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' REPLY BRIEF

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SUMMARY OF THE ARGUMENT

Appellants provided roll-off dumpster rental services to the residents of Holiday Island until the City enacted Ordinance No. 2022-004 (Ordinance), which gave the city authority to grant a monopoly on all solid waste collection to a single entity. This Ordinance granted that monopoly to Carroll County Solid Waste District (CCSW) and required all residents to contract with CCSW for regularly scheduled trash collection services. The Ordinance also prohibited any other entity from providing *any* solid waste services—thereby forbidding Appellants from offering their services.

To be clear: Appellants do *not* seek to offer regularly scheduled trash collection services, to usurp the monopoly granted to CCSW, or to relieve any resident of the responsibility to contract with and pay CCSW. They simply seek to offer services that *supplement* the services that CCSW is required to offer under the Ordinance. Indeed, Appellants offer services that CCSW is not even required to provide.

The City's prohibition on Appellants offering their dumpster services violates the Arkansas Constitution's prohibition on monopolies and its cumulative protections for the right to engage in a common occupation. *See* Ark Const Art. II, §§ 2, 8, and 19.

The City argues that precedent forecloses Appellants' claim, but the precedents it cites stand for the irrelevant proposition that cities can grant monopolies for solid waste services—a point that Appellants don't dispute. The City also argues that Ark. Code Ann. § 8-6-211 permits it to ban Appellants' services, but that misreads the plain text of the statute. And even if the statute did permit that prohibition, the statute would then be unconstitutional for the same reasons that the prohibition itself is unconstitutional.

The City also argues that courts do not need to look to see whether a regulation is truly aimed at health or safety, but should take the government's assertion as true. This Court's precedents contradict that argument. Finally, the City argues that state action immunity applies but the state action immunity doctrine only applies to cases brought under the Sherman Act, a law is not at issue here, so no this argument also fails.

IV.

ARGUMENT

A. The statute does not authorize the City to ban Appellants' business.

The City argues that Ark. Code Ann. § 8-6-211 gives it authority to prohibit Appellants from offering their services in Holiday Island. But the portions of that section that deal with solid waste just require the creation of system for solid waste management. This even allows for a city to grant a monopoly to a single entity for

solid waste collection and requires all residents or businesses to contract with that entity. It does not give a city the power to prohibit other services, like those Appellants' offer, that do not seek to supplant the monopoly or compete directly with the services the monopoly holder is required to provide.

When the legislature intended to empower cities to ban supplemental waste-hauling services, it did so. Consider Section 8-6-211(e) which empowers municipalities to "enact laws concerning … the prohibition of diverting of recyclable materials by persons other than a generator or collector of the recyclable material."

But no similar prohibition can be found in the statutory subsection governing *non*-recyclable material. And the fact that the same statute in a different subsection does let cities "prohibit[] … diverting of *recyclable* materials by persons other than a … collector of the recyclable material," but does *not* include language allowing cities to prohibit the hauling of *non-recyclable* materials shows the legislature didn't intend to give the power the City claims. *Cf. Buonauito v. Gibson*, 609 S.W.3d 381, 386, 2020 Ark. 352, 386 (relying on the rule that "the express designation of one thing may properly be construed to mean the exclusion of another"); *Dunhall Pharms., Inc. v. State, Dep't of Fin. & Admin*., 295 Ark. 483, 487, 749 S.W.2d 666, 669 (1988) (because legislature established a specific value for some items for tax purposes, but not for other items, showed that it did not intend such a value to apply to the latter).

B. Prohibiting Appellants' business violates the Constitution's strict prohibition of monopolies.

Even assuming that the statute does allow the City to prohibit Appellants' business, that prohibition nevertheless violates the Arkansas Constitution's Anti-Monopoly Clause. That Clause states: "monopolies are contrary to the genius of a republic, and shall not be allowed," Ark. Const. art. II, § 19. This Court has said that "no amount of judicial interpretation should ever be permitted to cause the slightest deviation from the clear language of [this] constitutional inhibition." *N. Little Rock Transp. Co. v. City of N. Little Rock*, 207 Ark. 976, 981, 184 S.W.2d 52, 54 (1944). The only exception is that government may create monopolies in certain services when *necessary* for public health and safety. *See Dreyfus v. Boone*, 88 Ark. 353, 114 S.W. 718, 721 (1908) (for a monopoly to be permissible it "must be reasonable, and must be directed *solely* to legitimate regulation of the subject–matter undertaken." (emphasis added)).

The City points to precedents from this Court and the Eighth Circuit to establish that its prohibition on Appellants' business is constitutionally permissible, and subject only to rational basis review. *See* Appellee's Br. at 15 ("Appellants must provide facts that show how 'the act is not rationally related to achieving any legitimate objective of state government under any reasonably conceivable state of facts.'" (citation omitted)). But that is not the standard this Court uses when applying the Arkansas Constitution's Anti-Monopoly Clause. On the contrary, it has said that

"monopolistic grants of special privilege" are constitutional *only when* they 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). That standard requires a realistic look at the actual purpose and effect of a challenged law.

