STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III
CASE NO. 2021AP001543/2022AP000307

In the Matter of the Refusal of Samuel G. Sharpe:

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SAMUEL G. SHARPE,

Defendant-Appellant.

ON APPEAL FROM THE DECISIONS AND ORDERS ENTERED IN THE CIRCUIT COURT FOR ST. CROIX COUNTY, CASE NO. 19 TR 632, THE HONORABLE SCOTT R. NEEDHAM, PRESIDING

DEFENDANT-APPELLANT'S BRIEF

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STATEMENT OF THE ISSUES

I. Whether Deputy Schaeppi violated the three-part test established in *County of Ozaukee v. Quelle*[1] thus requiring dismissal of the refusal proceeding?

The Trial Court Answered: "No."

II. Whether Wisconsin's Ignition Interlock Device statutory scheme violates the dormant Commerce Clause?

The Trial Court Answered: "No."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Sharpe does not request oral argument, as the briefs should adequately address the issues in this case. Sharpe does recommend that the opinion be published because this case presents an opportunity for the Court to address the constitutionality of Wisconsin's Ignition Interlock Device statutory scheme. Wis. Stat. (Rule) 809.23(1)(a)1.

[1] ***County of Ozaukee v. Quelle***, 198 Wis. 2d 269, 542 N.W.2d 196 (Ct. App. 1995).

STATEMENT OF THE CASE AND FACTS

On February 16, 2019, Sharpe was issued a Notice of Intent to Revoke Operating Privilege. (1). Sharpe, by counsel, timely demanded a refusal hearing on February 26, 2019. (3). A refusal hearing was held on February 12, 2021, during which Sharpe and Deputy Chase DuRand, of the St. Croix County Sheriff's Department, testified. (51:1, 2). Additionally, portions of the video recording of the deputy's body cam were admitted into the record. (51:3–4; 127). A copy of the Informing the Accused form ("ITAF") was also admitted into the record. (51:19; 121).

On February 16, 2019, DuRand arrested Sharpe for operating a motor vehicle while impaired ("OWI"). (51:5–6, 17). Following Sharpe's arrest, DuRand contacted St. Croix County Dispatch who advised that at the time of this arrest, Sharpe's most recent OWI arrest had occurred in 2004. (51:22–23; 127 at 00:00:54–00:01:29). Sharpe also had a prior implied consent violation from 2004. DuRand consulted Deputy Mitchell Schaeppi ("Schaeppi"), who was also at the scene. (51:25; 127 at 00:02:00–00:02:17). Ultimately, Schaeppi advised DuRand that an implied consent conviction is not a countable conviction under Wis. Stat. § 343.307. (51:25–26; 127 at 00:02:07–00:02:15).

DuRand again contacted dispatch for further clarification on Sharpe's prior OWI-related arrests. (127 at 00:06:30–00:09:10). Dispatch was unable to provide any additional information. (*Id*.)

Schaeppi then asked Sharpe directly whether he had ever been previously arrested for an OWI-related offense. (127 at 00:00:01–00:00:15). Sharpe responded, "Maybe a long time." (127 at 00:00:15–00:00:20). When asked by Schaeppi whether he had been arrested and convicted for an OWI-related offense in 2003 or 2004, Sharpe stated, "Yes, I was. … I think so if I remember correct. It was a long time ago." (127 at 00:00:32–00:01:12). DuRand and Schaeppi ultimately concluded it had been 10 years since Sharpe's last and only other OWI-related conviction, and

therefore Sharpe's OWI arrest in this case would be counted as a first offense. (127 at 00:02:14–00:02:41).

Schaeppi then advised Sharpe that his OWI arrest in this case would be treated as a first offense: "So it has been 10 years. In the State of Wisconsin, it is your first offense again." (51:29; 127 at 00:01:08–00:01:15).

DuRand read Sharpe the Informing the Accused form ("ITAF"). (51:18). Notably, the ITAF says nothing about the accused's prior convictions or the potential punishment for the current offense, but merely states the offense(s) for which the accused is being arrested. (121). Because DuRand believed Sharpe would only be charged with a first offense, he asked Sharpe to submit to an evidentiary breath test.[2] (51:19–21). Sharpe refused.

