal protection and due process theories, Mauldin will focus on the issue of equal protection, with the understanding that his arguments incorporate a due process component as well.

adequate remedy for the problem of "deadbeats".

When exercising the police power, the State Legislature may create reasonable classes, distinctions between which must be rationally related to the purpose of the law. See *Reed v. Reed*, 404 U.S. 71, 75-76, 92 S.Ct. 251, 254 (1971) ("[a] classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation'"); *Baxstrom v. Herold*, 383 U.S. 107, 111, 86 S.Ct. 760 (1966) ("[e]qual 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"); and *Kramer v. Union Free School District*, 395 U.S. 621, 632, 89 S.Ct. 1886 (1969)("classifications must be tailored so that the exclusion of * * * members of [a] class is necessary to achieve the articulated state goal"). See also *Foster v. Mobile County Hospital Board*, 398 F.2d 227 (5th Cir. 1968); and *United States v. State of South Dakota*, 636 F.2d 241 (8th Cir. 1980). If classifications are not reasonably related to the purpose of the law, then equal protection is violated. See *Linen Service Corp. of Texas v. City of Abilene*, 169 S.W.2d 497 (Tex.Civ.App. 1943); *Rucker v. State*, 170 Tex.Cr.R. 487, 342 S.W.2d 325 (1961); and *Miller v. Carter*, 547 F.2d 1314 (7th Cir. 1977). This is, of course, also true where a classification, rather than improperly *excluding* someone from a statutory scheme (thereby, for example, denying a benefit available to others) improperly *includes* an individual in a statutory scheme (thereby, as here, imposing a burden that he should not bear, in comparison to others).

Two standards exist to determine whether a statute violates equal protection principles: (i) the "strict scrutiny" test, and (ii) the "rational basis" test. Either test concerns itself with the question of whether, in light of the purpose and objective of the law, the classifications so made serve to further that purpose or objective.

When constitutional or other "fundamental" rights are being abridged by a law with arbitrary, unreasonable, or otherwise improper classifications, the strict scrutiny test is applied. See *Carrington v. Rash*, 380 U.S. 89, 85 S.Ct. 775 (1965)(Texas constitutional

provision which did not allow servicemen stationed in Texas to vote held overbroad and thus void); *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817 (1967)(law preventing marriage between races held void); *Coates v. City of Cincinnati*, 402 U.S. 611, 91 S.Ct. 1686 (1971)(ordinance which prohibited 3 or more people from assembling on a sidewalk and annoying passers-by held violative of equal protection); *Police Department of City of Chicago v. Mosley*, 408 U.S. 92, 92 S.Ct. 2286 (1972)(ordinance prohibiting picketing at schools was void); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 95 S.Ct. 2268 (1975)(nudity ordinance applicable to drive-in theater held void); *Cary v. Brown*, 447 U.S. 455, 100 S.Ct. 2286 (1980)(statute prohibiting picketing held void); *Aladdin's Castle, Inc. v. City of Mesquite*, 630 F.2d 1029 (5th Cir. 1980); *Dills v. City of Marietta*, 674 F.2d 1377 (11th Cir. 1982)(sign ordinance held void); *Miller v. Civil City of South Bend*, 904 F.2d 1081 (7th Cir. 1990)(nude dancing ordinance held void); and *Nunez v. City of San Diego*, 114 F.3d 935 (9th Cir. 1997)(curfew ordinance was void).

In all other types of equal protection cases, the rational basis test is used. See *U.S. Dep't. of Agriculture v. Moreno*, 413 U.S. 528, 93 S.Ct. 2821 (1973)(food stamp act making distinction between related and unrelated household members held violative of equal protection); *Caban v. Mohammed*, 441 U.S. 380, 99 S.Ct. 1760 (1979)(state law which distinguished between unwed mother and father was void); *Zobel v. Williams*, 457 U.S. 55, 102 S.Ct. 2309 (1982)(state law making distinction between those living in state before 1959 and those who did not was held void); *Plyler v. Doe*, 457 U.S. 202, 102 S.Ct. 2382 (1982)(Texas law which denied schooling to illegal Mexican children held violative of equal protection); *City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432, 105 S.Ct. 3249 (1985)(zoning ordinance restricting home for the mentally challenged held void); *H.L. Farm Corp. v. Self*, 877 S.W.2d 288 (Tex. 1994)(law preventing "open lands" designation for corporation with non-resident alien stockholder violated equal protection); and *Texas Educ. Agency v. Leeper*, 843 S.W.2d 41 (Tex.Civ.App. - Fort Worth 1991)(because of exceptions, compulsory school attendance law held void).

