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Inartful Drafting Does Not Necessarily a Void, as Opposed to a Vague, Statute Make—Even Under the First Amendment: The Eleventh Circuit Applies Common Sense to “Common Understanding” in Void-for-Vagueness Challenges to Lobbying Regulations

SAMUEL A. TERILLI†

Language is inherently ambiguous. We experience the ambiguity in the words we use, the sentences we utter, and in countless communication breakdowns. One researcher says that for the 500 most frequently used words in the English language, there are over 14,000 definitions. Take, for instance, the word “run.” A sprinter can “run” in a race. Yet, politicians “run” races but not exclusively with their legs. Although a horse “runs” with legs, it uses four of them, whereas sprinters use two. A woman can get a “run” in her hose, which is troublesome, but having a “run” of cards is good. However, having a “run” on a bank is bad. “Running” aground is not good at all for a sailor, but a “run” with the wind can be exhilarating. To score a “run” in baseball is different than a “run” in cricket. Hence we “run” into the ambiguity of language at every turn, even with simple, everyday words.¹

INTRODUCTION

Language, unlike mathematics, is the means by which we express a society’s laws, and the process of writing legislation does little, if anything, to eliminate the inherent ambiguity of language.² Language is malleable and open to interpretation. Sentences rarely resemble equations. At times a speaker may even appear to be directing his or her language to one person or group, while he or she is also communicating with and influencing another, albeit indirectly.³ Imprecise legislative

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1. PHILLIP G. CLAMPITT, *COMMUNICATING FOR MANAGERIAL EFFECTIVENESS* 24 (3d ed. 2005) (footnote omitted).

2. See, e.g., *Kolender v. Lawson*, 461 U.S. 352, 361 (1983) (“[D]ue process does not require ‘impossible standards’ of clarity.” (citing *United States v. Petrillo*, 332, U.S. 1, 7–8 (1947))); *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972) (“Condemned to the use of words, we can never expect mathematical certainty from our language.”).

3. See William V. Luneberg, *Anonymity and Its Dubious Relevance to the Constitutionality*

drafting, though perhaps inevitable in light of the realities of language,⁴ might lead potentially covered persons to claim confusion about the law's scope, while also arguing a broad application not intended by the legislature.⁵ The Eleventh Circuit faced these difficulties associated with speech, especially speech seeking to influence—that is, lobby—government officials, in *Florida Ass'n of Professional Lobbyists v. Division of Legislative Information Services of the Florida Office of Legislative Services* (“*FAPLI v. Division*”).⁶ By rejecting the lobbyists' void-for-vagueness and related overbreadth challenges under the First Amendment, the court declined to impose unnecessarily technical linguistic standards for unwary legislators trying to maintain, or perhaps restore, public confidence in government by demanding disclosure and limiting the influence of money in government.⁷

The *FAPLI v. Division* decision and the related Florida lobbying laws⁸ are noteworthy because, leaving aside a bit of harmlessly inartful legislative drafting, the Eleventh Circuit's reasoning and linguistic rescue of the Florida laws show that a little legislative ambiguity need not be fatal—constitutionally speaking—if courts read statutes as a whole and apply the common understandings of the covered persons (e.g., lobbyists and state officials) as opposed to the common understanding of the average person plainly outside the scope of the relevant law. In fact, a bit of such ambiguity may be just what the doctor ordered when tackling a problem as pervasive and subtle as the influence of lobbyists.⁹ If legislatures are to have a meaningful right of self-defense against the use of wealth to influence government, then they have to be allowed to address direct *and* indirect exercises of influence—even if the latter involves a bit of vague writing. The Florida Legislature essentially

of Lobbying Disclosure Legislation, 19 STAN. L. & POL'Y REV. 69, 103 (2008) (discussing *United States v. Harriss*, 347 U.S. 612 (1954), and *Federal Election Commission v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007), with regard to indirect lobbying of legislatures through grassroots campaigns).

4. See, e.g., *Smith v. Goguen*, 415 U.S. 566, 581 (1974) (“There are areas of human conduct where, by the nature of the problems presented, legislatures simply cannot establish standards with great precision.”).

5. E.g., *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n.6 (1982) (explaining the interrelationships between vagueness and overbreadth arguments in terms of statutory ambiguity that can lead to both); see also Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 75–85 (1960).

6. 525 F.3d 1073, 1075 (11th Cir. 2008).

7. See *id.* at 1079–80.

8. See FLA. STAT. § 11.045 (2008); *id.* § 112.3215.

9. See generally *United States v. Alford*, 274 U.S. 264, 266–67 (1927) (accepting the term “near” with its inherent ambiguity as constitutionally sufficient in a statute prohibiting fires in or near publicly owned forest and similar property, particularly in light of the importance of preventing forest fires).

employed a little ambiguity to get at an ambiguous subject.¹⁰

Although overbreadth and void-for-vagueness arguments often appear in tandem,¹¹ as happened in *FAPLI v. Division*,¹² this Article examines the Eleventh Circuit's void-for-vagueness ruling only and is so limited because the issue of ambiguity lay at the heart of both arguments. The *FAPLI* appellants argued that the Florida lobbying laws, by virtue of their general definitions and structure, could not be understood as a matter of common knowledge and also could not, therefore, be narrowed to apply only to direct communications with covered state officials to influence state policy or legislation.¹³ Somewhat ironically, the appellants complained of vague standards under a law aimed at indirect as well as direct expenditures for lobbying as a way of maintaining their own ability to use vague or indirect modes of influence upon or communication with government officials (i.e., by influencing government indirectly through the public and press).¹⁴ The overbreadth argument, therefore, shared the same root as the void-for-vagueness challenge—ambiguous language.

