STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Case No. 2013-AP-1710

GHALEB IBRAHIM, JATINDER CHEEMA and
AMITPAL SINGH,

Plaintiffs-Respondents,

v.

CITY OF MILWAUKEE,

Defendant-Appellant.

APPEAL FROM JUDGMENT OF THE CIRCUIT COURT OF MILWAUKEE COUNTY BRANCH 39, THE HONORABLE JANE CARROLL PRESIDING, CIRCUIT COURT CASE No. 2011-CV-15178

BRIEF OF SOUTHEASTERN WISCONSIN TAXI DRIVERS ASSOCIATION AND WISCONSIN INSTITUTE FOR LAW & LIBERTY AS *AMICI CURIAE*

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Interest of Amici

The Southeastern Wisconsin Taxi Drivers Association represents approximately 170 current or former taxi drivers in Milwaukee. Many of the Association's members are recent immigrants to the United States. The taxicab business appeals to immigrants because it does not require formal schooling or other technical training. Most new immigrants are already able to drive and are easily able to meet the requirements to obtain the Wisconsin public passenger license that is needed to drive a taxicab.

Absent the City of Milwaukee's interference with the free market, it would be relatively easy for citizens like the members of the Association to enter the taxicab market as owners of their own businesses. All that is required is a vehicle that can pass City safety inspections, insurance, a taxicab meter, and access to a radio dispatch service. An initial investment of several thousand dollars will suffice to put a driver into business.

But they cannot get a taxicab permit from the City of Milwaukee. The ordinance at issue in this case artificially caps the number of permits that may be issued by the City. As a result, the record shows that the cost of obtaining a permit from an existing holder is approximately $150,000. (April 16, 2013 Transcript at 46 City's Br. App. A.) This initial

"investment" is well beyond the means of most people, including the members of the Association. Accordingly, the members must for the most part pursue their profession by leasing taxicabs from the grandfathered permit holders – an economic arrangement that is expensive for them and that, like sharecropping, eliminates competition and discourages innovation and investment.

ARGUMENT

I. The Wisconsin Constitution Protects the Freedom of its Citizens to Engage in Trade and Commerce.

Article I, Section 1 of the Wisconsin Constitution provides that "all men are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed."

The Wisconsin Supreme Court has held that the individual "liberty" protected by the Constitution is to be broadly construed and includes economic freedom. Thus, "liberty does not mean merely immunity from imprisonment [but] the opportunity to do those things which are ordinarily done by free men, and the right of each individual to regulate his own

affairs, so far as consistent with rights of others." *State ex rel. Zillmer v. Kreutzberg*, 114 Wis. 530, 90 N.W. 1098, 1100 (1902). According to the Court, "liberty" can thus be said to "embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling." *Id*, quoting *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897).

Thus, in terms of the freedom afforded by the Wisconsin Constitution, "the general rule undoubtedly is that any person is at liberty to pursue any lawful calling, and to do so in his own way, not encroaching on the rights of others." *State v. Withrow*, 228 Wis. 404, 280 N.W. 364, 366 (1938) (emphasis added). The individual liberty protected by the Wisconsin Constitution thus plainly includes the liberty to engage in trade and commerce.

Of course, individual freedom to engage in trade or commerce is not unfettered. Government may intrude upon individual liberty in limited circumstances, but the scope of the police power that can properly be exercised by government is confined to the enactment of regulations that promote the public health, safety and welfare.

> The very existence of government renders imperative a power to restrain the individual to some extent. This is called the

> "police power," of which definition has been attempted by jurists and text-writers with so little success as to well-nigh discourage further attempts. It may be described, though not defined, as the power of the government to regulate conduct and property of some for safety and property of all…To ascertain and declare those limitations scientifically is, and for long to come will be, the despair and struggle of courts.

Kreutzberg, 90 N.W. at 1101.