None of the cases the City cites for the proposition the rational basis test applies concerned the Anti-Monopoly Clause. *City of Siloam Springs v. Benton County*, 350 Ark. 152, 158, 85 S.W.3d 504, 507 (2002), and *Streight v. Ragland*, 280 Ark. 206, 655 S.W.2d 459 (1983), concerned equal protection and the prohibition on local or special laws.

Instead, this Court in *Dreyfus* said municipalities can adopt laws that have monopolistic consequences, but only where "directed *solely*" to protecting public health—and that they cannot create monopolies "under the guise of police regulations." 88 Ark. 353, 114 S.W. at 721 (emphasis added). Indeed, the Court warned that "'the police power is too vague, indeterminate, and dangerous to be left without control, and the courts have even interfered to correct an unreasonable exercise or mistaken application of it.'" *Id*. at 722 (quoting *Taylor, Cleveland & Co. v. City of Pine Bluff*, 34 Ark. 603, 609 (1879)).

The precedents the City relies upon to support its substantive argument that its prohibition does not violate the Constitution's prohibition on monopolies fare no better. The case the City relies on most is *L&H Sanitation, Inc. v. Lake City*

Sanitation Inc, 769 F.2d 517 (8th Cir. 1985). But that case dealt with the federal Sherman Antitrust Act and the Fourteenth Amendment's Due Process Clause, not the Arkansas Constitution's anti-monopoly provision, so it is irrelevant. This Court should instead be guided by *Dreyfus*, 88 Ark. 353, 114 S.W. at 720–21, and *N. Little Rock Transp. Co*., 207 Ark. at 977, 184 S.W.2d at 52, which did involve the law on which Appellants base their case.

Guerin v. City of Little Rock, 203 Ark. 103, 155 S.W.2d 719, 720 (1941), and *Smith v. City of Springdale*, 291 Ark. 63, 66, 722 S.W.2d 569, 570 (1987), on which the City relies, are also inapposite and provide no support to the City. Both of those cases dealt with challenges to a city's power to grant a solid waste monopoly, brought by residents who didn't want to contract with the monopoly-holder. Both cases sought to have the monopoly itself declared unconstitutional. But, again, Appellants do not contend that the City lacks power to make an exclusive contract with CCSW. Appellants just want to offer a *supplemental* service that does not supplant CCSW's monopoly on regularly scheduled solid waste removal. *Guerin* and *Smith* are therefore irrelevant.

The City may certainly make an exclusive waste-removal contract. But it cannot *also* forbid Appellants from offering *additional, supplemental* waste-removal services to Holiday Island residents, when that business in no way interferes with the Ordinance's requirement that residents contract with CCSW.

C. The City's prohibition violates the cumulative due process protections for the right to engage in a common occupation because there is no meaningful relationship between the restriction on Appellants and public health, safety, or general welfare.

It's important to clarify what Appellants are actually arguing. The City characterizes Appellants as contending "that they have a fundamental right to contract free of state regulation." Appellee's Br. 22. But that's not true; in fact, Appellants said in their opening brief that the City may regulate occupations if the regulations are necessary for health, safety, or general welfare. But the City has gone far beyond that, and imposed a prohibition that does *not* promote health and safety—a prohibition on a business *other than* the regular trash-hauling that the Ordinance is concerned with.

That's a problem because Appellants *do* have a constitutional right to operate a business "subject only to such restraints as are necessary for the common welfare." *City of Helena v. Dwyer*, 64 Ark. 424, 42 S.W. 1071, 1072 (1897). That right is protected by the due process of law provisions of the Arkansas Constitution (Ark. Const. art. II §§ 2, 8, 21). To preserve that right, Arkansas courts have long held that "[s]tatutes 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).

The City's main argument is that the rational basis test applies to this due process cause of action, and that under that test, this Court need not inquire into whether challenged legislation actually does serve the state's legitimate interests. *See* Appellee's Br. 21. But that's not the rule, as this Court made clear in *Noble v. Davis*, 204 Ark. 156, 161 S.W.2d 189 (1942).

Noble involved a law setting prices for haircuts. The legislature claimed that the price-control was necessary for public health and safety, but this Court said "[t]he fact that the legislature so declared the purpose of the Act does not make it so"; instead, "'there must always be an *obvious and real* connection between the actual provisions of the police regulation and its avowed purpose.'" *Id*. at 191 (quoting *Am. Jur*.; emphasis added). Under due process analysis, "'the validity of an act is to be determined by its practical operation and effect, and not by its title or declared purpose,'" because otherwise constitutional rights might be "'abridged by legislation under the guise of police regulations.'" *Id.* In short, there must be a "substantial basis" for the exercise of the police power, so that it is not "'made a mere pretext.'" *Id.*