The decision in *FAPLI v. Division* demonstrates that the inherent malleability of language does not necessarily render a particular sentence or statute useless or constitute a violation of constitutional rights.¹⁵ The dividing line between acceptable and unacceptable ambiguity in legislation is the oft-invoked void-for-vagueness doctrine, which is not the same as simple vagueness or ambiguity.¹⁶ To be void for vagueness there must be something more. The doctrine does not guarantee either mathematical precision or even particularly good, as opposed to passable and contextually understandable, legislative drafting.¹⁷ If a litigant could employ the vagueness doctrine to frustrate the legislature's purpose every time a law used a word or clause capable of multiple, though perhaps stretched, meanings, then the doctrine would be overused to the point of meaninglessness. The limitations upon the doctrine actually strengthen it and its role in the individual's due process rights—particu-

10. *Fla. Ass'n of Prof'l Lobbyists*, 525 F.3d at 1080 ("We have made clear that the state has a compelling interest 'in self-protection in the face of coordinated pressure campaigns' directed by lobbyists." (quoting *Fla. League of Prof'l Lobbyists, Inc. v. Meggs*, 87 F.3d 457, 460–61 (11th Cir. 1996)) (internal quotation marks omitted)).

11. *See, e.g., Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494–95 (1982).

12. 525 F.3d at 1078.

13. Initial Brief of Appellants at 31–38, *Fla. Ass'n of Prof'l Lobbyists*, 525 F.3d 1073 (No. 07-10435-BB), 2007 WL 1379347.

14. *Id.* at 34–35.

15. 525 F.3d at 1079–80.

16. *See Vill. of Hoffman Estates*, 455 U.S. at 494 n.6.

17. *See James Bopp, Jr. & Richard E. Coleson, Webster, Vagueness and the First Amendment*, 15 AM. J.L. & MED. 217, 218–20 (1989).

larly when First Amendment rights are at stake.¹⁸

Context was the saving grace for the legislation in *FAPLI v. Division*, and that context came from the statute as a whole and the common understanding not of the common man, but of the common person covered by the new laws—state officials as well as lobbyists and their clients.¹⁹ In three sections this Article examines the decision in *FAPLI v. Division* as a means of understanding the void-for-vagueness doctrine in cases in which the statutory language under constitutional attack was arguably vague in a general sense, but reasonably clear to members of the specialized class of persons covered by the laws. First, the Article briefly examines the history of the vagueness doctrine and the support for a contextual analysis of statutory language that might otherwise appear to be vague. Second, the Article examines the Florida statutory provisions in question and the challenges brought by the lobbyists in *FAPLI v. Division*. Third, the Article examines the holding of the Eleventh Circuit and its analysis and application of the void-for-vagueness doctrine.

The Article concludes that the court correctly took into account the context of the lobbying laws as a whole, including all sections of the acts as well as the fact that the statutory standards were “explicit . . . for those who [would] apply them,” while giving people of ordinary intelligence a reasonable chance to know what conduct was covered.²⁰ The fact that the court rejected the vagueness challenge while also rejecting an overbreadth challenge and reaffirming a previous ruling recognizing the state’s compelling interest in self-protection against lobbying pressure²¹ signals a general receptiveness to such lobbying regulations, even if written without mathematical precision.

I. THE CONTEXTUAL APPROACH TO VOID-FOR-VAGUENESS CHALLENGES

The void-for-vagueness doctrine fills the void between the art of language and the precision of mathematics in legislative interpretation. If language is naturally susceptible to some ambiguity, courts must ask when the line is crossed between that which is constitutionally acceptable and that which is not.²² Obviously, not every ambiguity is cause for judicial rejection of a statute.²³ The void-for-vagueness doctrine arose in

18. See *United States v. Williams*, 128 S. Ct. 1830, 1845 (2008).

19. See *Fla. Ass’n of Prof’l Lobbyists*, 525 F.3d at 1080.

20. *Id.* at 1079.

21. *Id.* at 1080.

22. See, e.g., *Williams*, 128 S. Ct. 1830.

23. *Id.*

the context of criminal statutes, and it has been regularly cited as a key defense of liberty against laws written so vaguely that one would have no fair notice of what was prohibited and no defense against purely arbitrary application of the law by government officials.²⁴

Not all Supreme Court decisions addressing the doctrine have been consistent with one another or even entirely clear about the doctrine's limits and defenses.²⁵ While its importance in the context of criminal prosecutions is undisputed, the doctrine has extraordinary importance in cases involving laws and prosecutions limiting a person's exercise of fundamental liberties, such as the rights protected by the First Amendment.²⁶ A short review of the development of the doctrine is instructive because it reveals some tension between the urge to subject statutes to a searching and narrow—almost grammatically stringent—analysis of statutory language and a looser, contextual approach that gives a legislature a bit more leeway. By demanding the former, one is searching for the comfort that comes from certitude and the denial of discretion. By using the latter, one seeks to empower the legislature at the risk of greater discretion on the part of enforcement authorities and less notice to covered persons. The history of the doctrine shows that neither approach has ever been entirely ascendant because each has those obvious advantages and disadvantages.

Among the early Supreme Court invocations of the void-for-vagueness doctrine as a means of protecting individual liberty is the Court's decision in *United States v. Reese*.²⁷ In this 1875 decision, the Court focused on two interests: fair notice and the separation of powers between the legislative and judicial branches.²⁸ In the context of a federal prosecution of two Kentucky elections officials who refused to count the vote of an African American citizen, the Supreme Court

24. See Andrew E. Goldsmith, *The Void-for-Vagueness Doctrine in the Supreme Court, Revisited*, 30 AM. J. CRIM. L. 279, 280 (2003); John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 189, 196–197 (1985); Note, *supra* note 5, at 75.

