IN THE SUPREME COURT OF ARKANSAS

STEVEN HEDRICK;
And X-DUMPSTERS, **APPELLANTS**

v. **NO. CV-24-659**

CITY OF HOLIDAY ISLAND, **APPELLEE**

ON APPEAL FROM THE CIRCUIT COURT
OF CARROLL COUNTY, ARKANSAS
CIVIL DIVISION

THE HONORABLE SCOTT JACKSON

APPELLANTS BRIEF

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POINTS ON APPEAL

(1) Whether Holiday Island's Ordinance that grants an exclusive monopoly to the Carroll County Solid Waste District on the collection, transport, and disposal of solid waste in Holiday Island, and prohibits licensed entities, like Appellants, from offering supplemental services—services the District is *not* required to provide under the Ordinance and that do not relieve any resident of the requirement to contract with the District—violates the Arkansas Constitution's anti-monopoly provision.

(2) Whether that Ordinance violates the Arkansas Constitution's cumulative protections for the right to engage in a common occupation.

(3) Whether Ark. Code Ann. § 8-6-211 violates the Arkansas Constitution's anti-monopoly provisions or the cumulative protections to engage in a common occupation to the extent—if any—that it permits Appellee to enact the challenged provisions of the exclusive monopoly.

III.

TABLE OF AUTHORITIES

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JURISDICTIONAL STATEMENT

Appellants appeal the July 25, 2024, order dismissing Appellants' complaint. (RP 137-38). On July 29, 2024, a disposition sheet closing the case was entered by the Circuit Clerk for the Carroll County Circuit Court-Western District officially closing the case and disposing of all the Appellants' claims. (RP 139). Appellants timely appealed on August 23, 2024. (RP 140-42). Appellants then filed a corrected notice of appeal on August 27, 2024, adding in the proper date to the body of the appeal and the email address for the individual transcribing the oral argument. (RP 143-45).

Appellants respectfully request that the Supreme Court decide this appeal under Supreme Court Rule 1-2(a). Under that rule, "[a]ll appeals involving the interpretation or construction of the Constitution of Arkansas" should "be filed in the Supreme Court." This appeal involves the interpretation of multiple provisions of the Arkansas Constitution: (1) its prohibition on monopolies, Ark. Const. art. II § 19; and (2) its due process protections for the right to earn an honest living. Ark. Const. art. II §§ 2, 8, 21.

Finally, "[a]n appeal may be taken from a circuit court to the Arkansas Supreme Court from: (1) A final judgment or decree entered by the circuit court."

Ark. R. App. P. Civ. 2. This is an appeal from a circuit court's final judgment or decree, and thus this Court has jurisdiction to hear this appeal.

The issues of law presented in this matter are: (1) whether Appellants have sufficiently pleaded for this stage of litigation that the Holiday Island Ordinance that prevents them from offering supplemental trash removal services violates the Arkansas Constitution's anti-monopoly provisions; (2) whether that same ordinance violates the Arkansas Constitution's protections for the right to engage in a lawful occupation; and whether (3) Ark. Code Ann. § 8-6-211 permits Holiday Island's exclusive monopoly prohibiting Appellants from continuing to offer supplemental trash removal services.

The Circuit Court's order is a final judgment by a circuit court that is subject to review by this Court pursuant to Rule 2 of the Arkansas Rules of Appellate Civil Procedure. For the reasons set forth herein and pursuant to Arkansas Supreme Court Rule 1-2, the Arkansas Supreme Court should hear and decide this case. I express a belief based on a reasoned and studied professional judgment that this appeal does raise questions of legal significance for jurisdictional purposes.

By /s/ Whitfield Hyman
Whitfield Hyman
Adam Shelton
Attorneys for Appellants
Steven Hedrick & X-Dumpsters

V.

STATEMENT OF THE CASE AND THE FACTS

Steven Hedrick started a roll-off dumpster rental business called X-Dumpsters in 2020, after spending most of his career in the construction industry. (RP 70). ¶ 8. The Carroll County Solid Waste District ("District") granted him and his company (Appellants here) a license under the Solid Waste Hauler Licensing Program in 2020. (RP 70), ¶ 9. And Appellants have continued to renew their license as required by law. (RP 70), ¶ 10.

Appellants' business consists of delivering roll-off dumpsters to residents in Carroll County, allowing the clients to fill the dumpsters according to the waste permitted under the contract (RP 71) ¶¶ 13-16, and then returning a few days later to pick up the dumpster, and transport and dispose of the waste in line with their license from the District. (RP 72), ¶ 26.

