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Constitutional Law—Fourth Amendment—State V. Allen: An Effective Alternative to Unconstitutional "Safety Checks" on the State's Waters

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CONSTITUTIONAL LAW—FOURTH AMENDMENT—*STATE V. ALLEN*: AN EFFECTIVE ALTERNATIVE TO UNCONSTITUTIONAL “SAFETY CHECKS” ON THE STATE’S WATERS

I. INTRODUCTION

Imagine a group of friends on Lake Hamilton in Hot Springs, Arkansas; it has been a beautiful summer day on the water, but the sun is beginning to set and everyone is heading back to the marina. The friends also decide it is time to call it a day and begin to make their way to the shore when, out of nowhere, another boat being operated by someone under the influence crashes into them at sixty miles per hour, critically injuring everyone on board.

With over 600,000 acres of lakes, 90,000 miles of rivers and streams,¹ and nearly 200,000 boats registered in Arkansas, this scenario, unfortunately, becomes a reality in the state every year.² In the year 2013 alone, there were fifteen deaths across the state due to boating accidents, and the Arkansas Game & Fish Commission listed alcohol as one of the primary causes.³

After the Supreme Court of Arkansas’s holding in *State v. Allen*, which ruled provisions of Arkansas Code Annotated section 27-101-105 unconstitutional,⁴ state law enforcement lost a valuable tool to help combat the problem.⁵ The invalidated statute provided:

It shall be the duty of every sheriff, deputy sheriff, state police officer, and enforcement officer of the Arkansas State Game and Fish Commission to enforce the provisions of this chapter In the exercise of their duty to enforce the provisions of this chapter, they shall have the authori-

1. *Boating Information*, ARK. GAME & FISH COMM’N (2011), <http://www.agfc.com/fishing/Pages/BoatingInformation.aspx>.

2. 2014 BOATING ACCIDENT YEAR-END REPORT, ARK. GAME & FISH COMM’N, 2 (2014), <http://www.agfc.com/fishing/Documents/BoatingAccidentReport.pdf>. The boating industry in Arkansas had an annual economic impact of \$1.97 billion in 2012. *Economic Significance of Recreational Boating in Arkansas*, NAT’L MARINE MFRS. ASS’N (2013), http://www.nmma.org/assets/cabinets/Cabinet508/Arkansas_Boating_Economics%20State.pdf.

3. ARK. GAME & FISH COMM’N, *supra* note 2, at 3.

4. *State v. Allen*, 2013 Ark. 35, at 5, 425 S.W.3d 753, 757.

5. With the statutory power taken away, law enforcement made just sixty “boating under the influence” arrests in 2013, compared to over ninety the year before. ARK. GAME & FISH COMM’N, *supra* note 2.

ty to stop and board any vessel subject to this chapter and to investigate any accident or violation involving vessels subject to this chapter.⁶

The court in *Allen* held that the statute in question gave law enforcement “unfettered discretion” in stopping vessels on the state’s waterways for “safety checks” and that it, consequently, “violate[d] the Fourth Amendment to the United States Constitution.”⁷ The court instead imposed a strict probable cause standard for all future stops.⁸

While the decision to invalidate Arkansas Code Annotated section 27-101-105 was correct, the probable cause standard propounded by the *Allen* court is simply not enough to combat accidents caused by persons boating while intoxicated; therefore, the court or legislature should lower the standard to one of reasonable suspicion.

Part II of this note examines both the past and present laws in place with respect to boating in Arkansas.⁹ Part III discusses the court’s holding in *Allen*, along with its repercussions in the operations of law enforcement across the state.¹⁰ Lastly, Part III of this note then argues for a new standard for law enforcement to follow, similar to the one presently used in Michigan.¹¹

II. BACKGROUND

Currently, there are three bodies of law that regulate boating in the State of Arkansas: the (1) Arkansas Code,¹² (2) Arkansas Game & Fish Regulations,¹³ and (3) United States Coast Guard Regulations.¹⁴ Under this trichotomy of law, multiple state and federal agencies are tasked with boating enforcement, ranging from local sheriff’s departments and state wildlife officers¹⁵ to the United States Coast Guard.¹⁶

6. ARK. CODE ANN. § 27-101-105(a)(1)(A), (a)(2) (Repl. 2010).

7. *Allen*, 2013 Ark. 35, at 5, 425 S.W.3d at 757.

8. *See id.*, 425 S.W.3d at 757 (discussing the standards to be used for future water-based stops).

9. *See infra* Part II.

10. *See infra* Part III.

11. *See infra* Part III.

12. ARK. CODE ANN. §§ 27-101-101 to -904 (Repl. 2010).

13. ARK. CONST. amend. XXXV, § 1.

14. 14 U.S.C. § 89(a) (2013).

15. ARK. CODE ANN. § 27-101-105(a)(1)(A).

16. 14 U.S.C. § 89(a).

A. Arkansas Statutes Governing Boating

The Arkansas statutes governing boating in the state can be found in Title 27, Chapter 101 of the Arkansas Code.¹⁷ To ensure the chapter's enforcement, the Arkansas General Assembly adopted Arkansas Code Annotated section 27-101-105 in 1993,¹⁸ giving the state's Game & Fish Commission, along with local law enforcement agencies, the authority to pull over any boat to check compliance with state boating safety law.¹⁹

These provisions can generally be divided into two types. The first primarily deals with the operation of vessels on the water²⁰ and can be readily observed by law enforcement from a distance.²¹ A subpart of this category would include registration regulations,²² for example, the requirement of

17. See ARK. CODE ANN. §§ 27-101-101 to -904 (providing laws governing watercraft in the State of Arkansas).

18. *Id.* § 27-101-105.