B. The Fundamental Rights in Question Here.

In this case, the strict scrutiny test applies because Mauldin possesses several constitutional and statutory rights that are in fact being abridged by §231.302(c).

1. Right to Work.

Mauldin possesses the right to work for a living and consequently support his family. See *Ex parte Martin*, 127 Tex.Cr.R. 25, 74 S.W.2d 1017, 1018 (Tex.Cr.App. 1934)("The liberty thus guaranteed means, among other things, the right to pursue any lawful business"); *Hotel & Rest. Employees' International Alliance and Bartenders International League of America v. Longley*, 160 S.W.2d 124, 127 (Tex.App. 1942); *Ex parte George*, 152 Tex.Cr.R. 465, 215 S.W.2d 170 (1948); *Smith v. Decker*, 158 Tex. 416, 312 S.W.2d 632, 633-34 (1958); and *Font v. Carr*, 867 S.W.2d 873 (Tex.App.-Houston 1993).[13] It is unchallenged that Mauldin possesses the necessary skills to be a plumber and he will remain a plumber provided he maintains his annual license issued by the Board. The requirement to supply the Board a SSN has nothing to do with the skills needed to be a plumber, and therefore is not a "reasonable" regulation of this occupation. Yet refusal to supply such a number will result in the denial of a license, thus preventing a plumber like Mauldin from working. Clearly, the requirements of §231.302(c) directly abridge Mauldin's right to work.

2. Right To Hold and Practice Religious Beliefs.

Another of the fundamental rights possessed by Mauldin relates to his religious beliefs and freedoms, protected by Art. 1, §6 of the Texas Constitution and the First

[13] See also *Allgeyer v. Louisiana*, 165 U.S. 578, 589, 17 S.Ct. 427 (1897)("The 'liberty' mentioned in that amendment means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation"); *Adair v. United States*, 208 U.S. 161, 28 S.Ct. 277 (1908); *Coppage v. Kansas*, 236 U.S. 1, 14, 35 S.Ct. 240 (1915); *Truax v. Raich*, 239 U.S. 33, 41, 36 S.Ct. 7 (1915); and *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625 (1923).

Amendment of the U.S. Constitution. Mauldin has the right to worship God and obey His commandments. He believes that the Bible predicts in Revelation the rise of the "Anti-Christ," who will use a "666"[14] numbering system to mark all of humanity. Mauldin further believes that those who take the "Mark of the Beast" will be damned unless they repent. Based upon these beliefs, Mauldin fears any system which conditions the right to work upon providing some "mark" like a number.[15] Mauldin also believes that the current effort by the Board to condition his right to work upon the provision of his SSN has amazing parallels to these events predicted in Revelation. To follow his religious beliefs which he is entitled to hold, Mauldin is required to refuse providing the Board with his SSN. But by doing so, Mauldin would be denied a license, and therefore §231.302(c) abridges these constitutional rights. See *Leahy v. District of Columbia*, 833 F.2d 1046 (D.C.Cir. 1987); *Quaring v. Peterson*, 728 F.2d 1121 (8th Cir. 1984); *Dennis v. Charnes*, 805 F.2d 339 (10th Cir. 1984); *People v. Swartzentruber*, 170 Mich. App. 682, 429 N.W.2d 225 (1988); and *State v. Miller*, 196 Wis.2d 238, 538 N.W.2d 573 (1995).

3. Right to Privacy.

In *Texas State Employees Union v. Texas Dep't. of Mental Health & Mental*

[14] SSNs were created to keep a record of the contributions any particular individual makes to the federal Social Security Trust Fund. The act which created this fund is published at 53 Stat. 1360, ch. **666.**

[15] Revelation 13: 11-18, N.I.V. makes the following prophecy: "Then I saw another beast, coming out of the earth. He had two horns like a lamb, but he spoke like a dragon. He exercised all the authority of the first beast on his behalf, and made the earth and its inhabitants worship the first beast, whose fatal wound had been healed. And he performed great and miraculous signs, even causing fire to come down from heaven to earth in full view of men. Because of the signs he was given power to do on behalf of the first beast, he deceived the inhabitants of the earth. He ordered them to set up an image in honor of the beast who was wounded by the sword yet lived. He was given power to give breath to the image of the first beast, so that it could speak and cause all who refused to worship the image to be killed. He also forced everyone, small and great, rich and poor, free and slave, to receive a mark on his right hand or on his forehead, so that no one could buy or sell unless he had the mark, which is the name of the beast or the number of his name. *This calls for wisdom. If anyone has insight, let him calculate the number of the beast, for it is a man's number. His number is 666.*"

Retardation, 746 S.W.2d 203, 205 (Tex. 1987), the Texas Supreme Court determined that there was a right to privacy based upon a penumbra of constitutional protections. Included within this right to privacy is the right "of conscience in matters of religion." Similarly as in the above, §231.302(c) abridges this right.