Until 2022, Appellants provided services to the residents of Holiday Island. But Appellants can no longer offer roll-off dumpster rental services, because in April 2022, Holiday Island enacted Ordinance 2022-004 ("Ordinance"). This Ordinance bans anyone other than the City's selected contractor from transporting or hauling solid waste in Holiday Island. (RP 75), ¶¶ 44-48.

A. Ordinance 2022-004

This Ordinance authorizes the city to select a single entity that all residents and businesses in the City must contract with for the regularly scheduled disposal of solid waste. (RP 91). In doing so, the Ordinance prohibits any other entity except for the selected contractor from collecting, transporting, or hauling solid waste within city limits. (RP 91). There is no exception for any person or entity that the District has licensed to haul, transport, and dispose of waste within the County, such as Appellants.

Section 1 of the Ordinance states that "no other person or entity except such exclusive contractor shall be permitted to convey or transport Solid Waste or recycling for Regular Units within the City," and that "[t]he collection of Solid Waste by anyone other than the approved Contractor or Contractors is prohibited." (RP 91-92). Section 9 provides penalties and fines for "[a]ny individual found to be disposing of Solid Waste in a manner not permitted by this code." (RP 95). Under Section 9, a person found to be doing so "shall be guilty of a misdemeanor violation and subject to a fine of no greater than the sum of $500 for any one specified offense or violation, double that sum for each repetition of the offense or violation." (RP 95).

Finally, Section 12 lays out the requirements for the selected contactor to provide bulk collection. Under that Section, the selected contractor must allow "two curbside bulky item collections per year." (RP 96). Each of those two collections,

however, is limited to only "three items per pickup." *Id*. Also, the Ordinance does *not* require the selected contractor to provide ad hoc roll-off dumpster rental services, which is the only type of service Appellants provide.

The Ordinance's main requirement for the City's selected contractor is the regularly scheduled collection and disposal of solid waste throughout the City, a service Appellants do not provide. (RP 94-95).

The City promptly selected the District as the sole provider for solid waste services in Holiday Island. (RP 100). The Mayor sent a letter[1] to those licensed to dispose of solid waste by the District, which informed these licensees that the District was now the exclusive hauler for solid waste in Holiday Island. (RP 100).

B. Holiday Island's interpretation of the Ordinance respecting Appellants' business.

At first, Appellants did not believe the Ordinance applied to their business because they did not, and do not, provide any regularly scheduled or periodic solid waste disposal services, but only provide the type of ad hoc[2] services regarding

[1] The letter was sent on April 27, 2022, and the Ordinance was enacted on April 19, 2022. (RP 98, 100).

[2] That is, a customer must call X-Dumpsters to request a dumpster and pick-up when the customer needs it; X-Dumpsters does not make regular rounds. (RP 71), ¶¶ 13-15.

which the Ordinance was silent. (RP 74), ¶¶ 37-38. Appellants therefore continued to provide their services to Holiday Island residents.

But on November 8, Appellants received a letter from Aaron Hoyt, Holiday Island's code enforcement officer. (RP 74), ¶ 41. The letter asserted that on October 26, 2022, Appellants had a roll-off dumpster at a residence in Holiday Island, and possibly other locations, and that because Appellants were not an approved contractor for collecting or hauling solid waste in Holiday Island, they must immediately discontinue placing additional containers within city limits or suffer a citation. *Id.*

A few days later, on November 17, 2022, the District's Chairman sent a letter to Appellants informing them that due to violations of Holiday Island's Solid Waste Ordinance, Appellants' license to operate in Carroll County would be suspended if they did not immediately cease operating in Holiday Island. (RP 74), ¶ 42.

Appellants ceased operating within Holiday Island as a result of the letters. (RP 75), ¶ 45. Because Appellants have ceased operating, they have been forced to turn down numerous job opportunities in Holiday Island, costing them significant business opportunities. (RP 75), ¶ 47.

C. This Litigation

On August 22, 2023, Appellants filed a Complaint with the Carroll County Western District Circuit Court. (RP 10). The Complaint alleged that the City violated

Appellants' constitutional rights as protected by the Arkansas Constitution's anti-monopoly provision and its due process protections by prohibiting them from operating an ad hoc roll-off dumpster rental business. (RP 10-42). The City filed a Motion to Dismiss on September 29, 2023, arguing that the Ordinance was passed pursuant to a state statute which gives the City the authority to adopt the Ordinance and faulting Appellants for not attacking the validity of the statute. (RP 53).