25. Goldsmith, *supra* note 24, at 281.

26. See, e.g., *Grayned v. City of Rockford*, 408 U.S. 104 (1972).

27. 92 U.S. 214 (1875). This decision is thought to be the earliest use of the void-for-vagueness doctrine—though not by that specific name—by the Supreme Court. Goldsmith, *supra* note 24, at 280 n.1. However, an earlier case, to which the Court in *Reese* cites, actually dealt with questions of arguments regarding legislative ambiguity and the construction of law based on both legislative intent as well as a statute taken as a whole. *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 105 (1820). The logic employed in this earlier case is worth examining because, while it did not involve in a constitutional challenge to the statute, it did involve the attempted creation of an ambiguity based on legislative intent to change the scope of a criminal law, an attempt rejected by the Court because to the degree such intent may have existed, it contradicted the otherwise plain language of the statute. *Id.* Interestingly, the Court in *Wiltberger* examined the entire statute as a means of interpreting sections of it in context. See *id.* 93–105.

28. *Reese*, 92 U.S. at 220–21.

trumpeted the importance of fair notice regarding what conduct was prohibited:

If the legislature undertakes to define by statute a new offence, and provide for its punishment, it should express its will in language that need not deceive the common mind. Every man should be able to know with certainty when he is committing a crime.²⁹

The Court also declined to impose a limiting construction on the statute so generally written because that "would, to some extent, substitute the judicial for the legislative department"³⁰ and would be tantamount to the creation of new law by the Court, not enforcement of a law.

The Court in *Reese* was construing a "penal" statute—one that could be used to take away a person's liberty—and thus one might expect little tolerance for ambiguity in drafting. Judicial insistence upon fair notice and the avoidance of statutes with double meanings would seem quite unobjectionable. But this early, significant decision invoking notice as a value deserves a closer look. The Kentucky elections inspectors were charged under a federal law intended by Congress to address the denial of the vote to African Americans during the Reconstruction Era and under the Fifteenth Amendment.³¹ The problem for the Court was that two sections of that statute made no mention of limiting the scope of the prohibited conduct to violations based on race, color, or prior servitude—the authorized bases for such federal laws under the Fifteenth Amendment.³² The inspectors were prosecuted under those two sections.³³ Other sections of the statute, including a statement of congressional intent, specifically referred to violations on the basis of a voter's race, color, or prior servitude,³⁴ but the Court narrowly construed the sections authorizing punishment to avoid use of such general language in ways not authorized by the Constitution and not intended by Congress.³⁵

One could argue, as the dissent essentially did,³⁶ that this interpretation, while arguably laudable for its concern for liberty and precise laws, was actually quite crabbed, perhaps even hostile to civil rights for African Americans, and overly concerned with the technical issues of drafting—issues that could have been resolved through judicial construction in light of the clear intent of Congress and the other sections of

29. *Id.* at 220.

30. *Id.* at 221.

31. *See id.* at 216–18.

32. *Id.* at 216–17.

33. *Id.* at 215.

34. *Id.* at 216.

35. *Id.* at 219.

36. *See id.* at 256 (Clifford, J., dissenting).

the same law. As unfortunate as the result may have been, the motivation behind the majority's decision need not be determined to understand that the decision might support technical and narrow linguistic analyses to defeat statutes for which the intent and aim of the legislature were clear, though not well expressed.

The Court's concern for formal separation of powers declined in emphasis in later cases as the risk of arbitrary enforcement decisions under vaguely written statutes became a key concern.³⁷ With this transition, the Court began taking a more conscious and open look at subsections of statutes in the context of the statute as a whole. In *Grayned v. City of Rockford*, for example, the Court addressed an anti-noise ordinance that provided city officials (including the local police) with some degree of flexibility to protect local schools from diversionary noises made from an "adjacent" location while school was in session.³⁸ The Court concluded that it was "clear what the ordinance as a whole prohibit[ed]"³⁹ and thus rejected the void-for-vagueness challenge.⁴⁰ The Court acknowledged the need to examine the law for any "broad invitation to subjective or discriminatory enforcement," but found none given the language of the statute as a whole and concluded that the statute had "given fair warning as to what is prohibited."⁴¹ The fact that this anti-noise statute specifically dealt with a concrete, factual, and easily understood real-world setting or context (i.e., noise near a school in session) allowed the Court to easily distinguish it from more general anti-noise or preservation-of-the-peace statutes that might be applied in any number of unforeseeable settings.⁴² In other words, the Court in *Grayned* concluded that context counts—both in terms of fair warning to covered persons and fair limits upon enforcement discretion.

The importance of context became even clearer with two cases that followed *Grayned*, though the fact that a sufficient context was held to be lacking in those cases led the Court to strike down the subject statutes as impermissibly vague. In *Smith v. Goguen*, the Court struck a Massachusetts flag-abuse statute that imposed criminal sanctions on anyone who "publicly mutilates, tramples upon, defaces or treats contemptuously the flag of the United States."⁴³ The Court noted that in light of "today's tendencies to treat the flag unceremoniously," the notice or fair-warning standard was not satisfied, but the Court added that even

37. Goldsmith, *supra* note 24, at 284–88.

38. 408 U.S. 104, 110–11 (1972).

39. *Id.* at 110.

40. *Id.* at 114.

41. *Id.* at 113–14.

42. *Id.* at 110–12.