19. *Id.*

20. *Id.* § 27-101-202. Subsection one of the statute forbids operation of vessels in a reckless or negligent manner that endangers life, limb, or property of any person and provides examples of this type of behavior including weaving through congested vessel traffic, operating within 100 feet of a towboat, and jumping the wake too close to another vessel. *Id.* § 27-101-202(1). Subsection two of the statute prohibits operation of vessels at a speed that creates hazardous wakes for other vessels. *Id.* § 27-101-202(2). Subsection three makes it illegal to operate a vessel within one hundred feet (100') of a designated recreation area, dock, pier, raft, float, anchored boat, dam, intake structure, or other obstruction at over five miles per hour unless another limit has been posted. *Id.* § 27-101-202(3). Subsection four forbids the operation of any vessel or skis where they may strike another object or person. *Id.* § 27-101-202(4). Subsection five requires using either a spotter or mirror when towing. *Id.* § 27-101-202(5). Subsection six forbids towing skiers either one half hour after sunrise or before sunset. *Id.* § 27-101-202(6). Subsection seven forbids operating a vessel under the influence. *Id.* § 27-101-202(7). Subsection eight prohibits loading boats beyond their capacities. *Id.* § 27-101-202(8). Subsection nine makes it illegal to allow people to ride on the decking over the bow unless the boat is over twenty-six feet. *Id.* § 27-101-202(9). Subsection ten makes it illegal for a person under twelve to operate a vessel with over a ten horsepower motor unless under direct supervision. *Id.* § 27-101-202(10). Subsection eleven prohibits operating a vessel in any grossly negligent way that results in a serious injury or death to any person. *Id.* § 27-101-202(11). Subsection twelve makes it illegal to operate a vessel in a negligent manner, specifically inattentive operation, failing to keep a lookout, failing to abide by the inland navigation rules, and operating in a way that causes collision with another vessel or object. *Id.* § 27-101-202(12).

21. See *id.* § 27-101-202 (providing laws governing the operation of vessels on the state's waterways).

22. *Id.* § 27-101-301. According to the statute:

Every motorboat on the waters of this state shall be numbered. No person shall operate or give permission for the operation of any motorboat on the waters of this state unless: (1) The motorboat is numbered: (A) In accordance with this subchapter; or (B) In accordance with applicable federal law; or (C) In accordance with a federally approved numbering system of another state; and (2)(A) The certificate of number awarded to the motorboat is in full force and effect;

three-inch block lettering for registration numbers on the front sides of the vessels.²³ The second category, however, requires closer inspection of the vessel in order to determine compliance and consists mainly of requirements for certain safety equipment, such as floatation devices.²⁴ Another example of this second type of law would be Arkansas Code Annotated section 27-101-501, which requires boater safety and training education for all persons born after 1986.²⁵ Law enforcement would have to conduct a search and seizure of the person operating the vessel in order to determine if any of these types of violations had occurred.

B. Arkansas Game & Fish Commission Boating Regulations

As the first body of law governing Arkansas's waters comes from the state legislature, the second is derived from Amendment Thirty-Five to the Arkansas Constitution. Amendment Thirty-Five, in general, grants the Arkansas Game & Fish Commission the broad authority to regulate the state's wildlife.²⁶ This regulatory authority gives the commission sanction to create and enforce wildlife regulations on the state's waters.²⁷

The Code of Arkansas Rules gives wide latitude to the Arkansas Game & Fish Commission by authorizing wildlife officers to "go upon any proper-

and (B) The identifying number set forth in the certificate of number is displayed on each side of the bow of the motorboat.

Id.

23. ARK. CODE ANN. § 27-101-305(a)(2) (Repl. 2010). The statute requires:

The numbers to be procured and attached shall be at least three inches (3") in height and of block character, and shall be attached to the forward half of each side of the vessel and clearly visible, pursuant to federal law, and attached in such a manner and position on the boat as may be prescribed by the rules and regulations of the Arkansas State Game and Fish Commission in order that they may be clearly visible.

Id.

24. *Id.* § 27-101-203 (Repl. 2010).

25. *Id.* § 27-101-501CB(d) (Repl. 2010). The statute provides:

In order to operate a motorboat or a personal watercraft in Arkansas, all Arkansas residents born on or after January 1, 1986, and of legal age to operate a motorboat or personal watercraft must have successfully completed: (A) A commission-approved safe boating course and examination under subdivision (b)(2) of this section to obtain a permanent boater education certificate; or (B) A questionnaire to obtain a temporary boater education certificate under subsection (d)(4) of this section.

Id.

26. ARK. CONST. amend. XXXV, § 1. The state constitutional amendment provides that: "the control, management, restoration, conservation and regulation of birds, fish, game and wildlife resources of the State . . . [and] the administration of the laws now and/or hereafter pertaining thereto, shall be vested in a Commission to be known as the Arkansas State Game and Fish Commission." *Id.*

27. *Id.*

ty outside of private dwellings, posted or otherwise, in performance of their duties . . . and to conduct searches with or without a warrant according to the law.”²⁸ The code goes even further by allowing wildlife officers to “stop and detain any person who they Reasonably suspect is, or recently has been, involved in any hunting, fishing, or trapping activity to conduct an administrative inspection to determine whether the person is in compliance with the laws and regulations of the State”²⁹ The Arkansas General Assembly greatly exceeded previous delegations of authority to the Commission, however, when it passed Arkansas Code Annotated section 27-101-501, which charges the Game & Fish Commission with being the state agency primarily responsible for regulating all boating in the state,³⁰ presumably whether the boating activity is related to wildlife or not.

Along with the broad discretion it gives wildlife officers in the field, the Arkansas Code also dedicates an entire chapter to “General Fishing Regulations,” supplying officers with a plethora of grounds for seizing boats that they “reasonably suspect” have been engaged in fishing activity.³¹ Two of the most common regulations from this chapter that warrant stops of ves-

28. 002-00-001 ARK. CODE R. § 01.00-B (LexisNexis 2015). The regulation states: Wildlife Officers shall be commissioned by the Commission and shall have the right to apprehend persons detected of violating any of the laws or regulations of the State enacted for the protection of game, fish, furbearing animals and other wildlife, and to take such offenders before any court having jurisdiction in the county where such offense is committed. Wildlife Officers shall be authorized to serve all processes issued by a court of competent jurisdiction relating to the enforcement of all laws and regulations pertaining to game, fish, furbearing animals and other wildlife of the State

Id.