Appellants then filed an Amended Complaint on October 13, 2023. (RP 69). The only change to the Complaint was the addition of a claim attacking the validity of Ark. Code Ann § 8-6-211 to the extent—if any—that it authorizes the City's Ordinance. (RP 80-82).

The City filed a renewed motion to dismiss on November 2, 2023, arguing that precedent allowed the City to grant an exclusive monopoly to the District, so the Ordinance did not violate the Arkansas Constitution's anti-monopoly provisions or due process protections. (RP107-116). The City also asserted "state action immunity" in defense of the claim. (RP 114).

Appellants filed their opposition on November 20, 2023, (RP 120-29), and the City filed its reply on November 21, 2023. (RP 130-34). Once the motion to dismiss was fully briefed, the court scheduled a hearing on May 7, 2024. (RP 136). The circuit court granted the motion to dismiss on July 25, 2024 (RP 137-38). Appellants' timely appeal followed.

VI.

STANDARD OF REVIEW

The circuit court erroneously dismissed Appellants' First Amended Complaint. "In reviewing a circuit court's decision on a motion to dismiss," this Court treats "the facts alleged in the complaint as true and view[s] them in the light most favorable to the party who filed the complaint." *Arkansas State Claims Comm'n v. Duit Const. Co.,* 2014 Ark. 432, 445 S.W.3d 496, 501. "In testing the sufficiency of the complaint on a motion to dismiss, all reasonable inferences must be resolved in favor of the complaint, and the pleadings are to be liberally construed." *Id*. The "standard of review for the denial of a motion to dismiss is whether the circuit court abused its discretion." *Id*.

But issues of law are reviewed *de novo*. *Baptist Health Sys. v. Rutledge*, 2016 Ark. 121, 488 S.W.3d 507, 510; *Nelson v. Arkansas Rural Med. Practice Loan & Scholarship Bd.*, 2011 Ark. 491, 385 S.W.3d 762, 769. Specifically, the Supreme Court "reviews a circuit court's interpretation of the constitution de novo because it is for this court to determine what a constitutional provision means." *Thurston v. League of Women Voters of Ark.*, 2024 Ark. 90, 687 S.W.3d 805, 811. And an error of law itself constitutes an abuse of discretion. *See Ford Motor Co. v. Nuckolls*, 320 Ark. 15, 20, 894 S.W.2d 897, 900 (1995). Here, Appellants' appeal is based entirely on questions of Arkansas constitutional law.

VII.

ARGUMENT

The circuit court made two reversible legal errors in dismissing Appellants' First Amended Complaint.

First, it explicitly held that the Ordinance did not violate the Arkansas Constitution's prohibition on monopolies. *See* Ark. Const. art. II § 19. This was incorrect, because the monopoly given to the District in the Ordinance is not "directed *solely* to legitimate regulation of the subject-matter undertaken." *Dreyfus v. Boone*, 88 Ark. 353, 114 S.W. 718, 721 (1908) (emphasis added). In granting the District a monopoly, the City went beyond what was necessary to achieve a legitimate public health and safety purpose. Appellants do not seek to provide the regularly scheduled solid waste services contemplated by the Ordinance; they only wish to provide services *supplemental* to those offered by the District—services that do not relieve residents of their obligation to contract with the District, and services the District is not even required to provide under the Ordinance. Further, Appellants (who are already licensed by the City's selected contractor—the District—to provide these services), do so in a manner that does not threaten public health. In short, Appellants offer services *different from* those contemplated by the exclusive contract between the City and the District—and yet the City prohibits Appellants from

providing those services, not for reasons of public health, but merely "to raise [the District's] revenue," which is unconstitutional. *Id.*, 114 S.W. at 721.

Second, the lower court committed reversible legal error in implicitly holding that the Ordinance does not violate the Constitution's protection for the "fundamental" rights of life, liberty, and property. Generally, "[s]tatues limiting and regulating occupations which before were of common right can find no excuse except as they relate to the public and are for its benefit … [and] only where it is *necessary* to attain the end desired." *State ex rel. Att'y Gen. v. Gus Blass Co.*, 193 Ark. 1159, 105 S.W.2d 853, 857-58 (1937) (emphasis added). Because preventing a licensed entity from providing services that *do not compete* with the services the City's selected contractor is required to provide under the Ordinance does not reasonably relate to protecting public health and safety, the challenged portions of the Ordinance also violate the Arkansas Constitution's cumulative protections for the right to engage in a lawful occupation.