Withrow involved a challenge to a state statute that effectively prohibited the plaintiff from making his "grade stallion" available for stud service. Under the statute, only purebred stallions could be registered with the Department of Agriculture and used for that purpose. The court was unable to find any sufficiently plausible or important justification for the statute and struck it down. "It is 'beyond the police power to prohibit persons from engaging in the common business occupation or employments that are innocent and lawful in themselves, and that do not require the exercise of any special skill, and as to such occupations, the scope of the police power is confined to the enactment of regulations to promote the public health, safety and welfare.'" 280 N.W. at 366.

Since the Wisconsin Constitution protects the liberty interest of citizens to engage in a trade or business, state or municipal enactments that deprive them of that right must satisfy the Constitutional requirement of

substantive due process. "[T]he privilege of every citizen to use his property according to his own wishes and in a manner that will yield him the best economic return is a property right. This property right should be invaded only when it is necessary to secure the common welfare." *Town of Caledonia v. Racine Limestone Co., Inc.*, 266 Wis. 475, 479, 63 N.W.2d 697, 699 (1954); *see also John F. Jelke Co. v. Emery*, 193 Wis. 311, 214 N.W. 369 (1927) (state statute forbidding trade and commerce in oleomargarine is arbitrary and therefore violates due process under Wisconsin constitution); Dairy Queen of Wisconsin, Inc. v. *McDowell*, 260 Wis. 471, 51 N.W.2d 34 (1952) (same, regarding trade and commerce in soft serve ice cream).

Here, Article I, Section 1 protects citizens from a governmental enactment that effectively deprives them of their right to make a living by owning and driving a taxi. The Wisconsin Supreme Court described the substantive due process test in the following way:

> Governmental action violates "substantive due process" when the action in question, while adhering to the forms of law, unjustifiably abridges the Constitution's fundamental constraints upon the content of what government may do to people under the guise of the law. This court has recognized that "due process requires that the means chosen by the legislature bear a reasonable and rational relationship to the purpose or object of the enactment; if it does, and the

> legislative purpose is a proper one, the exercise of the police power is valid.

In re Reginald D., 193 Wis. 2d 299, 307, 533 N.W.2d 181, 185 (1995). But the exercise of the police power must be "tested by rules of reasonableness, both as to purpose and means employed." *State v. McKune*, 215 Wis. 592, 255 N.W. 916, 917 (1934) (emphasis added). Milwaukee's ordinance, which has the unquestioned effect of prohibiting Wisconsin citizens from obtaining new taxi permits cannot meet this "rational basis" requirement.

II. In the Case of Economic Regulation, the "Rational Basis" Test Must Be Informed by Wisconsin's Fundamental Economic Policy of Free and Open Competition.

In applying this rational basis test, the court must consider Wisconsin's historic strong policy in favor of competition. Substantial weight should be given to the value of competition and the freedom of persons to pursue a livelihood.

The Sherman Antitrust Act was passed by the Congress in 1890 to address the growing concentration of economic power in a new form: large and interrelated business entities known as "trusts." According to the Supreme Court, "the plain intention of the law was to protect the liberty of contract and the freedom of trade." *U.S. v. Trans-Missouri Freight*

Association, 166 U.S. 290, 355 (1897). The Supreme Court later described the Sherman Act as "a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. *Northern Pac. Ry. Co. v. U.S.*, 356 U.S. 1, 4 (1958).

The 1893 Wisconsin Antitrust Act was intended to serve as a state law equivalent to the Sherman Act, banning trusts and other anticompetitive "combinations." *See, e.g., Grams v. Boss*, 97 Wis. 2d 332, 340, 294 N.W.2d 473 (1980). Like the Sherman Act, the Wisconsin antitrust law is intended to preserve and protect the economic liberty of Wisconsin's citizens. The legislative intent of Chapter 133 "is to safeguard the public interest against the creation or perpetuation of monopolies and to faster and encourage competition…It is the intent of the legislature to make competition the fundamental policy of this state." Wis. Stat. § 133.01 (emphasis added). The Legislature has made it clear that the economic liberty of Wisconsin's citizens is best protected by free and open competition.