Sharpe refused because he was told the OWI would only be charged as a first offense. (51:19–20, 32, 36). Sharpe testified that at the time he refused to take the breath test he knew that the more prior OWI convictions a person had, the harsher the penalties for subsequent offenses. (51:32–33). Sharpe was aware of this enhanced penalty scheme because he had previously been convicted of as second offense OWI in Minnesota. (51:33). He knew that a third offense OWI would likewise be treated more severely than a first OWI offense in Wisconsin. (51:33).

The information Schaeppi provided was the "biggest factor" which "absolutely" affected Sharpe's decision to refuse the requested evidentiary breath test. (51:36, 39). Sharpe decided he could stomach the penalties for a first offense refusal because he "didn't want the officer to have more evidence against" him. (51:36-37; 57:2). Had he been correctly advised that he was in fact being arrested for an OWI third offense, he would have "definitely" considered consenting to the evidentiary breath test and taken his arrest "more seriously" knowing that a third OWI offense refusal entails more severe penalties than a first offense. (51:37). The

[2] The St. Croix County Sheriff's Department's policy is to only request evidentiary blood tests on second and subsequent OWI offenses. (51:23).

State of Wisconsin ultimately prosecuted Sharpe's arrest in this case as an OWI third offense. (51:21).

Following testimony, the circuit court directed the parties to submit briefs on whether Deputy Schaeppi complied with the informational provisions of Wis. Stat. § 343.305(4). (51:35–36).

Postconviction briefs were filed and on April 21, 2021, the circuit court entered a written decision and order. (55 (A:3)). The circuit court found that while Sharpe had satisfied the first and second ***Quelle*** prongs, he failed to satisfy the third prong of the inquiry. He did not prove by a preponderance of the evidence that the erroneous information Schaeppi[3] provided contributed to his refusal to submit to chemical testing. (55:5 (A:7)). The circuit court reasoned it was "hard pressed to understand that [the deputies'] decision to seek breath as compared to blood was misleading and affected Sharpe's ability to make a choice about testing." (55:5 (A:7)). In the court's opinion, "[i]t is purely speculative that, had a blood test been offered, Sharpe would have jumped at a chance and submitted to it." (55:6 (A:8)). "To suggest that had the deputy requested blood for an alleged third offense would have resulted in consent is incredible." The court further noted that "Sharpe was certainly in a position to know his driving history." (55:6 (A:8)). "Pure speculation is not synonymous with a preponderance of evidence, which is the applicable burden of proof that Sharpe must carry." (55:6 (A:8)). The circuit court revoked Sharpe's operating privilege under Wis. Stat. § 343.305(10) and ordered him to comply with the assessment and driver safety plan as well. (55:6 (A:8)).

On May 6, 2021, Sharpe filed a motion requesting the circuit court reconsider, and alternatively, correct its April 21 decision and order under the reconsideration principles discussed in ***Koepsell's Olde Popcorn Wagons, Inc. v.***

[3] The circuit court's April 21 Decision & Order states that Deputy DuRand was the officer who provided the additional erroneous information to Sharpe. However, it was Deputy Schaeppi who erroneously informed Sharpe that that he was being charged with a first OWI offense. (51:29; 127 at 00:01:08–00:01:15).

Koepsell's Festival Popcorn Wagons, Ltd., 2004 WI App 129, 275 Wis. 2d 397, 685 N.W.2d 853, and ***Village of Thiensville v. Olsen***, 223 Wis. 2d 256, 262, 588 N.W.2d 394 (Ct. App. 1998). (57:1–2). Sharpe argued that the circuit court erred in its factual determination on the third ***Quelle*** prong because the court analyzed the issue using facts not actually urged by the Defense to supports its desired legal conclusion. (57:3).

Sharpe reiterated that whether he took a beath test or a blood test was not the issue for him. He refused because he believed it would deny the police evidence that might be used to convict him in the OWI case, and the price—refusal penalties for a first offense—would be tolerable. (57:1-2). His gambit ultimately paid off, as he won his criminal trial. (57:2).