43. 415 U.S. 566, 569 n.3 (1974).

more troubling was the lack of any standards for enforcement that might avoid pursuit by police, prosecutors, and juries of their "personal predilections."⁴⁴ In so doing the Court acknowledged a key difference in terms of context:

We recognize that in a noncommercial context behavior as a general rule is not mapped out in advance on the basis of statutory language. In such cases, perhaps the most meaningful aspect of the vagueness doctrine is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement. It is in this regard that the statutory language under scrutiny has its most notable deficiencies.⁴⁵

The Court further emphasized the importance of context and the risk of arbitrary enforcement nearly ten years later in *Kolender v. Lawson*, a case striking a California disorderly conduct law providing that any person "[w]ho loiters . . . without apparent reason or business and who refuses to identify himself and to account for his presence when requested by any peace officer so to do, if the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification."⁴⁶ The Court also noted that, as construed by the California courts, the state law also required that an individual produce "credible and reliable" identification when requested by the police officer.⁴⁷ The Court held that, although due process did not require absolute clarity, this statute could have been written more precisely and had to be so written because it did not allow merely for some inevitable discretion in enforcement decisions, but actually "encourage[d] arbitrary enforcement by failing to describe with sufficient particularity what a suspect must do in order to satisfy the statute."⁴⁸

The *Kolender* decision essentially rested on the lack of any context in the statute. One could not argue that in the context of loiterers and police there was any common understanding of what credible identification meant. Without definitions, even poorly written definitions, the stat-

44. *Id.* at 574–75.

45. *Id.* at 574 (footnote omitted).

46. 461 U.S. 352, 353 n.1 (1983) (citing CAL. PENAL CODE § 647(e) (West 1970)).

47. *Id.* at 359–60.

48. *Id.* at 361; *see also* *United States v. Petrillo*, 332 U.S. 1, 7–8 (1947) (recognizing that while the Constitution "erected procedural safeguards to protect against conviction for crime except for violation of laws which have clearly defined conduct thereafter to be punished" it "does not require impossible standards"); *Precious Metals Assocs., Inc. v. Commodity Futures Trading Comm'n*, 620 F.2d 900, 907 (1st Cir. 1980) (noting that "language of proscription is not deficient if it 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices'" (quoting *Jordan v. De George*, 341 U.S. 223, 231–32 (1951))).

ute left law enforcement officials with no standards for deciding whether a suspect had complied with the identification requirement and thus not only failed to inform suspects of what was necessary, but also encouraged officers to make their own law on the spot.⁴⁹

The conscious and open consideration of statutory context rejects hypertechnical or overly parsimonious approaches to meaning and language. In *Hill v. Colorado*, for example, the Supreme Court specifically decried the proffered "hypertechnical theories" about the potential interpretations of a state statute making it unlawful for any person within 100 feet of a health-care facility's entrance to approach, knowingly and without consent, within eight feet of a person to hand out a leaflet, display a sign, or speak with that person to protest, counsel, or educate that person.⁵⁰ Instead the Court looked at the statute as a whole to gauge the clarity or fair notice of its prohibitions "in the vast majority of its intended applications" and its guidance to law enforcement authorities.⁵¹ The Court concluded that, while one could imagine various hypothetical problems, the scienter requirement and specificity of the statute left little risk of a misunderstanding of "any of those common words" or unreasonable exercises of judgment by police.⁵²

The concern for common understanding by ordinary citizens makes a great deal of sense when evaluating a penal law of general application to ordinary persons.⁵³ Statutes relevant to a particular subset of the general population should be judged, however, according to the understanding common of members of that subset (e.g., profession or trade) because it is the meaning understood by those persons that will be relevant.⁵⁴ The danger of placing too much emphasis on common understanding and common terms is that it can invite general vagueness arguments in specialized contexts.⁵⁵ Although the common understanding is the form of the standard employed by courts in many cases, those cases are in fact cases involving common words and common application.⁵⁶ With statutes aimed at more specialized settings, such as com-

49. *Kolender*, 461 U.S. at 360–61.

50. 530 U.S. 703, 707–08, 733 (2000).

51. *Id.* at 733 (quoting *United States v. Raines*, 362 U.S. 17, 23 (1960)).

52. *Id.* at 732–33.

53. See Jeffries, *supra* note 24, at 205–12.

54. See, e.g., *Go Leasing, Inc. v. Nat'l Transp. Safety Bd.*, 800 F.2d 1514, 1525 (9th Cir. 1986) (discussing federal commercial aircraft leasing regulations); *United States ex rel. Shott v. Tehan*, 365 F.2d 191, 197–98 (6th Cir. 1966) (referring to common commercial practices in securities industry); *Empire State Rest. & Tavern Ass'n v. New York*, 360 F. Supp. 2d 454, 460–62 (N.D.N.Y. 2005) (discussing smoking regulations in commercial context of bars and food-service establishments).

55. See, e.g., Initial Brief of Appellants, *supra* note 13, at 33–35.

56. See *Grayned v. City of Rockford*, 408 U.S. 104, 110–12 (1972) (discussing the subject of noise and disturbances near a school—a matter of common interpretation and application).

mercial or business dealings, the relevant common understanding is not that of the common person generally, but that of the common person involved in such specialized matters. In analyzing these statutes for vagueness defects, therefore, the context is logically different. The Supreme Court addressed this issue in an almost off-handed manner when it rejected a vagueness challenge against a Maryland law against certain business activities on Sundays: "We believe that business people of ordinary intelligence in the position of appellants' employer would be able to know what exceptions are encompassed by the statute either as a matter of ordinary commercial knowledge or by simply making a reasonable investigation."⁵⁷ Therefore, three threshold questions must be asked in evaluating vagueness challenges against specialized statutes: (1) Who are the covered persons under the statute (as well as the relevant enforcement authorities); (2) would the covered persons and relevant enforcement authorities know who is whom; and (3) would both covered persons and enforcement authorities, with their specialized knowledge, understand the statute so that covered persons had fair warning and enforcement authorities adequate guidance?

II. FLORIDA'S 2005 LEGISLATION AND THE LOBBYISTS' FIRST AMENDMENT CHALLENGE

The desire of some progressive legislators and reformers to adopt rules requiring disclosure and limiting certain forms of conduct and expenditures for lobbying has led to a multiplicity of state regulatory statutes as well as legal challenges.⁵⁸ Florida reentered the fray when, in a special legislative session in December 2005, the legislature passed, and governor ultimately signed, Chapter 2005-359, later codified as sections 11.045 and 112.3215 of the Florida Statutes.⁵⁹ The two laws substantially increased the disclosure or reporting requirements applicable to lobbyists and prohibited payments (defined precisely) by lobbyists to any member or employee of the legislature as well as any agency officials, employees, or members of the executive branch.⁶⁰ The two laws drew swift challenges by lobbying interests in Florida.⁶¹

57. *McGowan v. Maryland*, 366 U.S. 420, 428 (1961).