29. *Id.* The relevant part of the regulation states:

Wildlife Officers lawfully present in any place may, in the performance of their duties, stop and detain any person who they Reasonably suspect is, or recently has been, involved in any hunting, fishing, or trapping activity to conduct an administrative inspection to determine whether the person is in compliance with the laws and regulations of the State enacted for the protection of game, fish, furbearing animals and other wildlife.

Id.

30. ARK. CODE ANN. § 27-101-501. The statute specifies that “(a) The General Assembly finds and determines that: (1) The regulation of boating and boaters in the state is the primary responsibility of the Arkansas State Game and Fish Commission under Arkansas Constitution, Amendment 35” *Id.*

31. 002-00-001 ARK. CODE R. § 01.00-B.

sels include checking the boater for a valid fishing license³² and checking to make sure the boater is within the allowed limit of fish caught.³³

The code's expansive delegation of power to wildlife officers does not end with the authority to only seize the boats, however. Upon stopping a vessel that the officers reasonably suspect has been fishing, the code makes it illegal for a boater to refuse to let them search and inspect a number of items including ice chests, bags, and virtually any container present on the vessel.³⁴ With both the power to stop vessels for numerous reasons and broad authority to search them, the Arkansas Game & Fish Commission has the most power of any state agency on the water.³⁵

C. Federal Laws on Arkansas's Waters

Unlike the first two bodies of law created by the Arkansas General Assembly, which provide modest limits on the discretion allowed to state officers, the third governing authority, coming from Title 14, Section 7 of the United States Code, authorizes the United States Coast Guard to board any vessel on United States waters, at any time, for any reason.³⁶ This statute gives virtually unlimited authority to the United States Coast Guard on all of the nation's waters.³⁷

Currently, the Coast Guard has 20 active military and 142 auxiliary members in the State of Arkansas, operating with a force of two boats and

32. *Id.* § 03.02. The regulation makes it illegal to fish "in any manner in Arkansas without possessing on the person the appropriate Arkansas fishing license as provided herein" and goes on to list permitted licenses for different classes of fishermen, including residents, non-residents, commercial and sport fishermen, and youth and elderly licenses. *Id.*

33. *Id.* § 25.01. This regulation makes it "unlawful to keep more than the daily or aggregate limit of game fish while fishing or transporting fish by boat during a one-day fishing trip," with limits set by the Arkansas Game & Fish Commission. *Id.*

34. *Id.* § 05.28. The rule provides that it is "unlawful to refuse to immediately surrender the following items to a wildlife officer upon request for lawful inspection: any killing device, license, permit, tag, stamp, check sheet, ice chest, game bag, game vest, wildlife, fishing tackle, equipment used for hunting or fishing or container that can reasonably hold wildlife." *Id.*

35. *See generally id.* § 01.00-B (authorizing Game & Fish officers to stop and search any person they reasonably suspect is or has been engaging in wildlife activities).

36. 14 U.S.C. § 89(a) (2013). The statute establishes that "[t]he Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States." *Id.* The provision goes on to authorize Coast Guard personnel to "at any time go on board of any vessel subject to the jurisdiction . . . of the United States, address inquiries to those on board, examine the ship's documents and papers, and examine, inspect, and search the vessel and use all necessary force to compel compliance." *Id.*

37. *See id.* (authorizing Coast Guard personnel to board at any time any vessel that is subject to United States jurisdiction).

one cutter.³⁸ Even though the United States Coast Guard has the most discretion in enforcing law on state waters, its personnel limitations necessitate that state agencies are primarily tasked with this duty.³⁹

D. The Court's Holding in *Allen*

The *Allen* case presented the Supreme Court of Arkansas with its first opportunity to rule on the constitutionality of Arkansas Code Annotated section 27-101-105. The court began its analysis by noting three critical facts from the arresting officer's testimony concerning the stop of Allen's boat. The officer testified that "[t]here was no determination on what boats [he] might pull over," that he was not "pulling over every boat for a safety check," and that there was no plan in place when he stopped Allen's boat.⁴⁰ From this testimony, the court began to apply traditional Fourth Amendment standards that are used in analyzing traffic stops.⁴¹

The fundamental Fourth Amendment principle on which the court focused was that "[r]egardless of how brief or slight the intrusion, or how weighty the public interest, 'an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field.'"⁴² Along with this precedent, the court also focused on the officer's testimony that "he did not believe he had 'the unfettered discretion to pull over any boat at any time for any reason that [he desired],' but only to perform a safety check" in accordance with Arkansas Code Annotated section 27-101-105.⁴³

Taking both of these facts into consideration, the supreme court determined that the stop was based solely "on the law-enforcement officer's subjective assertion of his or her purpose when the Fourth Amendment requires objective facts supporting the stop or a plan embodying explicit, neutral limitations" and that "the practice of safety-check stops by law-enforcement officers in this case violates the Fourth Amendment."⁴⁴ Accordingly, the court ruled Arkansas Code Annotated section 27-101-105 was unconstitu-

38. U.S. COAST GUARD, U.S. COAST GUARD IN ARKANSAS 2014, <http://www.uscg.mil/publicaffairs/statedatasheets/ARKANSAS.pdf>. The local United States Coast Guard presence includes a budget of \$1,041,904 for operating expenses in the state and \$1,421,896 in boating safety grants. *Id.*

39. *See id.*

40. *State v. Allen*, 2013 Ark. 35, at 3, 425 S.W.3d 753, 756.

41. *Id.*, 425 S.W.3d at 756.

42. *Id.* at 5, 425 S.W.3d at 757.

43. *Id.*, 425 S.W.3d at 757.