4. Right To Not Speak.

A fourth right which Mauldin possesses arises from the First Amendment's "free speech" clause. A corollary of free speech constitutional rights is the right not to speak contrary to one's firmly held religious beliefs. Perhaps one of the seminal cases on this point is *West Virginia State Bd. of Education v. Barnette*, 319 U.S. 624, 633, 63 S.Ct. 1178 (1943). Here, some Jehovah's Witnesses were being prosecuted and having their children expelled from school because they refused to participate in a mandatory salute to the national flag. The reason for such refusal was based upon the religious beliefs of this particular faith that saluting the flag was worshiping a "graven image." In according First Amendment protection to these Witnesses, the Supreme Court declared that compelling the salute "requires the individual to communicate by word and sign his acceptance of the political ideas it thus bespeaks." The Court concluded that to "sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind," Id., at 634, which the Court declared was a position clearly at odds with the First Amendment.

The Court again followed the rationale of *Barnette* in *Wooley v. Maynard*, 430 U.S. 705, 714, 97 S.Ct. 1428 (1977), which involved the compulsory display of New Hampshire's state motto, "Live Free or Die," on automobile license plates. In protecting those who objected for religious reasons to the display of this motto, the Court concluded that "the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." See also *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475

U.S. 1, 16, 106 S.Ct. 903 (1986)("the choice to speak includes within it the choice of what not to say"); *Society of Separationists, Inc. v. Herman*, 939 F.2d 1207, 1215 (5th Cir. 1991)("Our Constitution protects not just the right to speak, but the right to 'refrain from speaking' * * * the right of individuals to hold a point of view different from the majority and to refuse to foster * * * an idea they find morally objectionable"); *Hays County Guardian v. Supple*, 969 F.2d 111, 123 (5th Cir. 1992)("the freedom of speech and association protected by the First Amendment includes the freedom to chose both what to say and what not to say"); and *Johnson v. State*, 755 S.W.2d 92, 97 (TexCr.App. 1988)("the right to differ is the centerpiece of our First Amendment freedoms"). See also *Matter of Marriage of Knighton*, 723 S.W.2d 274, 283 (Tex.App. - Amarillo 1987); and *Reynolds v. Rayborn*, 116 S.W.2d 836, 838-39 (Tex.Civ.App. - Amarillo 1938).

Here, Mauldin has religious beliefs which mandate that he "not speak" allegiance to any forerunner of the Beast's "666" numbering system and those beliefs and resulting action are constitutionally protected. Yet the Board, like the Beast, prevents all plumbers from working unless they provide the "mark." Obviously, §231.302(c) abridges Mauldin's rights in this respect.

5. Right of Self Defense.

Mauldin also holds certain secular beliefs relating to the Board's demand that he supply his SSN. By engaging in a study of certain publications found on the Internet, Mauldin has learned about a new crime known as identity theft.[16] Wishing to protect himself and his family from this crime (C.R. 249-50), Mauldin desires to curtail use and distribution of his SSN by exercising his right of self-defense. See *Erwin v. State*, 367 S.W.2d 680, 683 (Tex.Crim.App. 1963)("right of self-defense"); *Carlile v. State*, 96 Tex.Cr.R. 37, 255 S.W. 990, 991 (1923)("right of self-defense"); *Kelly v. State*, 68

[16] The actions of one identity thief are discussed in *Andrews v. T.R.W., Inc.*, 225 F.3d 1063, 1064-65 (9th Cir. 2000).

Tex.Cr.R. 317, 151 S.W. 304 (1912)("the defendant's perfect right of self-defense"); and *Cox v. State*, 57 Tex.Cr.R. 427, 123 S.W. 696, 697 (1909)("perfect right of self-defense").[17] Yet, the Board not only demand SSNs from all plumbers including Mauldin, but it improvidently expose these numbers to identity thieves in a variety of ways. This exposure to this new crime is the direct result of the implementation of §231.302(c).