A. The challenged provisions of the Ordinance violate the Arkansas Constitution's prohibition on monopolies.

The Arkansas Supreme Court has been consistent and clear: for a monopoly to be permissible, it "must be reasonable, and must be directed *solely* to legitimate regulation of the subject-matter undertaken." *Dreyfus*, 88 Ark. 353, 114 S.W. at 721 (emphasis added). Here, the Ordinance fails that strict test because it prohibits licensed individuals from providing services that the City's selected contractor is *not*

required to provide—services that are not only consistent with, but necessary for, the protection of public health and safety.

The *Dreyfus* Court held unconstitutional a monopoly given to Dreyfus for the removal of deposits from unsewered privies in Little Rock. *Id.* at 720. A Little Rock resident challenged the monopoly, arguing that he should not be required to contract with Dreyfus for the removal of deposits from his own unsewered privy. *Id*. The Court ruled in his favor, finding that the monopoly created by the city was really *not* about health and safety, but about raising revenue for the monopoly-holder. *Id*. at 722. In other words, the ordinance in *Dreyfus* was not "directed solely to legitimate regulation" for the "protection of the health, safety, and convenience" of the city's residents, but was designed "to obtain as much money as possible for the city out of the earnings of the business." *Id*. at 721-22.

Likewise, here, while the City certainly may select a contractor to provide regular waste disposal services, and regulate waste removal to promote public health and safety, Holiday Island has gone far beyond that: it has prohibited the offering of *supplemental* or *additional* solid waste services. The Ordinance contemplates regular household trash-hauling services, and requires citizens to contract with the District for that service. But Appellants provide a different service: ad hoc roll-off dumpster rental services. This is a service the District is not even required to provide under the Ordinance, and which does not interfere with or compete against regular

household trash-removal. Thus the City's prohibition against Appellants' business is not "directed solely" to legitimate regulation, nor does it serve the sanitation concerns addressed in the Ordinance, *Dreyfus*, 88 Ark. 353, 114 S.W. at 721. Instead, as in *Dreyfus*, it simply bars Appellants from practicing their trade in order to raise revenue for the District.

This case is actually more compelling than *Dreyfus* because there, Mr. Boone was seeking to *exempt* himself from having to contract with the waste-removal company. Here, by contrast, Appellants are not arguing that the City can't require citizens to contract for regular waste removal. Appellants instead wish to offer services *beyond* those contemplated by the Ordinance. This case is more analogous to a hypothetical situation in which Mr. Boone contracted with a business to remove deposits from his privy, but then also wanted to hire an additional individual to install a new septic tank, or clean up his privy after it had been vandalized by strangers. In this case, Appellants seek to offer services *above and beyond* regular trash removal—services that would in no way interfere with such removal—yet the City forbids this, and that prohibition does not promote health and safety.

In *North Little Rock Transportation Co. v. City of North Little Rock*, a competing cab company sued North Little Rock over a monopoly it gave to the Checker Cab Company to "haul[ ] passengers for hire in North Little Rock." 207 Ark. 976, 977, 184 S.W.2d 52, 52 (1944). The Court declared the monopoly

unconstitutional. *Id*. at 979-80, 184 S.W.2d at 54. The Arkansas Constitution's monopoly prohibition, it said, "is too clear to need elucidation, and no amount of judicial interpretation should ever be permitted to cause the slightest deviation from the clear language of the constitutional inhibition." *Id*. at 981, 184 S.W.2d at 54.

The Court noted that the City granted the company the exclusive right to engage in passenger pickup "[m]erely because it was [already] operating in North Little Rock … and without any legislative finding … based on substantial reasoning that an exclusive taxicab business … was for the public welfare, or was an exercise of the police power." *Id.* at 982, 184 S.W.2d at 55. So, too, the City here engaged in no substantial reasoning showing that the public health and safety would be served by barring Appellants from offering supplemental solid waste removal services, or that allowing Appellants to offer such services would interfere with the wholly different business of periodic household trash services. Indeed, such interference is unlikely, given that the Ordinance does *not* require the District to provide the dumpster services Appellants offer. But even if the Ordinance did require the District to provide those exact services, there's still no rational reason related to public health and safety to prohibit a licensed entity from providing services that do not supplant or make unsteady the part of the monopoly that's *actually necessary* for public health and safety.