44. *Id.*, 425 S.W.3d at 757.

tional and adopted the current probable cause standard for traffic stops to be used on the state's waters.⁴⁵

III. ARGUMENT

The Supreme Court of Arkansas's decision in *State v. Allen*, while correct in ruling the random stops unconstitutional, was wrong in its adoption of the probable cause standard. By adopting the stricter standard of probable cause,⁴⁶ the court effectively and unnecessarily took away an invaluable tool from law enforcement officers who seek to protect Arkansas's boaters. Additionally, it led to the hasty adoption of an unworkable, "roadblock" style safety stop for vessels⁴⁷ and inadvertently created double standards for different classes of boaters.⁴⁸

Instead of denying law enforcement the use of "safety checks" by approaching the issue with the same analysis used in the constitutionality of traffic stops, the court should follow more reasonable approaches taken in other states. Additionally, as explained in more detail below, the state legislature might be well advised to adopt an approach similar to Michigan's. To emphasize the implications of the new probable cause standard, Section A of this Part brings to light the problems with the court's analysis in *Allen*. Section B, then, discusses the implications of adopting the court's new standard. Section C shows how the court's new standard led the Arkansas Game & Fish Commission to adopt unworkable policies and procedures for water-based stops. Section D discusses how the new standard inadvertently created a double standard for different classes of boaters. Section E, then, illustrates the impracticality of the new standard in a real world situation. Section F introduces the current law in Michigan, as an example of a more practical standard. Section G argues for a new standard, similar to the one currently used in Michigan.

45. *See id.*, 425 S.W.3d at 757 (setting forth the new standards to be used when conducting water-based stops).

46. *See Allen*, 2013 Ark. 35, at 5, 425 S.W.3d at 757 (discussing the new standards to be adhered to by law enforcement when making water-based stops in the future).

47. *See* ARK. GAME & FISH COMM'N, LEP-30 EST. 07/92, INTERNAL POLICY & PROCEDURE: LAW ENFORCEMENT CHECKPOINTS (Nov. 2013) (providing procedures that must be followed by Arkansas Game & Fish officers before conducting a checkpoint on the water).

48. *See generally Allen*, 2013 Ark. 35, at 5, 425 S.W.3d at 757 (holding "safety checks" conducted pursuant to ARK. CODE ANN. § 27-101-105 to be unconstitutional but not ruling on the constitutionality of "compliance checks" conducted by the Game & Fish Commission under the authority of 002-00-001 ARK. CODE R. § 01.00-B); 002-00-001 ARK. CODE R. § 01.00-B (LexisNexis 2015) (authorizing Arkansas Game & Fish officers to stop and search any persons reasonably suspected of engaging in wildlife activities).

A. Problems with the Court's Analysis in *State v. Allen*

The major problems with the *Allen* court's analysis can be attributed to the lack of state common law dealing with safety stops on the water.⁴⁹ Unfortunately, the only state precedent that the court had available to look to when deciding the case came from the state appellate court's 2010 holding in *Brewer v. State*,⁵⁰ in which the majority ignored all other states' case laws for guidance despite there being no precedent in Arkansas.⁵¹

By not looking to other states for direction, the appellate court's opinion in *Brewer* began with a major flaw: it analyzed the stop of vessels on the open water in the same way that it analyzed traditional search and seizures,⁵² despite their inherent differences.⁵³

As it turned out, even though the constitutionality of the safety check was discussed, the *Brewer* court never had the opportunity to rule on the validity of Arkansas Code Annotated section 27-101-105 because law enforcement had probable cause to conduct the stop and the defense counsel did not preserve the constitutional question on appeal.⁵⁴ Nevertheless, the appellate court's discussion laid the groundwork for the supreme court's analysis in *Allen*, just three years later.⁵⁵

In light of the *Brewer* opinion, the *Allen* court began its discussion of the law by first setting forth the proper standards for determining the consti-

49. *Brewer v. State*, 2010 Ark. App. 275, at *4, 2010 WL 1233832, at **2. The appellate court conceded at the beginning of its discussion that “[t]here is currently no case law in Arkansas concerning the circumstances under which a boat operating on a waterway in this state may properly be stopped and a search conducted.” *Id.*, 2010 WL 1233832, at **2.

50. *Id.*, 2010 WL 1233832, at **2.

51. *See id.*, 2010 WL 1233832, at **2 (citing no case law from other states concerning water-based “safety check” stops); *Allen*, 2013 Ark. at 11, 425 S.W.3d at 760 (Danielson, J., dissenting) (citing cases in numerous states upholding the constitutionality of similar statutes to ARK. CODE ANN. § 27-101-105 that provide for random stops on waterways).

52. *See generally Brewer*, 2010 Ark. App. 275, 2010 WL 1233832. The court in *Brewer* concedes that there is no case law in Arkansas as of 2010 as to the circumstances under which a boat operating on a state waterway may be properly stopped and searched, so it then turns to the “well established” circumstances for motor vehicles for guidance. *Id.* at *4, 2010 WL 1233832, at **2. The court then proceeds in its analysis of traffic based stops by stating “[i]n order to be valid, a traffic stop requires that the officer have probable cause to believe that a traffic violation has occurred.” *Id.*, 2010 WL 1233832, at **2.

53. *See U.S. v. Villamonte-Marquez*, 462 U.S. 579, 589 (1983) (discussing complications that arise when attempting to apply traditional traffic stop standards to situations with vessels on the open water).

54. *Brewer*, 2010 Ark. App. 275, at *6, 2010 WL 1233832, at **3.

55. *See id.* at *4, 2010 WL 1233832, at **2 (discussing the standards for determining the constitutionality of traffic stops); *Allen*, 2013 Ark. at 5, 425 S.W.3d at 757 (analyzing the stop of *Allen*'s boat using a traditional Fourth Amendment traffic stop approach).

tutionality of Fourth Amendment searches and seizures in general.⁵⁶ After discussing the common law standards, the court proceeded to synthesize an overall standard, stating that “the Fourth Amendment requires that a seizure must be based on specific, objective facts indicating that society’s legitimate interests require the seizure of the particular individual, or that the seizure must be carried out pursuant to a plan, embodying explicit, neutral limitations on the conduct of the officers.”⁵⁷

Based on the facts of the case, the court determined that “Allen’s vessel was being operated in a legally unremarkable fashion” and that “there were no specific, objective facts about Allen’s vessel to indicate that society’s legitimate interests required the seizure of Allen and his particular vessel.”⁵⁸ After finding that there was no probable cause for the stop, the court questioned whether the law enforcement officers had a plan in place to determine what boats were to be stopped, which was also answered in the negative.⁵⁹ In light of these findings, the court held the stop of Allen’s boat, specifically, to be unconstitutional.⁶⁰