58. See, e.g., Steve Goldstein, *Lobbying Laws Are Stricter at the State Level*, PHILA. INQUIRER, Mar. 3, 2006, at A6; James C. McKinley, Jr., *Albany Looks Again at Lobbyist Disclosure Rules*, N.Y. TIMES, June 5, 2003, at B6; Lucy Morgan, *Florida Rules for Lobbyists Flunk*, ST. PETERSBURG TIMES, Aug. 13, 2005, at 1A.

59. See Fla. Ass'n of Prof'l Lobbyists v. Div. of Legislative Info. Servs., 525 F.3d 1073, 1075 (11th Cir. 2008).

60. See Lucy Morgan & Connie Humburg, *Price of Sway in Capital: \$200M*, ST. PETERSBURG TIMES, Feb. 25, 2007, at 1A (reflecting on the impact of the Act and 2006 lobbying fees in the aggregate).

61. See Steve Bousquet, *Dutch Treat or a Trick?*, ST. PETERSBURG TIMES, Feb. 19, 2006, at

To understand the heart of FAPLI's void-for-vagueness argument the place to begin is, quite naturally, the language of the two statutes. The difference between the two is essentially a question of applicability: Section 11.045 applies to legislative lobbying activities,⁶² and section 112.3215 applies to executive lobbying activities.⁶³ The substantive provisions and language of the two are otherwise essentially the same. The primary elements under constitutional attack included the expenditure prohibition, essentially a rule against lobbyists giving anything of value to the covered state officials for lobbying purposes,⁶⁴ and the disclosure rule, requiring annual compensation reports by lobbying firms showing, among other things, the amount paid to the firm by each principal (i.e., client) as well as any relevant subcontractual relationships.⁶⁵

Five key statutory definitions must be examined closely to understand the prohibition of payments by lobbyists to legislators (or other state legislative or executive employees) as well as the disclosure requirements. First, there are two fundamental and basically parallel definitions related to the money or value the legislature sought to reach. Both laws define "compensation" as "a payment, distribution, loan, advance, reimbursement, deposit, salary, fee, retainer, or anything of value provided or owed to a lobbying firm, directly or indirectly, by a principal for any lobbying activity."⁶⁶ Both laws define "expenditure" as "a payment, distribution, loan, advance, reimbursement, deposit, or anything of value made by a lobbyist or principal for the purpose of lobbying."⁶⁷ The definitions exclude certain political contributions covered by other laws and related matters. If one thinks of lobbying as a closed system, the former addresses value flowing to the lobbyist from the client and the latter addresses money, perhaps of the same origin, flowing from either the client or the lobbyist to a third party to accomplish the aims of the lobbying effort. The references in each definition to lobbying effort or activity effectively limited the scope and applicability of the laws to what the legislature was trying to address: influence accomplished through lobbying.

Second, the two laws define the activity at issue, but do so some-

1P; Lucy Morgan, *Haggling Ahead on Lobbyist Reporting*, ST. PETERSBURG TIMES, Mar. 31, 2005, at 6B; Lucy Morgan, *Lobbyists Fume over Portions of New Rules*, ST. PETERSBURG TIMES, May 5, 2005, at 5B.

62. FLA. STAT. § 11.045 (2008).

63. *Id.* § 112.3215.

64. *Id.* §§ 11.045(4)(a), 112.3215(6)(a).

65. *Id.* §§ 11.045(3)(a), 112.3215(5)(a).

66. *Id.* §§ 11.045(1)(b), 112.3215(1)(c).

67. *Id.* §§ 11.045(1)(d), 112.3215(1)(d).

what differently. The law aimed at lobbying of executive branch officials defines "lobbies" as follows:

"Lobbies" means seeking, on behalf of another person, to influence an agency with respect to a decision of the agency in the area of policy or procurement or an attempt to obtain the goodwill of an agency official or employee. "Lobbies" also means influencing or attempting to influence, on behalf of another, the Constitution Revision Commission's action or nonaction through oral or written communication or an attempt to obtain the goodwill of a member or employee of the Constitution Revision Commission.⁶⁸

The operative language here is not merely the use of "influence," but the fact that the effort to influence or obtain goodwill must occur "on behalf of another person" and not merely on behalf of oneself. The law aimed at lobbying before the legislature does not define "lobbies," but defines "lobbying" instead: "'Lobbying' means influencing or attempting to influence legislative action or nonaction through oral or written communication or an attempt to obtain the goodwill of a member or employee of the Legislature."⁶⁹ This language does not limit the activity to that which is performed on behalf of another person, but the definition of "lobbyist" does so.⁷⁰ Of particular interest in the definition of "lobbying" in section 11.045 is the reference to "an attempt to obtain the goodwill" of the covered officials because this language reflects a concern broader than communications. The sentences are not models of clarity, but a logical construction would designate "an attempt to obtain goodwill" as an alternative covered act of influence—that is, an act in addition to covered communications.

Third, the laws define the covered actors. The section dealing with the executive branch defines "lobbyist" as "a person who is employed and receives payment, or who contracts for economic consideration, for the purpose of lobbying, or a person who is principally employed for governmental affairs by another person or governmental entity to lobby on behalf of that other person or government entity."⁷¹ This definition continues by excluding from its scope attorneys representing clients in judicial or formal administrative proceedings, confidential informants, government employees acting in the normal course of their positions, and certain people involved in specified contract procurement matters.⁷² The parallel section aimed at lobbying before the legislature is the same

68. *Id.* § 112.3215(1)(f).