Sharpe never testified, nor had the Defense ever argued, that the deputies' decision to seek a breath rather than a blood test played into that refusal decision. (57:3). The court, nevertheless, focused on this unadvanced breath-versus-blood theory in deciding the third ***Quelle*** prong. (57:3). Sharpe argued that this constitutes the requisite error of fact under the ***Koepsell*** standard. (57:4–5). He also noted that under the ***Olsen*** standard, the court could further consider his argument and decide the case based on the degree-of-penalties theory that was actually advanced by the Defense. (57:2).

In response to the Defense's claim that the circuit court's order was the result of a manifest error of fact, the state argued that the Defense should have "argue[d] more strongly towards what they believe is a better theory." (59:2). "The Defense wishing to clarify the focus of their theory is not a valid reason under ***Koepsell*** to prevail on a motion for reconsideration." (59:2).

The state further argued that the Defense "does not present any 'newly discovered evidence'" as it "acknowledges that 'this Court accurately summarized the record with respect to Mr. Sharpe's testimony.'" (59:2).

Sharpe filed a response on June 8, 2021. First, while the circuit court used the correct legal standard, it did not consider the factual theory actually urged by the Defense to support its desired legal conclusion. (61:1) This constitutes the requisite error of fact under the ***Koepsell*** standard. (61:1)

Second, no error of fact is required for the circuit court to do justice under the ***Olsen*** standard, and as such, Sharpe requested the court "to consider its argument and decide the case based on the controversy actually at hand." (61:1–2).

Third, the last ***Quelle*** prong does not require a showing that the additional erroneous information from Schaeppi was the sole cause of the refusal, and Sharpe did not testify that it was. (61:2). Sharpe further testified "that he would have considered consenting to a chemical test had he been informed that it would be prosecuted more severely than the police promised." (61:2).

Fourth, the state's argument that the circuit court should disregard Sharpe's uncontroverted testimony because it is "self-serving" is not persuasive for two reasons. (61:2). First, the state's suggestion that Sharpe's uncontroverted testimony lacks credibility is unsupported. Second, the state's arguments are likewise self-serving. Sharpe's uncontroverted testimony therefore ought not to be disregarded solely on this account. (61:2).

Fifth, "Sharpe testified, under oath and penalty of perjury, that he felt that he could stomach the penalties for a first offense, having been through them before," and "he would have [further] considered taking the test if [he had been] advised that [his arrest was for] a third offense, or if [he] simply [was] never advised of the severity of the prosecution (the latter being the best practice for law enforcement)." (61:2). The state offered no evidence opposed to Sharpe's testimony and the body cam footage further corroborated his testimony. (61:2–3).

Sixth, "as explained in briefing, both before and now after [the c]ourt's initial written decision, the Defense never argued that the police's decision to seek breath as compared to blood affected [Sharpe's] ability to make a choice. Rather, it was

the police's promise to treat the matter as a first-offense 'pawn' rather than a third-offense "bishop" that affected his ability to make a decision." (61:3).

Finally, the Defense did not in fact advance the correct theory — that being the degree-of-penalties theory. (61:3).

On June 24, 2021, the circuit court entered a written decision and order denying Sharpe's motion for reconsideration, based on the reasoning articulated in its prior April 21 decision and order. (124:1–2 (A:9–10)).

Finding that Sharpe's refusal was improper, the circuit court filed a conviction status report with the Wisconsin Department of Transportation on August 18, 2021, which ordered an ignition interlock device ("IID") restriction for 12 months. (72 (A:11); 75 (A:12)).

On September 7, 2021, Sharpe filed a motion with the circuit court challenging the constitutionality of the IID order and the underlying statute. (89). Sharpe argued the statutory scheme under Wis. Stat. § 343.301(2m)(a) is unconstitutional because it fails to provide a means for an out-of-state resident to terminate an IID order, regardless of its length. Wis. Stat. § 343.301(2m)(a) states that the IID restriction shall "extend for a period of not less than one year ***after*** *the date the department issues any license granted under this chapter*[,]…." (emphasis added). Sharpe cannot ever rid himself of the IID restriction because, as a Minnesota resident, he is not eligible for a Wisconsin driver's license. *See* Wis. Stat. § 343.06(1)(k). (89:3). Sharpe further argued that his challenge to the IID was ripe for review as his motion "is not based on hypothetical or future facts." (147:1–2). "[The circuit court] ordered the IID and Mr. Sharpe has demonstrated the unfair harm that has been caused to him as a result, that being his inability ever to satisfy the IID order as an out-of-state driver." (147:2).