However, the court did not limit its ruling to the specific facts in *Allen*. Rather, it further declared the law enforcement practice, in its entirety, used to conduct safety checks as unconstitutional and in violation of the Fourth Amendment.⁶¹

56. *Allen*, 2013 Ark. 35, at 3, 425 S.W.3d at 756. The court noted, “The Fourth Amendment, of course, ‘applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest.’” *Id.*, 425 S.W.3d at 756 (quoting *Brown v. Texas*, 443 U.S. 47, 50 (1979)). The court went on to state that “[w]henver law enforcement stops and restrains a person, the officer has ‘seized’ that person, and the Fourth Amendment requires that the seizure be reasonable.” *Id.*, 425 S.W.3d at 756 (citing *Brown*, 443 U.S. at 50). The court proceeds to explain that “[c]onsideration of the constitutionality of such seizures involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty.” *Id.* at 4, 425 S.W.3d at 756 (quoting *Brown*, 443 U.S. at 50–51). The court continued, “A central concern in balancing these competing considerations in a variety of settings has been to assure that an individual’s reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field.” *Id.*, 425 S.W.3d at 757 (quoting *Brown*, 443 U.S. at 50–51).

57. *Id.*, 425 S.W.3d at 757.

58. *Id.*, 425 S.W.3d at 757.

59. *Id.*, 425 S.W.3d at 757. The law enforcement officer in the case testified that “while he tried to stop and perform a safety check on as many vessels as he could in a given day, there was no plan and nothing to determine which boats he stopped.” *Id.*, 425 S.W.3d at 757. He went on to testify that while he did not believe that he had “the unfettered discretion to pull over any boat at any time for any reason that [he desired],” he did believe that he could pull over any boat to perform a safety check. *Id.*, 425 S.W.3d at 757.

60. *Id.*, 425 S.W.3d at 757.

61. *Id.* at 5, 425 S.W.3d at 757 (because officers did not have a reason to conduct a safety check on a vessel, it “mean[t] that whether the stop is proper depends only on the law-enforcement officer’s subjective assertion of his or her purpose when the Fourth Amendment

The court's determination that the statute was unconstitutional hinged on the fact that the statute purportedly gave officers "unfettered discretion to pull over any boat at any time for any reason."⁶² This presents a second major problem with the court's approach to the case: it completely fails to discuss how the safety check situation fared in the balancing test presented in *Delaware v. Prouse*, a Supreme Court case in which the Court weighed the governmental interest in conducting the stop with the intrusion on the individual's Fourth Amendment rights.⁶³ Instead of weighing the competing interests, the *Allen* court skipped ahead in the analysis and focused primarily on the fact that (1) there were no objective reasons for the officers to pull over Allen's boat and (2) there was no plan in place.⁶⁴

The third major flaw in the court's analysis arises from its failure to take into consideration case law in other states. Instead of approaching the constitutional validity of the safety check statute in Arkansas from a traffic stop line of analysis, the court should have focused on decisions from other jurisdictions that deal with the constitutionality of water-based stop statutes similar to Arkansas Code Annotated section 27-101-205. In his dissenting opinion, Justice Danielson mentioned numerous cases involving fact patterns and statutes similar to those at issue in the *Allen* case.⁶⁵ In all of those cases, the courts found the statutes allowing random, suspicionless stops of the vessels in question to be constitutional.⁶⁶ Unfortunately, the majority in *Allen*, rather pointedly, ignored this precedent.⁶⁷

requires objective facts supporting the stop or a plan embodying explicit, neutral limitations").

62. *Allen*, 2013 Ark. 35, at 3, 425 S.W.3d at 756.

63. *Delaware v. Prouse*, 440 U.S. 648, 654 (1979) ("[T]he permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.").

64. *Allen*, 2013 Ark. 35, at 5, 425 S.W.3d at 757.

65. *Id.* at 10, 425 S.W.3d at 760 (Danielson, J., dissenting) ("While it is an issue of first impression in this state, other states with similar statutes have addressed this issue and upheld the statutes, failing to find any Fourth-Amendment violations."). Justice Danielson cites cases from Florida, Georgia, Illinois, Maine, Minnesota, North Carolina, and Texas. *Id.*, 425 S.W.3d at 760.

66. See *State v. Casal*, 410 So.2d 152, 155 (Fla. 1982); *Peruzzi v. State*, 567 S.E.2d 15, 17 (Ga. 2002); *People v. Roe*, 270 N.E.2d 27, 29 (Ill. 1971); *State v. Giles*, 669 A.2d 192, 193-94 (Me. 1996); *State v. Colosimo*, 669 N.W.2d 1, 19 (Minn. 2003); *State v. Pike*, 532 S.E.2d 543, 549 (N.C. App. 2000); *Schenekl v. State*, 30 S.W.3d 412, 416 (Tex. Crim. App. 2000).

67. See *Allen*, 2013 Ark. 35, at 1-5, 425 S.W.3d at 753-57 (the majority references no cases dealing with water-based stops in its decision).

B. The *Allen* Holding Took Away an Invaluable Law Enforcement Tool

By declaring that random safety checks on the water violate the Fourth Amendment, the Supreme Court of Arkansas severely undermined law enforcement's ability to effectively combat the state's intoxicated boater problem.

The new standard that the court seemed to adopt in place of "safety checks" was one of probable cause.⁶⁸ The major problem with this, however, is that there is an Arkansas statute currently in force that specifically prevents law enforcement from using open container sightings in boats as probable cause for pulling them over.⁶⁹ Unfortunately, this means that even if law enforcement sees a group of people openly drinking on an open vessel, they have no grounds to stop it unless there is another observable violation of the law.