69. *Id.* § 11.045(1)(f).

70. *Id.* § 11.045(1)(h).

71. *Id.* § 112.3215(1)(h).

72. *Id.*

but does not exclude attorneys, as does the preceding section.⁷³ Both laws define a "lobbying firm" to be a "business entity, including an individual contract lobbyist, that receives or becomes entitled to receive any compensation for the purpose of lobbying, where any partner, owner, officer, or employee of the business entity is a lobbyist."⁷⁴ Both define "principal" as "the person, firm, corporation, or other entity which has employed or retained a lobbyist."⁷⁵ The executive branch law adds a qualifier to its definition of the covered agency officials or employees of the state by limiting applicability to those required by law to file public financial disclosure forms.⁷⁶

In addition to requiring registration of lobbyists, establishing registration fees, providing for audits, and specifying fines and complaint procedures,⁷⁷ the laws allow for the adoption of additional rules by the respective chambers in the case of the legislature or by the Commission on Ethics in the case of the executive branch officials.⁷⁸ At the heart of both laws is the required disclosure of payments to lobbying firms for lobbying and the effort to cut off the flow of money or anything of value from lobbyists and principals to the covered officials. Lobbying firms file quarterly reports showing lobbying "compensation"—in total and by individually identified principals.⁷⁹ While the ambiguities, if any, in terms of the disclosure requirement largely relate to the above definitions and not any additional operative language requiring disclosure, the same cannot be said for expenditure prohibitions. Section 112.3215(6)(a), for example, states, "[n]otwithstanding s. 112.3148, s. 112.3149, or any other provision of law to the contrary, no lobbyist or principal shall make, directly or indirectly, and no agency official, member, or employee shall knowingly accept, directly or indirectly, any expenditure."⁸⁰ A model of linguistic clarity this sentence is not. Obviously, word order matters in terms of clarity to the reader. An ordinary person, perhaps one not involved in governmental affairs or the business of lobbying or being lobbied, might wonder if this language means that no lobbyist or principal can spend any money to lobby at all, whether

73. *Id.* § 11.045(1)(h).

74. *Id.* §§ 11.045(1)(g), 112.3215(1)(g).

75. *Id.* §§ 11.045(1)(i), 112.3215(1)(i).

76. *Id.* § 112.3215(1)(b).

77. *Id.* §§ 11.045(3), (5)–(9); 112.3215(7)–(14).

78. *E.g., id.* §§ 11.045(3), 11.045(6), 11.045(7), 112.3215(5)(d), (14).

79. *Id.* §§ 11.045(3)(a), 112.3215(5)(a).

80. *Id.* § 112.3215(6)(a). The language in the parallel provision covering lobbying before the legislature is the same but with one caveat allowing members and employees of the legislature to accept "floral arrangements or other celebratory items given to legislators and displayed in chambers the opening day of a regular session." *Id.* § 11.045(4)(a). Apparently, opening day is a cause for celebration for some people, particularly florists or their lobbyists.

paid to an agency official or not, and also means, as a separate matter, that no agency official may knowingly accept such money. The latter application would seem unobjectionable in light of the law's purpose, while the former would seem quite extreme, if not absurd, in light of the fact that nothing in the law purports to make lobbying illegal—a proposition that would result in an immediate and serious constitutional challenge. If one were to interpret the use of the conjunctive “and” to mean that a lobbyist or principal could not make any expenditure for the purpose of lobbying, whether or not those expenditures were paid to and accepted by government officials, then that interpretation would amount to a virtual prohibition of lobbying activity. No one has seriously suggested the Florida Legislature intended such an extreme result. One could easily imagine an elementary school language arts teacher insisting her or his students revise the sentence and practice a bit more if they wanted to pass the class, not to mention Florida's Comprehensive Assessment Test (FCAT).⁸¹

The expenditure sections could have been improved by at least being more specific. For example, the legislature could have written that no lobbyist or principal shall make or offer, directly or indirectly, any expenditure to any agency official, member, or employee, and no agency official, member, or employee shall knowingly solicit or accept, directly or indirectly, any expenditure. Admittedly, this revision also tackles the possible question of attempts, but with or without those additional words, it would have cleaned up the ambiguity left hanging in what was actually adopted. One might argue that other terms in the revised hypothetical or actual laws are also too vague, but those arguments essentially complain about the inherent ambiguity of language, not the basic drafting or sentence structure of the laws.

FAPLI challenged the expenditure prohibition and the disclosure requirements of both statutes on several grounds, including three Florida constitutional challenges—separation of powers, failure to comply with requirements for passage of legislation in a special session, and a violation of the state supreme court's exclusive jurisdiction to regulate lawyers—and a combined void-for-vagueness and overbreadth challenge under the U.S. Constitution, relying on the argument that lobbying amounts to speech and thus implicates a fundamental, First Amendment right.⁸²

81. Although the FCAT tests rather minimal levels of achievement in elementary and secondary schools, basic writing skills are required. *See, e.g.,* Joni James, *New Law Allows Some FCAT-Failing Students To Graduate*, MIAMI HERALD, June 21, 2003, at 5B; *State Sued over FCAT Graders*, MIAMI HERALD, Apr. 25, 2006, at 7B. If nothing else, the controversy and litigation over these lobbying laws demonstrate the need for solid instruction in the state's schools.