The circuit court denied Sharpe's motion. (149 (A:12)). His facial challenge to Wisconsin's IID statutory scheme failed as Sharpe did not "show that Wisconsin's IID law is unconstitutional beyond a reasonable doubt." (149:3

(A:15)). "[T]he Court agrees with the State's equally plausible argument that the IID restrictions required for individuals convicted of certain OWI offenses in Wisconsin apply equally to residents both inside and outside of Wisconsin and that the statute therefore passes constitutional muster." (149:4 (A:16)).

The court further found that Sharpe "failed to show that the IID restriction on his operating privileges in Wisconsin ordered by the Court has had any effect on his Minnesota driver's license" or that "the IID restriction required under Wis. Stat. § 343.301 has had any effect on his ability to operate a motor vehicle in Wisconsin." (149:5 (A:17)). "Sharpe simply speaks in hypotheticals and the potential effect of having the IID restriction removed is uncertain at this point which causes the Court to conclude, as it must, that his as-applied challenge fails as a matter of law at this time." (149:5 (A:17)).

Sharpe now appeals to this Court.

ARGUMENT

I. SHARPE DID NOT IMPROPERLY REFUSE TO SUBMIT TO CHEMICAL TESTING WHEN THE OFFICER VIOLATED *COUNTY OF OZAUKEE V. QUELLE.*

1. Deputy Schaeppi violated *Quelle* when he provided Sharpe with erroneous information which affected his decision to refuse chemical testing.

i. Introduction and standard of review.

A defendant may challenge compliance with the informational provisions of Wis. Stat. § 343.305(9)(a)5 at a refusal hearing. *See* ***In Re Smith***, 2008 WI 23, ¶ 2 fn.3, 308 Wis. 2d 65, 746 N.W.2d 243. A refusal finding cannot be sustained if the defendant can show the warning process under the implied consent law fails to meet the three-part test in ***County of Ozaukee v. Quelle*** to assess the adequacy of the warning process under the implied consent law:

> (1) Has the law enforcement officer not met, or exceeded his or her duty under secs. 343.305(4) and (4m) to provide information to the accused driver?
> (2) Is the lack or oversupply of information misleading?
> (3) Has the failure to properly inform the driver affected his or her ability to make the choice about chemical testing?

198 Wis. 2d 269, 280, 542 N.W.2d 196 (Ct. App. 1995), *abrogated on other grounds by* ***In re Smith***, 2008 WI 23, 308 Wis. 2d 65, 746 N.W.2d 243 (upholding the ***Quelle*** framework with respect to "excessive information" cases such as the one at bar). In this case, all three factors are met.

The interpretation and application of Wis. Stat. § 343.305 to undisputed facts is a question of law that this Court determines independently of the circuit court but benefiting from its analysis. This Court examines the case law interpreting and applying Wis. Stat. § 343.305 to fact situations in which a law enforcement officer has given additional and incorrect information to the person from whom a test is required. ***In re Smith***, 2008 WI 23 at ¶ 55.

ii. Deputy Schaeppi exceeded his duty under Wis. Stat. § 343.305.

The circuit court found that Schaeppi exceeded his duty under Wis. Stat. § 343.305(4) by providing Sharpe incorrect information found nowhere on the ITAF; that is, that Sharpe's OWI arrest in this case would be treated as a first offense. (55:5). Those words are nowhere to be found on the ITAF. (121).

The fact that DuRand read the ITAF after Sharpe was told by Schaeppi he was facing a first offense does not change the fact that Sharpe was provided erroneous information. The first ***Quelle*** prong is satisfied whenever a law enforcement officer has gone beyond simply reading the ITAF. ***Smith***, 2008 WI 23 at ¶ 78 ("*After* discharging his duty under § 343.305(4) by reading the Department of Transportation's Informing the Accused form verbatim to the defendant, Deputy Sutherland went on to provide additional information to the defendant … The first prong of the three-prong ***Quelle*** inquiry is answered in the affirmative." (Emphasis added).).

iii. The additional information Deputy Schaeppi provided Sharpe was incorrect and misleading.