Although Appellants discussed *Noble* in their Opening Brief (at 24), the City ignored it. The City also ignored *McCastlain v. R. & B. Tobacco Co.*,, 242 Ark. 74, 79, 411 S.W.2d 882, 885 (1967), and *Ports Petroleum Co., Inc. of Ohio v. Tucker*, 323 Ark. 680, 916 S.W.2d 749, 755 (1996), both of which Appellants discussed in

their Opening Brief (at 24-25), and both of which illustrate how Arkansas courts analyze due process challenges to infringements on the right to operate a business. In *McCastlain*, this Court declared that a regulation that required a tobacco company to supply open-account letters from three-fourths of cigarette manufacturers with general distribution in Arkansas violated Article II, § 2, 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. at 79, 411 S.W.2d at 885. And *Ports Petroleum Co.,* held a price-control law unconstitutional because it "hamper[ed] innocent and legitimate competition [and could not] in any [way] be deemed to be rational." 916 S.W.2d at 755-56. These cases show that Arkansas courts require that there be a genuine, meaningful connection between a restriction on business operations and the protection of public health and safety in order to satisfy due process. Yet the City doesn't even discuss them.

Instead, it relies on *Streight, supra,* and *Johnson v. Sunray Services, Inc.*, 306 Ark. 497, 505, 816 S.W.2d 582, 587 (1991), to argue that the Court should take the government at its word that the prohibition on Appellants' business serves legitimate public purposes. But neither *Streight* nor *Johnson* employed such extreme deference. In *Streight*, this Court said that a law fails the rational basis test if it is "arbitrary" or devoid of "deliberate and lawful purpose"—in other words, the law must have "a deliberate nexus with state objectives." 280 Ark. at 215, 655 S.W.2d at 464. And

Johnson said that there must be a "legitimate rationale" for a challenged law. 306 Ark. at 507, 816 S.W.2d at 588.

But the City's prohibition of Appellant's business lacks a legitimate rationale. At no point in its brief does the City even hint as to why allowing Appellant's business—which *supplements*, not *supplants*, the services provided by CCSW—interferes in any way with its legitimate interest in public health and safety. It simply asserts that "the City's Ordinance was lawfully enacted to protect the public health," Appellee's Br. at 21—a point that Appellants do not dispute—but nowhere explains how banning Appellants' business bears any relationship to making Holiday Island cleaner or to ensuring that garbage in Holiday Island is removed. On the contrary, as Appellants have shown, the prohibition likely does the opposite—making it harder and more expensive to remove trash. *See* Appellants' Opening Br. at 22.[1]

The bottom line is simple: prohibiting Appellants as a licensed entity from offering supplemental, *ad hoc* roll-off dumpster rental services to the residents of Holiday Island is not "necessary to attain the end desired." *Gus Blass Co.*, 193 Ark.

[1] The City says it "enacted the Ordinance to combat illegal dumping, issues with trash storage on property, and wear and tear on the roads," Appellee's Br. at 8, but because Appellants don't challenge the Ordinance's requirement that citizens contract with CCSW, and because Appellants already hold a license that requires them to comply with all applicable health and safety rules, this, too, is beside the point.

1159, 105 S.W.2d at 857-58. And the fact that the City claims the ban protects public safety "does not make it so." *Noble,* 204 Ark. 156, 161 S.W.2d at 191.

Appellants provide a necessary service—one the City *does not even require CCSW to provide*—one that does not interfere with the City's legitimate interest in regular household trash-hauling—and one that, if not provided, will harm public health by leading to *more* unauthorized dumping.[2] The prohibition therefore violates due process.

D. State action immunity is categorically inapplicable.

The City's argument that the city is entitled to "state action immunity" is premised on a very basic error. State action immunity doctrine applies to the Sherman Antitrust Act—but Appellants have not brought any claims under that Act. The doctrine is therefore inapplicable.

State action immunity doctrine originated in *Parker v. Brown*, 317 U.S. 341, 350–51 (1943), where plaintiffs challenged the legality of a state-created cartel, arguing that it violated the Sherman Act. The U.S. Supreme Court held that state entities aren't "persons" under the Act, and are therefore immune from liability. *Id.* Since then, the state action immunity doctrine has always been a function of the Sherman Act (or other federal antitrust statutes). The cases the City relies on—such

[2] CCSW is only required to offer two bulk trash services per year, and limits those services to three items per pickup. *See* Appellants' Opening Br. at 9-10.

as *Gold Cross Ambulance & Transfer v. City of Kansas City*, 705 F.2d 1005 (8th Cir. 1983), *Scott v. City of Sioux City, Iowa*, 736 F.2d 1207 (8th Cir. 1984), and *L&H Sanitation, Inc., supra*—all concerned claims brought under the Sherman Act, and all the question of whether *Parker* immunity applied.

But this isn't a federal antitrust case. Thus, the state action immunity doctrine, and cases applying it, including *Gold Gross Ambulance, Scott,* and *L&H Sanitation*, are irrelevant.

V.

CONCLUSION

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

Respectfully submitted,

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VI.

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 31st day of March 2025, 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 31st day of March 2025:

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VII.

CERTIFICATE OF COMPLIANCE WITH ADMINISTRATIVE ORDER NO. 19 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 2,798 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
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November 18, 2024