82. Initial Brief of Appellants, *supra* note 13, at 31–38.

Leaving aside the state constitutional arguments, as did the Eleventh Circuit,⁸³ and focusing on the vagueness and overbreadth arguments, it would appear that these two arguments were largely driven by the use of the word "indirect" or "indirectly" in two key provisions—one aimed at disclosure and the other aimed at prohibiting payments to state officials.⁸⁴ The essence of this attack boiled down to the following: (1) The laws rely on "standards that a person of common intelligence" would not understand; (2) these vague standards, presumably by including the use of the word "indirect," "allow for the unbridled discretion" by the enforcement authorities within the legislative and executive branches for their respective officials and lobbyists; and (3) the laws broadly sweep in speech not directly aimed at legislators and other covered state officials.⁸⁵ Appellants thus argued the legislature drafted the statute so poorly that no one could know what the expenditure prohibition and disclosure requirement covered—resulting in a lack of fair notice or possible arbitrary enforcement, or both—and that the disclosure requirement could be read broadly to cover speech to the public or press by a lobbyist that was made on behalf of another, but not for expressly advocating action by the legislature or other covered state officials.

III. THE ELEVENTH CIRCUIT REELS IN VAGUE VAGUENESS ARGUMENTS UNDER THE FIRST AMENDMENT IN THE CONTEXT OF STATE REGULATION OF LOBBYISTS

The court addressed the FAPLI challenge in two steps. First, it certified to the Florida Supreme Court the state law questions regarding state separation of powers, whether the Florida House of Representatives used the proper procedure for passing the Act during a special session, and whether the Act, by regulating the lobbying activities of lawyers, violated the exclusive jurisdiction of the Florida Supreme Court under the state constitution to regulate lawyers.⁸⁶ Second, it addressed substan-

83. Fla. Ass'n of Prof'l Lobbyists v. Div. of Legislative Info. Servs., 525 F.3d 1073, 1077–78 (11th Cir. 2008).

84. FLA. STAT. §§ 11.045(1)(b), 11.045(4)(a), 112.3215(1)(c), 112.3215(6)(a). The latter in each context is the prohibition of payments of expenditures to the covered officials—subsections that themselves use these terms. The former in each context is the definition of "compensation," which must be plugged into the respective section requiring disclosure. *Id.* §§ 11.045(3), 112.3215(5). It is these definitions that use the terms "direct" and "indirect."

85. Initial Brief of Appellants, *supra* note 13, at 31–38.

86. Fla. Ass'n of Prof'l Lobbyists, 525 F.3d at 1077–78 (concluding that Florida law was not sufficiently established for the court to "determine with confidence" the constitutionality of the Act under the Florida constitution); *see also* Fla. Ass'n of Prof'l Lobbyists v. Div. of Legislative Info. Servs., No. SC08-791, 2009 Fla. LEXIS 403 (Fla. Mar. 19, 2009) (rejecting all three state law challenges and upholding the Act under the Florida Constitution).

tively the vagueness and overbreadth challenges and rejected both.⁸⁷

With regard to vagueness the Eleventh Circuit focused on FAPLI's argument that the use of terms such as "expenditure" or "direct" and "indirect" left the statutes so poorly defined "that a person of common intelligence must guess at their meaning and that, as a result, the Act allows for unbridled discretion in its enforcement."⁸⁸ The court addressed the heart of the argument, as well as the most obvious instance of questionable legislative drafting, by directly looking at the language of the expenditure prohibition—the language that might appear to prohibit all expenditures by lobbyists for lobbying as well as the acceptance of any such funds by state officials. Here the court relied on the use of the conjunctive "and" to mean as a matter of common sense that the prohibition applied not to the two activities separately to prohibit both individually and independently of one another, but only to the two in combination—that is, a prohibition of lobbying expenditures to state officials.⁸⁹ Any other interpretation would have been illogical or at least contrary to common sense. Similarly, the court accepted the use of the term "indirect" as one that in this context the covered individuals would understand to "appl[y] to expenditures or compensation paid through a third party."⁹⁰

The Eleventh Circuit's analysis of the overbreadth argument of FAPLI followed a fairly standard path of constitutional analysis, but the court revealed by its logic that the overbreadth challenge rested in part on FAPLI's general vagueness argument.⁹¹ FAPLI argued that by requiring disclosure of all expenditures, including indirect expenditures, the statute swept into its ambit protected speech by lobbyists who were merely communicating with the public or press, for example, and not with legislators or other covered state officials.⁹² Again, while the statutory language could have been clearer, the court deflected this argument by pointing out that the provision requiring disclosure of all fees and payments to lobbyists by their clients used the term "compensation," which the statute defined to include only those payments, direct or indirect, to a lobbying firm for "lobbying activity," and that the statute also define "lobbies"—presumably as the root of "lobbying activity"—to

87. *Fla. Ass'n of Prof'l Lobbyists*, 525 F.3d at 1078–80.

88. *Id.* at 1078.

89. *Id.*

90. *Id.* at 1079.

91. *Id.*; see also *United States v. Williams*, 444 F.3d 1286, 1305 (11th Cir. 2006), *rev'd on other grounds*, 128 S. Ct. 1830 (2008) (recognizing that, while distinct, the vagueness and overbreadth doctrines are logically related because both often involve interpretation of unclear language).

92. Initial Brief of Appellants, *supra* note 13, at 35–37.

mean seeking to influence the covered state officials in terms of policy or procurement or to obtain their goodwill.⁹³

As with much of the vagueness argument, the court's rejection of the overbreadth argument turned to a significant degree on the interpretation of the term "indirect" and parsing of defined terms. Vague and convoluted drafting effectively handed *FAPLI* not one, but two bites at this apple. In this regard, some linguistic spadework allowed the court to uncover a definition of "lobbying activity" that limited the disclosure requirement to efforts to influence the covered officials and not merely to communicate with the public or press. Once the statute was so confined, it implicated the state's "compelling interest in 'self-protection' in the face of coordinated pressure campaigns directed by lobbyists" and thus assured the statute's constitutionality.⁹⁴ The court thus salvaged the statute by reading it as a whole and confining its application only to that which the state had a compelling interest in securing: the disclosure of payments to lobby state officials either directly or indirectly and the prohibition of payments by lobbyists directly or indirectly to covered state officials—as well as their knowing acceptance of such payments—for lobbying purposes.