The circuit court likewise found that Schaeppi provided misleading information to Sharpe when he incorrectly told him that his OWI arrest in this case would be treated as a first offense. (55:5). In actuality, Sharpe was ultimately prosecuted for an OWI third offense. (51:21).

The term "misleading" in the second ***Quelle*** prong was meant by this Court to be synonymous with the term "erroneous," and requires no showing of bad faith. ***State v. Ludwigson***, 212 Wis. 2d 871, 875, 569 N.W.2d 762 (Ct. App. 1997). This additional erroneous information misstated the legal reality.

Schaeppi, like the officer in ***Ludwigson***, chose to go beyond simply reading the form by giving *additional* information to the accused. ***Id***. at 874. After reading the provisions of the ITAF, the officer in ***Ludwigson*** then exceeded his duty under Wis. Stat. § 343.305(4) and also attempted to explain the form to Ludwigson in "layman's terms." ***Id***. But the additional information the officer provided to Ludwigson was wrong. ***Id***. at 874 n.1.[4] After the officer read and explained the form to Ludwigson, she still refused to submit to the test. ***Id***. at 874.

Like the officer in ***Ludwigson,*** the additional information Schaeppi provided to Sharpe was wrong and misleading for the reasons above. ***Id***. Schaeppi therefore provided definitionally misleading information. ***Id***. at 875. On these facts, the second ***Quelle*** prong is satisfied. ***Id***. ("We hold, as a matter of law, that the police officer exceeded his duty under § 343.305(4), STATS., and the information given to Ludwigson was erroneous, thereby meeting the first two prongs of the ***Quelle*** test.").

[4] The officer told Ludwigson that the normal penalty for refusing to submit to a chemical test is a one-year revocation of driving privileges. This was incorrect as Ludwigson had a prior OWI conviction and her revocation period would be two years. The officer also told Ludwigson that if she was not satisfied with her initial test, she could request an alternative test at her own expense. This was also incorrect. Under Wis. Stats. §§ 343.305(2) and (5), law enforcement agencies are required to administer an alternative chemical test at their own expense.

iv. The incorrect and misleading information affected Sharpe's ability to make his decision regarding chemical testing.

The misleading information Schaeppi provided affected Sharpe's ability to make an informed decision about chemical testing. *See* ***Smith***, 2008 WI 23 at ¶ 85 (defendant must show that misleading information contributed to defendant's decision to refuse chemical testing). Again, Sharpe testified that Schaeppi's claim that Sharpe's OWI arrest in this case would be treated as a first offense was the "[b]iggest factor" in his decision to refuse the evidentiary breath test. (51:39).

Importantly, this Court has "concluded that to obtain substantial compliance [with the procedure established by Wis. Stat. § 343.305(4)], *the officer must not understate the penalties for either refusal to take the test or taking the test and obtaining an inappropriate test result*." ***State v. Sutton***, 177 Wis. 2d 709, 713–15, 503 N.W.2d 326 (Ct. App. 1993) (citing ***State v. Wilke***, 152 Wis. 2d 243, 249–250, 448 N.W.2d 13 (Ct. App. 1989)).

Here, Sharpe was aware that the penalties for a first OWI offense are less severe than the penalties associated with subsequent OWI offenses. (51:36). He was further aware that by refusing the evidentiary breath test, he would be denying the State critical evidence that could be used at trial to prove his guilt, which turned out to be true. (51:36). Thus, upon hearing Schaeppi's additional information that his arrest in this case would be treated as a first offense, Sharpe explicitly believed he could "stomach" those penalties associated with a first OWI offense, regardless of whether he submitted or refused the evidentiary breath test. (51:37). Accordingly, based on Schaeppi's erroneous statements that his arrest in this case would be treated as a first offense, Sharpe refused the evidentiary breath test. (51:19–20).

The Defense has therefore demonstrated a causal link between the misinformation and Sharpe's ultimate refusal of the chemical test. On these facts, the third ***Quelle*** prong is satisfied.