In short, Arkansas courts "have sustained … monopolistic grants of special privilege" only where such grants are "needful in controlling a type of business fraught with perils to public peace, health and safety." *Gipson v. Morley,* 217 Ark. 560, 567, 233 S.W.2d 79, 83 (1950). Or, as *Dreyfus* put it, only when the monopoly is reasonable and aimed solely at the legitimate health and safety purpose. *See* 114 S.W. at 721. But that's not the case here, because the services Appellants provide are simply different from the household trash-hauling provided for by the Ordinance, and there's no showing that allowing Appellants to offer their dumpster services when the regularly scheduled trash removal services are insufficient would in any way interfere with the City's legitimate concerns regarding contracting for household waste-removal. That's particularly true given that the Ordinance does *not* require the District to provide the services Appellants provide.

This case is like if a city were to require citizens to contract with a particular tree-trimming company to regularly cut back trees overhanging the sidewalk—which a city may do, *cf. Driggers v. Locke*, 323 Ark. 63, 913 S.W.2d 269, 272 (1996)—but then also forbade a licensed landscaper from providing the service of cutting down trees in people's back yards to make room for weddings or barbecues.

The City below pointed to two cases in support of their argument that the Ordinance does not constitute an unconstitutional monopoly: *Smith v. City of Springdale,* 291 Ark. 63, 722 S.W.2d 569 (1987), and *L&H Sanitation, Inc. v. Lake*

City Sanitation, Inc., 769 F.2d 517 (8th Cir. 1985). Neither case, however, supports the City's position.

In *Smith,* a taxpayer challenged the assessment of a fee imposed by the city to pay for the collection of garbage by the city's selected contractor, arguing that it was an illegal monopoly. The Court disagreed, holding that the city was "authorized to enter into proper exclusive contracts for sanitation services." 291 Ark. at 65, 722 S.W.2d at 570. But that's not in dispute here. Appellants do not contend that the City cannot make a contract with the District whereby the District is exclusively allowed to provide regularly scheduled solid waste services. Rather, they contend that by going further, and forbidding Appellants from providing a *different* service—one the Ordinance does *not* require the District to provide, and one that, if Appellants provide, will not relieve any Holiday Island resident of the duty to contract with the District for regular solid waste disposal—the City has created an unconstitutional monopoly. Appellants only challenge the Ordinance insofar as it prevents them from offering *supplemental ad hoc roll-off dumpster rental services*—services it already has a license to provide. *Smith* concerned a challenge by a taxpayer seeking to overturn the grant of the monopoly as a whole. That's a far cry from the situation here, where Appellants don't seek to supplant the District's monopoly on regular trash-hauling, but only to offer services that *supplement* those the District is required to provide.

As for *L&H Sanitation,* that case did not involve a challenge under the Arkansas Constitution's anti-monopoly provision, but instead a challenge under the federal Sherman Antitrust Act—a law that restricts the actions of *private* businesses, whereas the anti-monopoly provision of the Arkansas Constitution restrains the actions of *government*. *Dreyfus*, 88 Ark. 353, 114 S.W. at 720–21. The other aspect of *L&H Sanitation* that makes it an ill fit for this situation is that it involved a challenge to the monopoly as a whole by a competitor that wanted to offer services in place of the monopoly-holder. 769 F.2d at 519. But Appellants here do *not* seek to compete with the District or provide the same services; instead they seek to offer a *different* service—one that will not interfere with the District's provision of regular trash-hauling services.

This case therefore concerns a different question than was at issue in *Smith* or *L&H Sanitation*. Instead, this case is governed by *Dreyfus* and *North Little Rock Transportation Co.* The issue is whether prohibiting Appellants from offering supplemental ad hoc roll-off dumpster rental services is "reasonable … [and] directed solely to legitimate regulation of [trash hauling]," *Dreyfus*, 88 Ark. 353, 114 S.W. at 721, and whether that prohibition is constitutional, given the lack of "substantial reasoning" to show that it promotes "the public welfare, or [is] an exercise of the police power." *North Little Rock Transp.,* 207 Ark. at 982, 184 S.W.2d at 55.