A comparison of the Eleventh Circuit's vagueness analysis in *FAPLI v. Division* with its vagueness analysis in *United States v. Williams*,⁹⁵ which was later reversed,⁹⁶ shows even more plainly the importance of a contextual approach to statutes as a whole when parsing seemingly vague terms. In *Williams*, the issue was a federal law directed at the knowing advertising, promotion, presentation, distribution, or solicitation of child pornography or, in other words, speech related to transactions in child pornography.⁹⁷ The Eleventh Circuit concluded that the federal law was "not at all clear what [was] meant by promoting or soliciting material 'in a manner that reflects the belief, or that is intended to cause another to believe' that touted or desired material contains illegal child pornography."⁹⁸ Noting a heightened concern for clarity in a criminal statute implicating First Amendment rights, the Eleventh Circuit concluded this pandering law was so devoid of context that it could apply to "innocent baby-in-the-bubbles snapshots or candid stills of the family Rottweiler in a No. 10 washtub" or some "chronic forwarder of

93. *Fla. Ass'n of Prof'l Lobbyists*, 525 F.3d at 1079–80.

94. *Id.* at 1080 (internal quotation marks omitted).

95. *Williams*, 444 F.3d at 1305–07.

96. *See Williams*, 128 S. Ct. 1830.

97. *See Williams*, 444 F.3d at 1288–89. The federal law at issue in *Williams* was the pandering provision of the PROTECT Act, 18 U.S.C. § 2252A(a)(3)(B) (2006).

98. *Williams*, 444 F.3d at 1306 (quoting 18 U.S.C. § 2252A(a)(3)(B)).

cute photos with racy tongue-in-cheek subject lines.”⁹⁹

The Supreme Court, in a seven-to-two decision, disagreed on several grounds, not the least of which was the question of any statutory context that might shed meaning on the restrictions.¹⁰⁰ Dismissing the value of unlikely hypothetical cases or imagined close cases that a jury would resolve by weighing the evidence according to the “requirement of proof beyond a reasonable doubt,”¹⁰¹ the Court looked for and found the Eleventh Circuit’s missing context because the statute applied only to those persons who believed, spoke in a manner reflecting a belief, or intended to cause another to believe that the pictures actually showed children engaged in “sexually explicit conduct” as defined by the law.¹⁰² Further, the Court rejected the use of close cases to inject ambiguity in a statute that is as precise as language will reasonably permit:

What renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is. Thus, we have stuck down statutes that tied criminal culpability to whether the defendant’s conduct was “annoying” or “indecent”—wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings.¹⁰³

In other words, the Court concluded the pandering law gave law enforcement officials no more discretion than did any other law against “fraud, conspiracy, or solicitation.”¹⁰⁴ Having stripped away questions of fact that might result in close cases for a jury, the Court held the law taken as a whole was not vague about what or who was covered and thus not void for vagueness.¹⁰⁵

The decisions in *Williams* and *FAPLI v. Division* are not inconsistent in terms of the importance of context in determining whether the inherent ambiguities of statutory language are fatal constitutionally. Both cases implicated First Amendment rights. Both involved laws with detailed definitions. Both involved laws that arguably could have been a

99. *Id.* at 1306–07.

100. *Williams*, 128 S. Ct. at 1846 (“Close cases can be imagined under virtually any statute.”).

101. *Id.*

102. *Id.*; see also 18 U.S.C. § 2256(2)(A) (defining “sexually explicit conduct” as “actual or simulated—(i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; (ii) bestiality; (iii) masturbation; (iv) sadistic or masochistic abuse; or (v) lascivious exhibition of the genitals or pubic area of any person”).

103. *Williams*, 128 S. Ct. at 1846. Note also the Court’s citation of *Ward v. Rock Against Racism* for the proposition that “perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity.” *Id.* at 1845 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989)).

104. *Id.* at 1846.

105. *Id.*

bit clearer in writing or structure. The difference was that in *Williams* the Eleventh Circuit discounted or dismissed the overall context of the pandering law by focusing on possible misunderstandings by would-be innocent senders of cute baby pictures rather than focusing on the more relevant context of sexually explicit conduct and the intentions of persons who deal or attempt to deal in such material involving children. In *FAPLI v. Division*, the Eleventh Circuit found the relevant context: lobbyists, their principals, the legislature, and other covered state officials or employees—people who know influence peddling as surely as peddlers of child pornography know sexually explicit conduct.

CONCLUSION

The void-for-vagueness doctrine is a key defense against unfair and arbitrary laws because the doctrine requires enough legislative clarity to provide fair notice of the prohibited conduct and to avoid, or at least not invite, arbitrary enforcement. The doctrine was never meant to be a judicially imposed equivalent of a technical writing examination or basis for the conjuring of unlikely hypothetical problems that, while imaginable given the inherent malleability of language, obviously exceed the express context of a statute. The Eleventh Circuit employed this common sense approach to the vagueness challenge in *FAPLI v. Division* by concluding that a fair reading of the definitions and other sections of the lobbying laws left no unconstitutional ambiguity about who or what was covered. Although one might have to read the statutes a few times to be clear about the meaning, that meaning should be clear to those involved and would in all likelihood come as no surprise: Lobbyists and their clients cannot give money or anything of value (directly or indirectly) to covered officials for the purpose of lobbying, those officials cannot accept such things from lobbyists or their clients, and lobbying firms must disclose what they have been paid (directly or indirectly) and by whom to influence covered state agencies and officials or to obtain their goodwill. Perhaps the statutes could have been written more eloquently or clearly, but who ever said legislators need be masters of prose or even particularly literate? Not the Eleventh Circuit, at least not when it comes to lobbyists and state officials who ought to know what the legislators meant.