The law requires only an influence on the decision. The law does not require the deputy to have subjectively changed Sharpe's mind about chemical testing for suppression to occur. Thus, under the third ***Quelle*** prong, Sharpe merely has to demonstrate that Schaeppi's additional information affected his ability to make his decision about chemical testing. Sharpe has made such a showing. *See* ***Quelle***, 198 Wis. 2d at 280 (holding that the inquiry under the third prong considers whether the misinformation "affected" the driver's ability to make a choice).

Finally, this Court must also find that because of Schaeppi's misleading comments to Sharpe that his arrest in this case would be treated as a first offense because his Minnesota conviction was more than 10 years old, Sharpe was never given the opportunity to consent based on correct statements by law enforcement as to the total number of prior convictions that would be used in his prosecution for the events of February 16, 2019.

The ***Quelle*** case is about whether the officer robbed the accused of the ability to make a free and unconstrained choice, either by volunteering additional and incorrect information, or by engaging in conduct impacting what would have otherwise been a voluntary decision. 198 Wis. 2d at 277 ("The police, however, may create confusion for the accused by misstating the warnings *or using other coercive* and manipulative means to procure information." (emphasis added.)). Here, Schaeppi's misleading comments robbed Sharpe of this ability to make a free and unconstrained choice.

Accordingly, the circuit court's refusal finding cannot be sustained as Sharpe has shown that law enforcement officers in this case failed to comply with the implied consent statute. ***State v. Zielke***, 137 Wis. 2d 39, 54, 403 N.W.2d 427 (Ct. App. 1987) (holding that "when law enforcement officers fail to comply with the implied consent statute the driver's license cannot be revoked for refusing to submit to chemical tests.").

II. THE WISCONSIN IGNITION INTERLOCK DEVICE STATUTORY SCHEME VIOLATES THE DORMANT COMMERCE CLAUSE BECAUSE IT DISCRIMINATES AGAINST OUT-OF-STATE DRIVERS.

1. Introduction and standard of review.

The Commerce Clause provides that "Congress shall have power … to regulate commerce … among the several states …." U.S. Const. Art. I, sec. 8, cl. 3.

The United States Supreme Court gave the commerce power its initial interpretation in ***Gibbons v. Ogden***, 22 U.S. 1 (1824), whereby it outlined the contours of the terms "commerce" and "among the several states." The Court took a broad view of this power, recognizing that while states undoubtedly possess the ability to regulate their internal affairs, commerce is best defined as "intercourse between … parts of nations … and is regulated by prescribing rules for carrying on that intercourse." ***Id***. at 190. The Court further resolved that the broad definition of commerce included navigation and other forms of commercial intercourse that is "intermingled with" the states. ***Id***. at 189–90.

Cementing this view of the Commerce Clause's breadth, the Court has interpreted the grant of power to Congress in the Commerce Clause as implying a "dormant" or negative aspect, *see* ***Northwest Airlines, Inc. v. Wisconsin Dept. of Revenue***, 2006 WI 88, ¶ 27, 293 Wis. 2d 202, 717 N.W.2d 280, thereby limiting the ability of states to enact regulations that either "discriminate against," ***City of Philadelphia v. New Jersey***, 437 U.S. 617, 628 (1978), or impose an "undue burden," ***Dean Milk Co. v. City of Madison***, 340 U.S. 349, 353 (1951), on interstate commerce.[5]

[5] *See* ***Cooley v. Bd. of Wardens***, 53 U.S. 299, 319 (1852) (declaring that the grant of the commerce power to Congress in and of itself precluded certain types of state lawmaking, for congressional power was deemed "exclusive" as to "subjects . . . in their nature national"), *overruled on other grounds by* ***Complete Auto Transit, Inc. v. Brady***, 430 U.S. 274 (1977).

This legal doctrine serves as a self-executing limitation on state power to regulate interstate commerce and is held to apply even when Congress has *not* acted or when no preemption is found. ***Hunt v. Wash. Apple Adver. Comm'n***, 432 U.S. 333, 350 (1977) (maintaining that the Commerce Clause itself is "a limitation upon state power even without congressional implementation").

Under the dormant Commerce Clause, courts "'protect [] the free flow of commerce, and thereby safeguard[] Congress' latent power from encroachment by the several States[]' when Congress has not affirmatively exercised its Commerce Clause power." ***Northwest Airlines, Inc.***, 2006 WI 88 at ¶ 27 (citation omitted). Accordingly, the dormant Commerce Clause is the idea that courts must invalidate state laws for running afoul of the Commerce Clause or the limiting principles implied from it.