6. Right To Be Free From Official Discrimination.

The recently adopted Texas Civil Practice and Remedies Code §106.001 provides as follows:

> "Sec. 106.001. Prohibited Acts.
>
> "(a) An officer or employee of the state or of a political subdivision of the state who is acting or purporting to act in an official capacity may not, because of a person's race, religion, color, sex, or national origin:
>
> "(1) refuse to issue to the person a license, permit, or certificate."

This law condemns state officials who deny a license to anyone because of religious beliefs. Here, the Board is requiring pursuant to §231.302(c) that Mauldin supply his SSN to secure a plumber's license, yet Mauldin holds religious beliefs which counsel against providing his number. Section 231.302(c) thus abridges this statutory right to be free from such discrimination emanating from government "because of a person's * * * religion * * *"

C. This Classification Is Overinclusive.

Legislative classifications in equal protection cases are categorized as either "overinclusive" or "underinclusive." One commentator described the difference between these two classes as follows: "An overinclusive classification burdens a wider than necessary range of individuals, extending beyond those persons possessing the trait contributing to the mischief or evil the legislature seeks to eradicate. * * * An

[17] See generally Penal Code §9.22 (necessity defense).

underinclusive classification exists when all persons in the class are indeed perpetrators of the mischief or evil the state wishes to eliminate, but others who possess the same undesirable trait remain outside the class."[18] As the Supreme Court declared in *Kramer v. Union Free School District*, *supra*, a State may make classifications so as "to achieve the articulated state goal," but in its effort to remedy any particular problem, it may not create irrational and arbitrary classes which are at least overinclusive.

This distinction between overinclusive and underinclusive classes has been used by the U.S. Supreme Court to determine whether certain laws did in fact comport with equal protection. For example, in *Jimenez v. Weinberger*, 417 U.S. 628, 637, 94 S.Ct. 2496 (1974), at issue was whether the classification of illegitimate children in a welfare law was either overinclusive or underinclusive. In finding that this law denied equal protection, the Court declared:

> "Indeed, as we have noted, those illegitimates statutorily deemed dependent are entitled to benefits regardless of whether they were living in, or had ever lived in, a dependent family setting with their disabled parent. Even if children might rationally be classified on the basis of whether they are dependent upon their disabled parent, the Act's definition of these two subclasses of illegitimates is 'overinclusive' in that it benefits some children who are legitimated, or entitled to inherit, or illegitimate solely because of a defect in the marriage of their parents, but who are not dependent on their disabled parent. Conversely, the Act is 'underinclusive' in that it conclusively excludes some illegitimates in appellants' subclass who are, in fact, dependent upon their disabled parent. Thus, for all that is shown in this record, the two subclasses of illegitimates stand on equal footing, and the potential for spurious claims is the same as to both; hence to conclusively deny one subclass benefits presumptively available to the other denies the former the equal protection of the laws guaranteed by the due process provision of the Fifth Amendment."

See also *Rinaldi v. Yeager*, 384 U.S. 305, 309, 86 S.Ct. 1497 (1966); *Simon & Schuster v. New York Crime Victims Board*, 502 U.S. 105, 121, 112 S.Ct. 501 (1991); *Alvarez v.*

[18] Tussman and ten-Broek, "The Equal Protection of the Laws," 37 *California L. Rev.* 341, 348-50 (1949).

Chavez, 118 N.M. 732, 886 P.2d 461 (1994)(license restriction for bondsmen was overinclusive); *Beach Communications, Inc. v. Federal Communications Comm.*, 965 F.2d 1103, 1105 (D.C.Cir. 1992)(distinction in Cable Act between "external, quasi-private" and "wholly private" cable systems was "overinclusive ... in that this burden does not serve the Act's purpose"); *Shriners Hospital for Crippled Children v. Zrillic*, 563 So.2d 64, 69 (Fla. 1990)("Equal protection analysis requires that classifications be neither too narrow nor too broad to achieve the desired end. Such underinclusive or overinclusive classifications fail to meet even the minimal standards of the rational basis test"); *French v. Amalgamated Local Union 376*, 203 Conn. 624, 526 A.2d 861 (1987)(ban on residential picketing except for unions was overinclusive); *District of Columbia v. E.M.*, 467 A.2d 457, 466 (D.C.App.1983) (welfare statute of limitations was void because classes were both "underinclusive and overinclusive"); *Isakson v. Rickey*, 550 P.2d 359 (Alaska 1976)(using the rational basis test, the Court determined that a commercial fisherman limitation was unconstitutional because the act's classifications were both overbroad and underinclusive); *Laakonen v. Eighth Judicial District Court for County of Clark*, 91 Nev. 506, 538 P.2d 574 (1975)(guest statute violated equal protection); and *Brown v. Merlo*, 8 Cal.3d 855, 506 P.2d 212, 227 (1973)(California guest statute was overinclusive, had many exceptions and it "'imposes a burden upon a wider range of individuals than are included in the class of those tainted with the mischief at which the law aims'").