Of course the Wisconsin Legislature understood the tension that naturally exists between a fundamental policy of economic freedom and the exercise of the governmental police power to enact laws and regulations to

promote the public welfare. Chapter 133 strikes the balance on the side of economic freedom. "State regulatory agencies shall regard the public interest as requiring the preservation and promotion of the maximum level of competition in any regulated industry consistent with the other public interest goals established by the legislature." *Id.* (emphasis added). Local governments must defer to the clearly-expressed policy of the State of Wisconsin whenever possible in connection with municipal regulation of trade and commerce.

III. The Circuit Court Correctly Ruled that Milwaukee's Cap on Taxicab Permits Violates the Wisconsin Constitution.

Two principles emerge from this discussion. The first is that the freedom to engage in lawful trade and commerce is a fundamental liberty interest protected by the Wisconsin Constitution. State or municipal enactments that abridge this constitutionally protected liberty interest cannot survive unless they serve a proper governmental purpose and the means employed bear a reasonable and rational basis to that purpose.

The second is that Wisconsin antitrust law was enacted, at least in part, to protect the fundamental liberty of Wisconsin citizens to engage in trade and commerce, with the clear understanding that free and open competition is the best and most appropriate policy to preserve their

freedom. Given this clear statement of public policy, the "rational basis" test as applied to a municipal exercise of police power in a way that restricts or eliminates competition must consider whether such a result is substantially related to some otherwise legitimate purpose and narrowly tailored to achieve that purpose. Rules and regulations that abridge economic freedom in a way that is directly inconsistent with the "fundamental economic policy" of the State of Wisconsin require this careful scrutiny. Wisconsin citizens' freedom is threatened by the type of rent seeking and economic favoritism that lead to the Milwaukee ordinance. Strong judicial oversight is required to ensure that political processes are not subverted by well-motivated special interests and the public interest justifies granting economic privileges to a select few. The Milwaukee ordinance cannot survive that oversight.

The Common Council stated two purposes for the challenged ordinance. The first was that the Council no longer wanted to assume the burden of annual hearings on the adequacy of applications for renewal by taxicab permit holders. The Court did not reach the question whether the ordinance had a rational basis, since it held that the simple desire to avoid doing the work of government could not satisfy the threshold test of

furthering a "legitimate" governmental purpose. (April 16, 2013 Transcript at 54; City Br. App. A.)

The second was to create regulations – involving capping the total number of permits by forbidding new applications and permitting existing permits to be bought and sold on the open market – that would create "value" for already existing permit holders. The value of existing permits has risen to approximately $150,000, putting the purchase of an existing permit – and entry into the taxicab business – beyond the reach of new competitors. (*Id.*) The Circuit Court held that this system of regulation merely increased the value of their business for exiting permit holders, and did nothing to accomplish the City's stated goals of increasing the "professionalism" of taxicab operators and their level of investment in the taxicab business. Thus, the ordinance has no reasonable and rational relationship to a legitimate governmental purpose. (*Id.* at 60.)

Although these findings were applied by the Circuit Court in the context of its equal protection analysis, the Circuit Court made it clear that they applied as well to its ruling on substantive due process. (*Id.* at 62.)

The legislative record is clear that the Common Council was fully aware of the anticompetitive purpose and effect of the ordinance at the time

it was enacted. The law was to create "value" for Milwaukee taxicab permits by, in effect, creating a shared monopoly in the taxicab business for the group of owners who happened to have valid permits in 1991. In the words of Alderman Nardelli, "if you don't have a taxi and you want to get into the taxi business, you've got to find someone whose [sic] selling and buy their taxi." (City Br. 11.) The effect of the statute has been to raise the price of new entry to the point of effective impossibility. Not surprisingly, the Milwaukee market for taxicab service is now highly concentrated. (Plaintiffs-Respondents Br. 8.) The Milwaukee taxicab industry has become exactly the kind of anticompetitive "combination" the antitrust laws were enacted to prevent.