Ultimately, this restriction upon states prohibits "regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." ***Fulton Corp. v. Faulkner***, 516 U.S. 325, 330 (1996). If a challenged state law discriminates, either on its face or in purpose or effect, against out-of-state drivers, the law is per se invalid under the dormant Commerce Clause. ***Pike v. Bruce Church, Inc.***, 397 U.S. 137, 142 (1970); *see also* ***Granholm v. Heald***, 544 U.S. 460, 476 (2005) ("State laws that discriminate against interstate commerce face a virtually per se rule of invalidity.")

"Even when no discrimination is evident on the face of a state provision, it may violate the Dormant Commerce Clause if its effects discriminate against non-residents." ***Saban Rent-A-Car LLC v. Arizona Dep't of Revenue***, 244 Ariz. 293, 304, 418 P.3d 1066, 1077 (Ct. App. 2018), *aff'd*, 246 Ariz. 89, 434 P.3d 1168 (2019).

In this context, "'discrimination' simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." ***Oregon Waste Systems, Inc. v. Department of Environmental Quality of***

Ore., 511 U.S. 93, 99 (1994); ***New Energy Co. of Ind. v. Limbach,*** 486 U.S. 269, 273 (1988). The key component to the notion of "discrimination" therefore rests on a comparison of in-state or in-region benefits and burdens with out-of-state or out-of-region benefits and burdens. *See, e.g.*, ***Bacchus Imports, Ltd. v. Dias***, 468 U.S. 263, 273 (1984) ("A discrimination claim, by its nature, requires a comparison of the two classifications … ").[6]

A well-intended regulation might easily and unintentionally "favor in-state economic interests over out-of-state interests" after the benefits and burdens of the regulation are compared. ***Oregon Waste Sys., Inc.***, 511 U.S. at 99. Such a regulation will in fact "discriminate" against interstate commerce, even if that was not the goal of the local legislature.[7] *See, e.g.*, ***Associated Indus. of Missouri v. Lohman***, 511 U.S. 641, 653 (1994) ("[C]ourt need not inquire into the purpose or motivation behind a law to determine that in actuality it impermissibly discriminates against interstate commerce").

Once a state law is found to discriminate against out-of-state commerce, it is generally struck down without further inquiry. *See* ***Chem. Waste Mgmt., Inc. v. Hunt***, 504 U.S. 334, 342 (1992).

A party must have standing to challenge a statute on dormant Commerce Clause grounds. ***Cibolo Waste, Inc. v. City of San Antonio***, 718 F.3d 469, 475–76 (5th Cir. 2013). In Wisconsin courts, the requirements of standing are applied liberally, so that "even an injury to a trifling interest" can support a party's standing. ***McConkey v. Van Hollen***, 2010 WI 57, ¶ 15, 326 Wis. 2d l, 783 N.W.2d 855

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[6] *See also* Mark Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 WISC. L. REV. 125, 131–40 (1979) (suggesting categories of discriminatory impact based on where the benefits and burdens of a statute fall).

[7] The Court has even gone so far as to denounce purpose as irrelevant in dormant Commerce Clause analysis. ***Philadelphia***, 437 U.S. at 626 (describing legislative purpose as "not ... relevant to the constitutional issue to be decided."). *See also* ***Oregon Waste Sys. Inc.***, 511 U.S. at 100 ("The purpose of, or justification for, a law has no bearing on whether it is facially discriminatory."). This is as opposed to equal-protection-type arguments which analyze discriminatory purpose and effect. Commerce Clause analyses do not embrace discriminatory purpose – only discriminatory effect.

(quoting ***Fox v. DHSS***, 112 Wis. 2d. 514, 524, 334 N.W.2d. 532 (1975)). Put differently, "[t]his Court will not construe the law of standing narrowly or restrictively." ***Park Bancorporation, Inc. v. Sletteland***, 182 Wis. 2d 131, 145, 513 N.W.2d 609 (Ct. App. 1994) (citation omitted).