Texas courts are particularly sensitive to the problem of overinclusive and underinclusive classes. For example, in *Sullivan v. Univ. Interscholastic League*, 616 S.W.2d 170, 172-73 (Tex. 1981), the validity of an "anti-recruiting" rule for high school athletes was being challenged as violative of Art. 1, §3 of the Texas Constitution. There, the "anti-recruiting" rule prevented all student athletes transferring to different schools from playing sports for a year after the transfer. Because this rule was "overinclusive," the Supreme Court declared it unconstitutional:

> "The transfer rule creates two classes of students: those who do not transfer from one school to another, as compared to those who transfer. The rule treats these two classes of students differently by permitting members of the first group to compete in interscholastic activities without any delay while imposing a one-year period of ineligibility on the second group. The purpose of the transfer rule was to discourage recruitment of high school athletes. This is a legitimate state purpose. However, equal protection analysis still requires us to 'reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose.' *McLaughlin v. Florida*, 379 U.S. 184, 191, 85 S. Ct. 283, 13 L. Ed. 2d 222 (1964).
>
> "In practical effect, the challenged classification simply does not operate rationally to deter recruitment. The U.I.L. rule is overbroad and over-inclusive. The rule burdens many high school athletes who were not recruited and were forced to move when their family moved for employment or other reasons. The fact that there is no means of rebutting the presumption that all transferring athletes have been recruited illustrates the capriciousness of the rule. The inclusion of athletes who have legitimately transferred with recruited athletes does not further the purpose of the transfer rule. Under strict equal protection analysis the classification must include all those similarly situated with respect to purpose. *Rinaldi v. Yeager*, 384 U.S. 305, 86 S. Ct. 1497, 16 L. Ed. 2d 577 (1966). See Developments in the Law – Equal Protection, 82 Harv. L. Rev. 1065, 1084 (1969). It is clear that the transfer rule broadly affects athletes who are not similarly situated."[19]

See also *Bell v. Lone Oak Independent School District*, 507 S.W.2d 636 (Tex.App.-Texarkana 1974).

In *Whitworth v. Bynum*, 699 S.W.2d 194, 197 (Tex. 1985), the Texas guest statute was challenged as violative of equal protection. Finding that law unconstitutional, the Supreme Court held:

> "Even when the purpose of a statute is legitimate, equal protection analysis still requires a determination that the classifications drawn by the statute are rationally related to the statute's purpose [cite omitted]. Under the rational basis test of *Sullivan*, similarly situated individuals must be treated equally under the statutory classification unless there is a rational basis for not doing so. Although Bynum has

[19] A similar decision was made by the Indiana Supreme Court in *Sturrup v. Mahan*, 261 Ind. 463, 305 N.E.2d 877, 881 (1974).

> argued that an overinclusive statute cannot be struck down under a rational relationship test, overinclusiveness was a determinative factor in *Sullivan*."

See also *Prudential Health Care Plan, Inc. v. Comm. of Insurance*, 626 S.W.2d 822, 830 (Tex.App.- Austin 1982).

In Mauldin's case, which challenges the State's undifferentiated, across-the-board requirement to provide SSNs in order to obtain a plumber's license, the requirement falls on two separate and distinct classes: first, the "deadbeat " class; and second, the "nondeadbeat" class. This "deadbeat" class constitutes only a small segment of licensees, the vast majority of whom is not and never will be composed of "deadbeats", actual or potential. The social problem the requirement supposedly addresses is strictly a domestic relations issue, not an issue of licensing; and (as shown above) the straightforward solution to this problem is to collect SSNs from individuals who are or may become "deadbeats" when they enter the Texas domestic relations system. Collecting SSNs from all licensees who have no connection with this domestic relations problem simply does not and can not solve the problem, because it imposes a requirement on people who, because they are not the cause of the problem, are in no position to remedy it, whether they disclose their SSNs or not. (Moreover, as a purely practical matter, collecting SSNs from the large "non-deadbeat" class needlessly increases the State's administrative costs.)