C. The Arkansas Game & Fish Commission's Response to the Holding in *Allen*

Immediately following the supreme court's holding in *Allen*, the Arkansas Game & Fish Commission adopted an unworkable "roadblock" style policy for conducting safety checks on the water.⁷⁰ This new policy is essentially the same for water and land-based checkpoints in virtually every aspect, including the procedures for site selections and initial and secondary stops.⁷¹ The "Checkpoint Request Plan" form for the two different check-

68. *Id.* at 4, 425 S.W.3d at 757 (discussing the standards to be used in conducting water-based stops in the future).

69. ARK. CODE ANN. § 5-65-103(b) (West, Westlaw current through the 2015 Reg. Sess. and 2015 1st Ex. Sess. of the 90th Arkansas General Assembly). The statute states, in particular, that "[t]he consumption of alcohol or the possession of an open container aboard a vessel does not in and of itself constitute probable cause that the person committed the offense of boating while intoxicated." *Id.*

70. See ARK. GAME & FISH COMM'N, *supra* note 47, § 2.1.1.7, § 2.1.3 (setting forth the policy for both land and water-based checkpoint stops).

71. See *id.* With regards to site selection, the land-based policy reads: "Base the selection of sites on standard enforcement factors consider time of day, day of week, roadway, history of violations and/or complaints in the area, and any special activities in the area. . . . The site should have adequate space to divert vehicles if further action is needed." *Id.* § 2.1.1.7.

The policy for water based site selection is virtually identical to the land-based policy:

Base the selection of sites on standard enforcement factors considering time of day, day of week, waterway, history of violations and or complaints in the area, and any special activities in the area. Area selected should have an area which allows for safe stops and should have an area to divert vessels or other water based conveyances if further action is needed.

Id. § 2.1.3.

The initial stop policy is similarly identical:

points is even the same, with only a checkbox at the top to designate whether it is for a water-based or a land-based checkpoint.⁷² Trying to conduct blocks on the water using the same standards as on the road presents a major problem because they are inherently different.⁷³ Problems not only arise from the obvious differences between boats and automobiles, but also due to the areas in which they operate.⁷⁴

Another problem with adopting the “roadblock” style policy on the water has to do with the potential effectiveness of the blocks on water. This can be attributed to the inherent difference between operation of boats and automobiles.⁷⁵ There is statutory law in place that allows avoidance of law enforcement to be a factor in determining reasonable suspicion to stop a motor vehicle,⁷⁶ but as Justice Rehnquist noted in the Supreme Court case of *United States v. Villamonte-Marquez*, “vessels can move in any direction at any time and need not follow established ‘avenues’ as automobiles must

Upon initial contact, law enforcement personnel should inform the occupants of the vehicle/vessel or other water based conveyance of the reason for the checkpoint. The initial inquiries or demands that are made of the driver and or occupants of the vehicle/vessel at a checkpoint should be within the scope of the purposes for which the checkpoint is authorized, and must be within the statutory or regulatory authorities enforceable by the Arkansas Game and Fish Commission or by cooperating law enforcement personnel. After an initial stop and completion of the objectives of the checkpoint, a vehicle/vessel or other water based conveyance should not be involuntarily detained, unless law enforcement personnel have reasonable suspicion or probable cause to conduct further action.

Id. § 2.1.10.

Similarly, the policy does not differentiate at all for secondary stop policy:

Other activities, facts or circumstances observed as the vehicle/vessel or other water based conveyance approaches or is stopped at the checkpoint site may present reasonable suspicion or probable cause to justify diverting vehicles/vessels or other water based conveyance to a secondary site. Further action at the secondary site may be taken to the extent justified by the reasonable suspicion or probable cause for the secondary stop.

Id. § 2.1.11.

72. *See id.* § 2.1.1 to 2.1.3 (explaining that the “Checkpoint Request Plan” is part of the internal policies and procedures of the Arkansas Game & Fish Commission and must be submitted and approved prior to conducting a checkpoint stop).

73. *U.S. v. Villamonte-Marquez*, 462 U.S. 579, 589 (1983) (“[N]o reasonable claim can be made that permanent checkpoints would be practical on waters such as these where vessels can move in any direction at any time and need not follow established ‘avenues’ as automobiles must do.”).

74. *Peruzzi v. State*, 567 S.E.2d 15, 16–17 (Ga. 2002). The court in *Peruzzi* discusses this point in its holding when it notes “unlike cars traveling upon a public road, boats on an open body of water such as Lake Peachtree originate from a large number of docks and launches and need not follow any particular path. A roadblock is clearly infeasible . . .” *Id.* at 16.

75. *See* ARK. GAME & FISH COMM’N, *supra* note 47.

76. ARK. CODE ANN. § 16-81-203(14) (Repl. 2010).

do.”⁷⁷ With no defined paths to follow, it would pose a near impossible challenge for law enforcement to try to determine whether the boater was merely joyfully boating or actively avoiding authorities.

D. The Court’s New Standard Created Double Standards for Boaters

By adopting a probable cause standard for law enforcement to use when stopping recreational boaters, the Supreme Court of Arkansas inadvertently created double standards for boaters on the state’s waters.⁷⁸

After the *Allen* decision, the least protected class of boaters are the sportsmen—those engaging in either fishing or hunting activities on the water.⁷⁹ With just a mere reasonable suspicion that a boater has been engaged in one of these wildlife activities, he can be stopped and boarded by Arkansas Game & Fish officers to make sure that he is complying with state game and fish laws pursuant to the Code of Arkansas Rules.⁸⁰ The officers not only have the authority to stop and board, but according to 002-00-001 Code of Arkansas Rules section 05.28, it is unlawful for a boater to refuse to let the officer inspect any container that can “reasonably hold wildlife,” including all bags and ice chests on board.⁸¹

The second class is made up of boaters that are purely recreational and not participating in sporting activities. They are the ones that are actually afforded the protection of the probable cause standard adopted by the court

77. *Villamonte-Marquez*, 462 U.S. at 589.

78. *See* *State v. Allen*, 2013 Ark. 35, at 5, 425 S.W.3d 753, 757.

79. *Id.*, 425 S.W.3d at 757.