The Ordinance fails that exacting standard because it is not necessary for the preservation of public health and safety to prohibit someone already licensed to provide services from doing so when those services are only *supplemental* to the services provided by the monopoly-holder, and do not relieve the residents of Holiday Island from their duty to contract with the District.

Actually, the Ordinance *threatens* public health. The District only has to provide two "bulk pickups" a year, with only three items per pickup. (RP 96). But what about situations where, say, a family comes in to clean a house upon the death of a relative so it can be sold? Or where an individual purchases a dilapidated lot with the intent of removing the junk or repairing the facilities, and improving the community? (RP 96). Under the Ordinance, Appellants cannot offer their roll-off dumpster service in such situations, because it explicitly prohibits any "person or entity except such exclusive contractor" from "transport[ing] Solid Waste or recycling for Regular Units within the City." (RP 92). Yet nothing in the Ordinance requires the District to provide those services either. In any event, this fact demonstrates the arbitrariness and unreasonableness of the monopoly here. Barring Appellants from offering services that *differ* from those the Ordinance requires the District to provide does not promote the public safety concerns that justify the Ordinance's requirement that households contract with the District for regular waste-removal.

Because the prohibition Appellants challenge is not reasonable or properly limited to matters that promote public health and safety, it constitutes an unlawful monopoly to the extent that it prohibits Appellants from providing their services. Thus, this Court should reverse the circuit court's order dismissing the complaint.

B. The Ordinance, by prohibiting Appellants from providing supplemental roll-off dumpster services which they are licensed to provide violates the guarantees of the "fundamental" rights of life, liberty, and property protected by the Arkansas Constitution.

The right to "acquire and possess property" is one of "the 'rights of persons'" and "it is the most essential to human happiness." *Leep v. St. Louis, I.M. & S. Ry. Co.*, 58 Ark. 407, 25 S.W. 75, 77 (1894). Consequently, "[s]tatues limiting and regulating occupations which before were of common right can find no excuse except as they relate to the public and are for its benefit … [and] only where it is *necessary* to attain the end desired." *State ex rel. Att'y Gen. v. Gus Blass Co.*, 193 Ark. 1159, 105 S.W.2d 853, 857-58 (1937) (emphasis added).

This Court has held that when examining a law abridging the right to engage in a lawful occupation,[3] courts must *first* determine whether the law is *truly* geared toward health, safety, and public welfare. Generally, "[t]he state cannot by statute, under the guise of the police power, impose arbitrary or unreasonable restrictions

[3] To repeat, not only are Appellants' ad hoc dumpster rental and removal services lawful, but Appellants are already licensed to provide those services. (RP 91-92).

upon private property or its use." *Bachman v. State*, 235 Ark. 339, 343, 359 S.W.2d 815, 817 (1962). Further, when "a statute is penal in nature, it is strictly construed in favor of the offender." *Ports Petroleum Co., Inc. of Ohio v. Tucker*, 323 Ark. 680, 916 S.W.2d 749, 753 (1996). Here, the Ordinance is penal in nature, as it is enforced through fines. (RP 95).

A trio of cases demonstrates how this Court looks behind a restriction on the right to engage in an occupation, to ensure that it actually relates to public health and safety and is not arbitrary or irrational.

First, in *Noble v. Davis*, 204 Ark. 156, 161 S.W.2d 189, 192 (1942), the Court found that a statutory provision giving the State Board of Barber Examiners the power to set the minimum wages of persons providing haircuts and shaves violated Article II, Sections 2 and 19 of the Arkansas Constitution. The Court explained that even though the Legislature asserted that the measure was related to health and safety, and even though the Legislature was within its power to regulate *other* aspects of barbering, wage-setting was not itself related to public health or safety. *Id*. Consequently, the wage restrictions violated the state constitution's protections for economic freedom of choice. *Id.*

Second, in *McCastlain v. R. & B. Tobacco Co.*, the Court struck down a regulation that required a tobacco company to supply "open account" letters from three-fourths of the cigarette manufacturers with general distribution in Arkansas.

This, too, violated Article II, Section 2, of the Arkansas Constitution because "it impose[d] an *unusual* and *unnecessary* restriction on a lawful occupation" and was not aimed at health, safety, or public welfare. 242 Ark. 74, 79, 411 S.W.2d 882, 885 (1967) (emphasis added).