As noted above, "[a]n overinclusive classification burdens a wider than necessary range of individuals, extending beyond those persons possessing the trait contributing to the mischief or evil the legislature seeks to eradicate". Here, eradication of the "deadbeats" problem is the objective, and the evil to be remedied is to relieve the welfare rolls of families forced onto public assistance by the "deadbeats'" refusal to perform their financial obligations. But under the current regulatory scheme, members of the "non-deadbeat" class, who cannot in any way assist with solving the "deadbeat" problem, are themselves arbitrarily denied the opportunity to obtain licenses—and, therefore, to work in their chosen occupations—if they do not provide their SSNs, even if (as in Mauldin's

case) their religious beliefs preclude them from doing so. In theory, the State has created a class of persons from whom it wishes to deny licenses because of their failure to pay child support. However, in practice the State law includes within the class of persons actually denied licenses *all* those who (for whatever reason, including religious scruples) will not supply their SSNs, even though those persons are not among the "deadbeats" the State is trying to reach. Thus, the State's statutory scheme is wildly and undeniably "overinclusive"—and therefore unconstitutional.

V. The Board's Heavy Burden of Proof.

In the trial court, the Board and Maxwell defended the constitutionality of §231.302(c) with a circular and inconsistent argument. They first argued that Mauldin erred by contending that this law contained classifications:

> "First, Mauldin's argument is flawed because it imposes an artificial classification into the plumbing license process. Neither the Plumbing License law nor Family Code §231.302 draw a distinction between child support obligors and non-obligors. The Statutes are facially neutral and address all the citizens of Texas because all citizens are potential child support obligors. Mauldin's artificial classification simply does not appear in the Statute" (C.R. 191-192).

But after making this statement, the Board admitted that the statute contained inherent classes which were in fact overbroad: the "statute simply requires that each person provide their social security number to aid in the finding of those who avoid their child support obligation" (C.R. 193). By this statement, the Board recognized that §231.302(c) imposes a burden upon every licensee, and that this imposition upon everyone is for the purpose of only finding a far fewer number of people. And this burden is justified because "all citizens are potential child support obligors" as they may still bear children or adopt them, no matter how unlikely.

Clearly then, the Board has recognized the obvious. Family Code §231.302(c)(1) provides that "each licensing authority shall request and each applicant for a license shall provide the applicant's [SSN]" in order "[t]o assist in the administration of laws relating

to child support enforcement". And 42 U.S.C. §666(a)(13)(A) mandates "[p]rocedures requiring that the social security number of * * * any applicant for a * * * occupational license" in order "to increase the effectiveness of the program which the State administers". The Board recognizes that this statutory scheme imposes burdens upon 100% of the licensed public for the purpose of using information gathered thereby to implement programs affecting a far smaller segment of the public.

In this appeal, because Mauldin's fundamental rights are involved here, the burden rests on the Board to establish with facts in this record that these statutes, as applied to Mauldin, subserve a compelling governmental interest by the means least restrictive of his rights. See, *e.g.*, *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777, 106 S.Ct. 1558 (1986); *United States v. Robel*, 389 U.S. 258, 267-68, 88 S.Ct. 419 (1967); *Aptheker v. Secretary of State*, 378 U.S. 500, 514, 84 S.Ct. 1659 (1964); *DeGregory v. Attorney General*, 383 U.S. 825, 829-30, 86 S.Ct. 1148 (1966); *NAACP v. Button*, 371 U.S. 415, 444, 83 S.Ct. 328 (1963); and *United States v. O'Brien*, 391 U.S. 367, 377, 88 S.Ct. 1673 (1968). Importantly, the Board must proffer *facts* from this record, not simply unreasonable assumptions such as everyone, including Mauldin, is a potential child support obligor. See, *e.g.*, *New Jersey Citizen Action v. Edison Township*, 797 F.2d 1250, 1259 (3rd Cir. 1986). See also, *e.g.*, *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 496, 106 S.Ct. 2034 (1986); *Crowell v. Benson*, 285 U.S. 22, 56-64, 52 S.Ct. 285 (1932); *St. Joseph Stockyards Co. v. United States*, 298 U.S. 38, 50-54, 56 S.Ct. 720 (1936); and *Pickering v. Board of Education*, 391 U.S. 563, 578-79 & n.2, 88 S.Ct. 1731 (1968).

But the facts of the administration of the Texas "deadbeat" program (outlined above) show that there is no conceivable compelling (or even any legitimate) governmental interest in requiring *all* applicants for licenses to provide SSNs, let alone the subset of individuals, such as Mauldin, with genuine religious objections to such use of SSNs. To demonstrate that the SSNs of those individuals like Mauldin do in some way

assist with the "deadbeats" problem,[20] the Board needs to describe those cases; to establish that they are not so rare as to be essentially fictional; and to show in particular how Mauldin's situation does or would conceivably fit one or more of such cases.