80. 002-00-001 ARK. CODE R. § 01.00-B (LexisNexis 2015). The state’s appellate court reviewed the Arkansas Game & Fish Commission’s power to randomly stop any persons that officers reasonably suspect to be engaging in hunting or fishing activities. *See Pickle v. State*, 2014 Ark. App. 726, at 11, 453 S.W.3d 157, 165. The court’s decision on the matter was split. *Id.*, 453 S.W.3d at 165. Judge Vaught wrote the court’s opinion, with three judges agreeing and two concurring, which held that game and fish officers did not have the power to conduct these types of stops without a reasonable suspicion that the person was engaging or had been engaged in unlawful conduct, or without a sufficient plan of explicit, neutral limitations in place. *Id.* at 12, 453 S.W.3d at 165. In his concurring opinion, Judge Brown wrote that while he agreed with the outcome of the court’s opinion, he believed that game and fish officers did, in fact, have the power to conduct hunting and safety compliance checks without reasonable suspicion or a plan with explicit, neutral limitations. *Id.*, 453 S.W.3d at 157 (Brown, J., concurring). Chief Judge Gladwin wrote the dissenting opinion in the case, focusing on the inherent differences between the search of people engaged in the practice of hunting and fishing and those that are not. *Id.* at 1–11, 453 S.W.3d at 157–65 (Gladwin, C.J., dissenting). The dissent argues that “[t]he highly dangerous and regulated nature of hunting and fishing demands compliance checks, including questioning and checking of hunting and fishing equipment and licenses, even though similar actions might not be reasonable outside the hunting and fishing context.” *Id.* at 8, 453 S.W.3d at 169.

81. 002-00-001 ARK. CODE R. § 01.00-B.

in *Allen*.⁸² This dual standard poses yet another major problem for Game & Fish Commission officers in the field: they must determine whether a boater is either a sportsman or recreational boater prior to making the initial stop.⁸³

E. An Illustration of the Impracticality of the Law After *Allen*

To illustrate the deficiency in the post-*Allen* law, consider applying it to the fictitious fact pattern introduced at the beginning of this note. Imagine the boat that caused the accident in the scenario motoring around the lake at a normal speed, not breaking any observable laws, but when it passes law enforcement patrol, the officers notice a number of open containers on the boat.

At this point in the illustration, the law greatly depends on the identity of the particular law enforcement agency that is involved. If the unit were a local police or sheriff's patrol, its stop would be held to the standard set forth in *Allen*. As mentioned earlier, the officers could not use solely the sight of open containers in the vessel as grounds for probable cause because of Arkansas Code Annotated section 5-65-103.⁸⁴ This means that if the officers did not observe any clear operating violations, they would not have grounds for a constitutional stop, and thus allowing the boater to continue on without questioning and ending just like the fact pattern above. If the unit happened to be an Arkansas Game & Fish patrol, the first thing that the wildlife officers would need to do would be to make a determination of what class of boater the vessel falls into. If the officers reasonably suspect that the boat had been engaged in a wildlife activity, a stop would be warranted and an inspection and arrest would have most likely occurred, preventing the impending collision. On the other hand, if the officers had found the boat to be purely recreational, the probable cause standard would be used, as it was in the scenario with the local police and sheriff's department patrols, and the boat would not have been stopped, inevitably resulting in the accident.

If the drunken boater had the unlikely misfortune of passing a United States Coast Guard unit, there would have almost certainly been a stop, given that they have the authority to stop and board any vessel for any reason.⁸⁵

Now, suppose instead that law enforcement was not patrolling when the boat passed, but had a "roadblock" style checkpoint on the water. As noted in cases above, this would most likely not result in a stop either. There would be any number of options available for the vessel to avoid it.⁸⁶ The

82. *Allen*, 2013 Ark. 35, at 5, 425 S.W.3d at 757.

83. *Id.*, 425 S.W.3d at 757.

84. ARK. CODE ANN. § 5-65-103(b) (Supp. 2013).

85. 14 U.S.C. § 89(a) (2013).

86. *See* U.S. v. Villamonte-Marquez, 462 U.S. 579, 589 (1983) (discussing the impracticality of water-based checkpoints on lakes and rivers).

driver may either just go around the checkpoint,⁸⁷ go in the opposite direction, or simply wait the checkpoint out.⁸⁸

Based on the application above, the differing levels of discretion that the law grants to the various law enforcement agencies combined with the double standard for boaters greatly impacts the officers' efficiency in keeping our state's waterways safe for the public.

F. The Court and Legislature Should Look to Michigan for Guidance

The Supreme Court of Arkansas and the Arkansas General Assembly should look to other states' approaches to water-based stops and form the state's own, more workable, standard for law enforcement agencies to follow on the water, such as the one passed by the legislature in Michigan.⁸⁹

The Michigan standard is unique in that it only provides the extra constitutional protection provided by the "reasonable suspicion" standard for stops of boats to those that have previously cleared a safety inspection by law enforcement.⁹⁰ On the other hand, for those vessels that have not received a decal denoting that they have passed a safety inspection from law enforcement,⁹¹ officers in the field need no reason to stop them to check for compliance.⁹²

87. Lake Hamilton, where the fact pattern is set, has an area of approximately 7,460 acres. *Lake Hamilton, Arkansas Lakes and Rivers*, ARK. DEP'T. OF PARKS & TOURISM (2014), <http://www.arkansas.com/places-to-go/lakes-rivers/lake.aspx?id=18>.

88. According to the Arkansas Game & Fish Commission policy, there must be a set time limit approved before conducting a checkpoint. ARK. GAME & FISH COMM'N, *supra* note 47. The Arkansas Game & Fish Commission's current "checkpoint" policy states that "[b]efore a checkpoint may be conducted, a checkpoint plan should be submitted on the standard checkpoint request plan form and approved by a supervisory law enforcement officer or designated officer in charge. The checkpoint plan should address . . . [t]he approximate time and duration of the checkpoint." *Id.*

89. MICH. COMP. LAWS ANN. § 324.80166 (Supp. 2014).

90. *Id.* § 324.80166(2) (stating that "[a] peace officer shall not stop and inspect a vessel bearing the decal described in section 80166a . . . unless that peace officer has a reasonable suspicion that the vessel or the vessel's operator is in violation of a marine law or is otherwise engaged in criminal activity").