Finally, in *Ports Petroleum Co., Inc. of Ohio v. Tucker,* the Court struck down a *price* control law because it unconstitutionally interfered with a gas company's business enterprises. 323 Ark. 680, 916 S.W.2d 749, 753 (1996). The case challenged a regulation that prohibited the sale of unbranded motor fuel at low-cost prices, but did not require a showing of any predatory intent. Absent such a showing, the regulation had "the ironic effect of hindering competition and amount[ed] to an unreasonable exercise of the state's police power," *id*. at 751, because it simply prohibited "legitimate and innocent below-cost strategies." *Id.* at 756. In other words, the Court did not defer to the government's mere assertion that its restriction on economic choices promoted public safety; it examined the reasonableness of that restriction, and concluded that "legislation which hampers innocent and legitimate competition can[not] in any [way] be deemed to be rational." *Id*. at 755.

Here, the challenged provision of the Ordinance is not aimed at protecting public health and safety, but only precludes legitimate competition. Appellants are licensed to provide their services. Those services would not even compete with those the Ordinance requires the District to provide. Blocking Appellants from providing

these services does not protect public health and safety, and even imperils it, by preventing Appellants from offering the public important, much-needed sanitation services—services the Ordinance does not require the District to provide. (RP 75).

There's *no* evidence, let alone any "substantial reasoning" to show that barring Appellants from doing their job "[is] for the public welfare." *North Little Rock Transp. Co.,* 207 Ark. at 982, 184 S.W.2d at 55. Because this challenged aspect of the Ordinance is arbitrary and not directly related to public health or safety, it is unreasonable and therefore violates the Arkansas Constitution's cumulative protections for the right to engage in a lawful occupation.

C. Arkansas Code Annotated Section 8-6-211 is unconstitutional to the extent that Holiday Island argues that it permits the challenged conduct.

The City argued below that the authority to enact the challenged portions of the Ordinance comes from Ark. Code Ann. § 8-6-211. The City asserted that this statute allows it to prohibit Appellants' roll-off dumpster rental business. Appellants amended their Complaint to include a claim against Section 8-6-211 to the extent—and only to the extent—that it permits a municipality to prohibit a licensed entity from offering supplemental solid waste services that do not supplant the monopoly as unconstitutional for the same reasons that the Ordinance itself is unconstitutional.

But Appellants do not view the statute that way. The statute actually makes no reference to such a situation; it merely empowers cities to "provide a solid waste

management system," and to make policies and contracts for that purpose. It contains no provision entitling the City to do what it is doing here: to ban a *different* business, one that does not interfere with the regular trash-hauling contemplated by the Ordinance, that does not threaten public health, and that the Ordinance does not require the District itself to provide. In Appellants' view, Section 8-6-211 is simply silent on these questions; the applicable law is the Constitution. However, if, as the City contends, Section 8-6-211 *does* authorize the monopoly at issue here, it is unconstitutional for the reasons given above.

Respectfully submitted,

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By /s/ Whitfield Hyman

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VIII.

REQUEST FOR RELIEF

For all the reasons set forth above, Appellants request that the Supreme Court reverse the circuit court's grant of the motion to dismiss Appellants claims and remand for further proceedings consistent with this opinion.

IX.

CERTIFICATE OF SERVICE

The undersigned attorney does hereby certify that a true and correct copy of the foregoing will be served on the following counsels of record via eFlex on this 19th day of November 2024, pursuant to Administrative Order No. 21, § 7(a). Additionally, a true and correct copy of the foregoing has been served upon the following via U.S. Mail, First Class Postage prepaid on the 19th day of November 2024:

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X.

CERTIFICATE OF COMPLIANCE WITH ADMINISTRATIVE ORDERS NO. 19 AND 21 AND WITH WORD-COUNT LIMITATIONS

I, the undersigned attorney, hereby certify that the attached Appellants' Brief complies with Administrative Order No 19 in that all "confidential information" has been excluded from the "case record" by eliminating all unnecessary or irrelevant confidential information.

Further, the undersigned states that the foregoing Brief complies with Administrative Order No. 21, Section 9, in that it contains no hyperlinks to external papers or websites.

Further, the undersigned states that the foregoing Brief conforms to the word-count limitation identified in Rule 4-2(d) and said Brief contains 5,103 words.

Identification of paper documents not in PDF format:

The following original paper documents are not in PDF format and are not included in the PDF document(s) file with the Court: None.

/s/ Whitfield Hyman
Whitfield Hyman (Bar No. 2013237)
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