Also, to require *every* applicant for a license to provide a SSN in order to obtain for the State the supposed advantage of using SSNs in such rare cases (if any arguably exist) is plainly not the means least restrictive of the rights of individuals with genuine religious objections, such as Mauldin. Actually, it is the *most* restrictive means ("overinclusive"), because it abridges the rights of religious objectors in every case, without any indication, let alone proof, that a single "deadbeat" has been or could be identified or required to perform his statutory duties if Mauldin and individuals similarly situated were compelled to provide the Board with their own SSNs.

If the Board contests this, it is the Board's burden to show that *no* less restrictive means is available for "assist[ing] in the administration of laws relating to child support enforcement", and "increas[ing] the effectiveness of the program which the State administers". This the Board cannot do, as Mauldin has already suggested several quite workable, more rational, and far less restrictive means to accomplish the statute's goals.

The Board must also contend with the problem that requiring Mauldin to disclose his SSN as a condition precedent to his receipt of an occupational license in effect conditions his right to work in the occupation of his choice on his surrender of his constitutional rights and freedoms. And the law is crystal clear that no agency of government may condition any public benefit or privilege (such as an occupational license), let alone the exercise of a constitutional or statutory right, on an individual's surrender of any other constitutional or statutory right. See, *e.g.*, *Branti v. Finkel*, 445 U.S. 507, 513-16, 100 S.Ct. 1287 (1980); *Abood v. Detroit Board of Education*, 431 U.S.

[20] Of course, Sheryl Hays has already admitted that having the SSNs of people not within the "deadbeats" class does not assist locating deadbeats (C.R. 273).

209, 233-34, 97 S.Ct. 1782 (1977); *Graham v. Richardson*, 403 U.S. 365, 374-75, 91 S.Ct. 1848 (1971); *Pickering v. Board of Education*, 391 U.S. 563, 568, 88 S.Ct. 1731 (1968); and *United States v. Robel*, 389 U.S. 258, 263-66, 88 S.Ct. 419 (1967). See generally, Sullivan, "Unconstitutional Conditions", 102 *Harvard L. Rev.* 1413 (1989).

Prescinding from Mauldin's fundamental constitutional rights, the Court must look to the statutes involved to see whether their purposes, and the means by which they attempt to achieve these purposes, subserve legitimate governmental interests in a rational manner. Family Code § 231.302(c)(1) provides that "each licensing authority shall request and each applicant for a license shall provide the applicant's [SSN]" *in order "[t]o assist in the administration of laws relating to child support enforcement"*. And 42 U.S.C. §666(a)(13)(A) mandates "[p]rocedures requiring that the social security number of * * * any applicant for a * * * occupational license" *in order "to increase the effectiveness of the program which the State administers"*.

The facts of the "deadbeat" program in operation show, however, that requiring Mauldin and individuals similarly situated to provide their own SSNs as a condition of receiving an occupational license is plainly overinclusive for the purposes of "assist[ing] in the administration of laws relating to child support enforcement", and "increas[ing] the effectiveness of the program which the State administers". Indeed, those facts indicate the absence of even a rational basis for requiring Mauldin and individuals similarly situated to provide their own SSNs as a condition of receiving a license. In the absence of a rational basis, though, the statutory requirement must fall, no matter what rights Mauldin asserts.

VI. The Plea of "Administrative Convenience" Is Inadequate.

Facts from several different sources reveal how SSNs are used "for child support purposes." In discovery, Mauldin posed the following Interrogatory No. 6 to defendant Conrad: "Can you describe for me please how federal social security numbers supplied by plumber license applicants are used by the Texas State Board of Plumbing

Examiners?" In reply, Conrad simply answered that "The Board matches social security numbers with delinquent non-custodial child support parent payers and delinquent student loan borrowers." Taking into consideration the fact that plumbers provide their SSNs to the Board, it appears clear from the above answer that the Board records the SSNs of plumbers in its computer, and when notified by some court to suspend a plumber's license, the SSN is just simply used for further identification of the specific plumber who is subject to the license suspension. In short, use of SSNs by the Board itself is an administrative convenience.

But use of SSNs by the Attorney General's child support office is also an administrative convenience. Through the deposition of Sheryl Hays, a computer systems analyst who works with the Attorney General's child support program computer, it was shown that the child support division obtains computer data regarding all licensees from all Texas licensing agencies (C.R. 266-275). This data contain "data elements" like name, address, date of birth, driver license number, employer and SSN. Since the child support division is attempting to locate delinquent child support obligors, data regarding a delinquent obligor possessed by the Attorney General is compared with the data from the agencies. A "match" of data elements appears to assist finding a delinquent. However, it is not empirically known how much the SSN data element increases the ability to locate a delinquent in comparison to the other data elements such as name, date of birth, etc. But clearly, the collection of SSNs is for the administrative convenience of the Attorney General's child support division.