As the Circuit Court pointed out, there is no basis for the City's claim that creating a monopoly windfall for existing permit holders would or did actually have the effect of increasing professionalism or investment in taxicab service. The rational basis test must at a minimum involve some level of actual rationality. It cannot be satisfied by hope, but must have some basis in reality.

The City now claims that the 1991 cap was based on a finding that the number of taxicab permits then existing was "adequate." (Defendant-

Appellant Br. 15.) Thus, the City says that "taxicab congestion is well-known by anecdotal evidence" and justifies a cap on taxicab permits, whether or not that was the point when it was enacted in 1981. (*Id.*)

There is no evidence of record here that indicates that the Milwaukee Common Council knows or could ever determine how many taxicab permits are "adequate" for Milwaukee or why it would ever be important for them to do so.

There is no dispute that the City may enact reasonable health and safety regulations that pertain to taxicabs, just as it does with respect to all businesses. But such regulations must be narrowly tailored to achieve the legitimate public policy goal of safe and reliable public transportation. If congestion is a problem at certain locations, the City may address that problem.

Decisions about the number of taxis, restaurants, or other businesses that are "adequate" to serve Milwaukee are not within the competence of the Common Council, and are in any event best left to free individuals exercising unfettered freedom to engage in normal trade or commerce in the way they think best. That is why the Legislature has declared the free and open competition is the fundamental economic policy of Wisconsin. There

can be no rational basis for a decision that does fundamental violence to that policy.

The City relies on the Wisconsin Supreme Court's decision in *County of Milwaukee v. Williams, supra,* to support its position that a cap on the number or taxicab permits is within its police power. There, the supreme court upheld a cap imposed by Milwaukee County on the number of taxicabs permitted to do business at the Milwaukee County airport. *Williams* does not support the City's position.

First, the *Williams* defendants[1] did not challenge the constitutionality of the ordinance in question as a violation of their constitutional liberty interest. They instead argued that the ordinance violated various state statutes. 2007 WI 69, ¶1. They did not invoke, and the court did not consider, the constitutionality of the county ordinance under the substantive due process protection of Article I, Section 1. In fact, the supreme court made it clear in its decision that it was limiting the decision to an interpretation of the statutes relied upon by the defendants in that case and not on a constitutional analysis. *Id.*, ¶63.

[1] *Williams* arose in the context of a prosecution for violation of an Ordinance and, thus, the parties challenging the Ordinance were the defendants.

Second, the *Williams* defendants did invoke Chapter 133. But, they claimed that it directly applied to county ordinances and required as a matter of law that such ordinances use the least competitively restrictive means possible to achieve their legislative goals. The court rejected such a sweeping application of Chapter 133. *Id.*, ¶55. Plaintiffs make no such claim here. But the fact that Chapter 133 does not directly apply to municipal enactments in the manner rejected by the *Williams* court does not mean that Wisconsin's policy of free and open competition should not be taken into consideration in testing the rational basis of a City ordinance on a claim arising under the Wisconsin Constitution.

And third, the county ordinance in question in *Williams* was directed at a specific problem – congestion at the county-owned and operated airport – and it addressed that specific problem by limiting the number of taxicab permits at the airport. *Id.*, ¶¶7-11. As the supreme court explained, state law specifically authorizes Wisconsin counties to regulate the use of airports that they operate. *Id.*, ¶20. And even though the county had been given such explicit statutory authority, the *Williams* court invalidated certain provisions of the ordinance as being overly restrictive. *Id.*, ¶44. Had Milwaukee County attempted to solve the limited problem of airport

congestion by imposing a cap on the total number of taxicabs operating anywhere in the county, the result would surely have been different.

Dated this 19th day of December, 2013.

Respectfully submitted,
WISCONSIN INSTITUTE FOR
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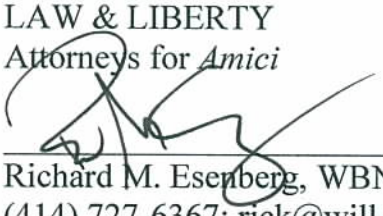
Attorneys for *Amici*



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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2,976 words.

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 19th day of December, 2013.

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