91. *See id.* § 324.80166a. This section provides that:

(1) The department may enter into an agreement with the United States coast guard, the United States coast guard auxiliary, or an organization sponsored by the United States coast guard or the United States coast guard auxiliary to provide for vessel safety checks of a vessel and its equipment. An agreement entered into under this subsection shall not preclude the department, or any peace officer within his or her jurisdiction, from performing an inspection of a vessel or the vessel's equipment for enforcement purposes or courtesy purposes.

(2) An agreement entered into under this section shall specify that the United States coast guard, the United States coast guard auxiliary, or an organization sponsored by the United States coast guard or the United States coast guard aux-

By creating this incentive of protection from baseless search and seizures, the Michigan legislature has not only created a major incentive for safety law compliance that serves the state's interest in ensuring its citizens' safety on the water, but has also provided a clear standard for law enforcement officers to follow in the field.⁹³

Ohio has recently taken Michigan's lead with respect to boater law, with its legislature passing the "Ohio Boater Freedom Act" in 2013.⁹⁴ The Ohio Act set forth a reasonable suspicion standard for law enforcement to use in the field,⁹⁵ reasoning that the state's practice of conducting random, suspicionless "safety checks" was an "intrusive and time-consuming burden" on its citizens.⁹⁶

iliary shall provide the department with a sufficient number of vessel safety check decals for conservation officers and those counties that participate in the marine safety program. In addition to any other information that is included on a vessel safety check decal, each vessel safety check decal shall bear the likeness of the state seal of Michigan. The vessel safety check decal shall display the year in which the decal was issued and during which it is valid.

(3) Upon the completion of an inspection of a vessel or the vessel's equipment by a peace officer, the United States coast guard, the United States coast guard auxiliary, or an organization sponsored by the United States coast guard or the United States coast guard auxiliary, the peace officer or person performing the inspection shall affix to the vessel the vessel safety check decal provided for in this section.

Id.

92. *See id.* § 324.80166(1). The statute states that:

[u]pon the direction of a peace officer acting in the lawful performance of his or her duty, the operator of a vessel moving on the waters of this state shall immediately bring the vessel to a stop or maneuver it in a manner that permits the peace officer to come beside the vessel. The operator of the vessel shall do the following upon the request of the peace officer: (a) Provide his or her correct name and address. (b) Exhibit the certificate of number awarded for the vessel. (c) If the vessel does not bear a decal described in section 80166a or an equivalent decal issued by or on behalf of another state, submit to a reasonable inspection of the vessel and to a reasonable inspection and test of the equipment of the vessel.

Id.

93. *Id.*

94. Majority Caucus, *Ohio House Passes "Boater Freedom Act,"* MAJORITY CAUCUS BLOG (June 4, 2013), <http://www.ohiohouse.gov/republicans/press/ohio-house-passes-boater-freedom-act>.

95. *Id.* The Republican caucus wrote that "House Bill 29 specifies that the state's law enforcement personnel may only stop a vessel if they have reasonable suspicion that the vessel or vessel's operator are in violation of marine law or otherwise engaged in criminal activity." *Id.*

96. *Id.*

G. Arkansas Should Adopt a Standard Similar to Michigan's

In light of the innovative Michigan and Ohio standards, Arkansas should adopt a similar law; however, the law adopted by Arkansas should include a requirement for boaters to allow law enforcement to conduct safety checks as part of the registration process of the vessel. By making the checks and the display decal indicating the boat's passage of the inspections mandatory, Arkansas law enforcement would not only be able to quickly and clearly distinguish between the checked and unchecked boats on the water, but would automatically be given cause to pull over boats that do not have the decal displayed. This would allow state officers to further the state's interest in keeping the waterways safe by being able to focus on boats that have not been held up to safety standards.

In practice, adopting this type of law in Arkansas would prove to be an effective way to balance the government's interest in boating safety with the intrusiveness of a stop, as suggested by the majority opinion in *Allen*.⁹⁷ A Michigan style standard would allow Arkansas law enforcement to clearly distinguish between boats that have passed inspections and those that have not in the field.⁹⁸

For example, consider applying this proposed standard to the fact pattern set forth in the introduction. The infeasible "roadblock" style checkpoint would no longer be an issue, so law enforcement in the situation would most likely be patrolling the lake freely. If they passed the subject boat, and it had no safety inspection compliance sticker, the officers would automatically be authorized to stop and inspect the vessel. On the other hand, if the boat did have the decal that indicated it had passed safety inspection, the officers would still only be held to a "reasonable suspicion" standard. This means that the officers would have a chance to look at the totality of the circumstances, including the occupants of the vessel openly drinking alcoholic beverages, to determine whether a stop is permitted or not. In either one of these cases, it is likely that law enforcement would be able to prevent the impending accident by stopping the vessel in question, be it through the obvious violation of safety inspection laws or through objective facts amounting to reasonable suspicion.

97. *State v. Allen*, 2013 Ark. 35, at 4, 425 S.W.3d 753, 756. The court noted that "[c]onsideration of the constitutionality of such seizures involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." *Id.*, 425 S.W.3d at 756.

98. *See* MICH. COMP. LAWS ANN. § 324.80166 (requiring a decal to be placed on the side of the boat indicating that it had passed a "safety check").

IV. CONCLUSION

Arkansas has been blessed with an abundance of lakes and rivers for its citizens to enjoy,⁹⁹ but with that blessing comes the responsibility to keep its citizens safe in their activities. The state's law enforcement agencies, however, lost a valuable tool for doing so when the Supreme Court of Arkansas held Arkansas Code Annotated section 27-101-105 to be unconstitutional. Even though the court made the right decision on that point, the alternative probable cause standard that it adopted does not give law enforcement officials the discretion required to successfully protect the public. The court and legislature should look to the current law in Michigan and adopt a similar standard, making safety checks required at registration and reasonable suspicion the new standard for stops of all vessels, which would prove to be much more effective in combating the state's intoxicated boater problem.

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99. ARK. GAME & FISH COMM'N, *supra* note 1.

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