But administrative convenience is not sufficient justification for this requirement. A number of federal courts have held that when some constitutional right is being abridged, a plea of "administrative convenience" as justification for burdening such right is inadequate. See *Frontiero v. Richardson*, 411 U.S. 677, 690, 93 S.Ct. 1764 (1973)("In any case, our prior decisions make clear that, although efficacious administration of governmental programs is not without some importance, 'the Constitution recognizes

higher values than speed and efficiency.' *Stanley v. Illinois*, 405 U.S. 645, 656 (1972). And when we enter the realm of 'strict judicial scrutiny,' there can be no doubt that 'administrative convenience' is not a shibboleth, the mere recitation of which dictates constitutionality"); *Schneider v. Rusk*, 377 U.S. 163, 167, 84 S.Ct. 1187 (1964)("As stated by Judge Fahy, dissenting below, such legislation, touching as it does on the 'most precious right' of citizenship (*Kennedy v. Mendoza-Martinez*, 372 U.S., at 159), would have to be justified under the foreign relations power 'by some more urgent public necessity than substituting administrative convenience for the individual right of which the citizen is deprived'"); *Police Department of the City of Chicago v. Mosley*, 408 U.S. 92, 102 fn9, 92 S.Ct. 2286 (1972)("This attenuated interest, at best a claim of small administrative convenience and perhaps merely a confession of legislative laziness, cannot justify the blanket permission given to labor picketing and the blanket prohibition applicable to others");*Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 647, 94 S.Ct. 791 (1974) ("administrative convenience alone is insufficient to make valid what otherwise is a violation of due process of law"); *Taylor v. Louisiana*, 419 U.S. 522, 535, 95 S.Ct. 692 (1975)("But that task is performed in the case of men, and the administrative convenience in dealing with women as a class is insufficient justification for diluting the quality of community judgment represented by the jury in criminal trials"); *Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142, 152, 100 S.Ct. 1540 (1980)("We think, then, that the claimed justification of administrative convenience fails, just as it has in our prior cases"); *Orr v. Orr*, 440 U.S. 268, 281, 99 S.Ct. 1102 (1979)("In such circumstances, not even an administrative-convenience rationale exists to justify operating by generalization or proxy"); and *Wessmann v. Gittens*, 160 F.3d 790, 799 fn. 5 (1st Cir. 1998)("But administrative convenience is not a sufficient justification for promoting racial distinctions"). Yet, administrative convenience is precisely what the Board relied upon as justification for the SSN requirement ("access to social security numbers aids in the execution of one of the most valuable child support enforcement tools")(C.R. 193).

CLOSING SUMMARY

The population of Texas is most likely better than 20 million people. It is also probable that about 15 million of these possess the most common form of license: a Texas driver license. A less common form of Texas license is that issued to plumbers and it is known that there were in 1999 a total of 18,791 plumbers licensed by the Board. All of these licensees are required via §231.302 to provide their SSNs.

Alicia Key provided in her affidavit (C.R. 210-12) some interesting statistics. Her child support division in the Attorney General's Office has a little over 1 million cases and experience demonstrates that child support payments will be made in at least half of these cases. This means that her office has a problem in tracking down about 500,000 people. When these people are located, litigation is required to secure court ordered child support payments. If some of these fail to pay child support, at last resort efforts are made to suspend the licenses of the delinquents. Since 1996, a total of 3300 licenses have been suspended (C.R. 211). In 1999, the licenses of only two plumbers were suspended. Clearly, use of SSNs to suspend licenses is minuscule.

There is a better and least restrictive way to obtain these SSNs as Mauldin has shown: collect them when these litigants enter the domestic relations system. Further, some administrative procedure could be established so that people like Mauldin could avoid providing their SSNs. But rather than do this, §231.302 imposes a burden upon 100% of the licensed public, the vast majority of whom did not contribute to this "deadbeats" problem and who are in no position to assist in a resolution of it. Throwing Mauldin into this overinclusive class is arbitrary and irrational. Since excluding Mauldin and members of his class from obtaining occupational licenses is not "***necessary to achieve the articulated state goal***" of solving the "deadbeats" problem, §231.302 is clearly unconstitutional.

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 ___ day of April, 2002.

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