And while standing is a jurisdictional requirement in federal courts, in Wisconsin it is a principle of "sound judicial policy." ***McConkey***, 2010 WI 57 at ¶ 15. For this reason, the standing inquiry is focused on "ensuring that the issues and arguments presented will be carefully developed and zealously argued," so that the court may be best informed "of the consequences of its decision." ***Id***. at ¶ 16.

A party has standing to challenge a statute if that statute causes that party injury in fact and the party has a personal stake in the outcome of the action. ***Mast v. Olsen***, 89 Wis. 2d 12, 16, 278 N.W.2d 205 (1979). "The essence of the standing inquiry is whether the party seeking to invoke the court's jurisdiction has alleged a personal stake in the outcome which is at once related to a distinct and palpable injury and a fairly traceable causal connection between the claimed injury and the challenged conduct." ***Park Bancorporation, Inc.***, 182 Wis. 2d at 145 (citation omitted).

While standing to protect rights more often arises in the civil context, it has been recognized in criminal proceedings as well. *See, e.g.*, ***Payment of Witness Fees in State v. Brenizer***, 179 Wis. 2d 312, 316–17, 507 N.W.2d 576 (Ct. App. 1993) (county was aggrieved by court order appointing experts for criminal trial at the county's expense, and county therefore had standing to appeal the order).

Similarly, a party's challenge to a statute must be ripe. Ripeness and standing are often considered together, as they both share the requirement that an injury in fact be certainly impending. ***Montana Env't Info. Ctr. v. Stone-Manning***, 766 F.3d 1184, 1188–89 (9th Cir. 2014).

"If the resolution of a claim depends on hypothetical or future facts, the claim is not ripe for adjudication and will not be addressed by this court." ***State v.***

Armstead, 220 Wis. 2d 626, 631, 583 N.W.2d 444 (Ct. App. 1998). "The two fundamental considerations in a ripeness analysis are 'the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." ***State v. Thiel***, 2012 WI App 48, ¶ 7, 340 Wis. 2d 654, 813 N.W.2d 709 (citation omitted).

Whether a challenged statute violates the dormant Commerce Clause is a question of law that this Court reviews de novo. ***Northwest Airlines, Inc.***, 2006 WI 88 at ¶ 25.

The issues of standing and ripeness are likewise questions of law. ***State v. Popenhagen***, 2008 WI 55, ¶ 23, 309 Wis. 2d 601, 749 N.W.2d 611; ***Olson v. Town of Cottage Grove***, 2008 WI 51, ¶ 37, 309 Wis. 2d 365, 749 N.W.2d 211.

2. The Wisconsin Ignition Interlock Device (IID) statutory scheme unlawfully discriminates against out-of-state drivers because it provides no means for terminating an IID order.

The Wisconsin IID statutory scheme has several material components, which include the following.

a) If a person has a BAC of 0.15 or more, the court shall enter an IID order. Wis. Stat. § 343.301(1g)(1)(2)a.
b) The IID restriction begins "on the date the order . . . is issued." Wis. Stat. § 343.301(2m).
c) The IID restriction *shall "extend* for a period of not less than one year ***after*** *the date the department issues any license granted under this chapter.*" *Id.* (emphasis added).

In other words, an IID order only ends sometime "*after" the Department issues* a license under Chapter 343. The problem is that out-of-state residents are not eligible for Wisconsin driver's licenses. *See* Wis. Stat. § 343.06(1)(k) ("The department shall not issue a license [t]o any person who is not a resident."). Thus, out-of-state drivers – even those who install the IID for the full period of the order – can never rid themselves of the IID restriction.

This catch-22 is the product of a recent change in the law. With 2017 Wisconsin Act 124 ("the Act"), the Wisconsin legislature amended Wis. Stats. §§

343.301(2m)(a), 347.413(1), and 347.50(1t). Prior to this amendment, an IID restriction began on the date that the DOT issued an operator's license. See prior Wis. Stat. § 343.301(2m)(a) ("the court shall restrict the operating privilege . . . *beginning on the date the department issues any license granted under this chapter*." (emphasis added). After this amendment, IID restrictions begin "on the date the order . . . is issued." Wis. Stat. § 343.301(2m). Put another way, IID restrictions previously *began* upon re-licensure. Now, the IID restrictions begin immediately after conviction but the length of the IID restriction ordered by the court ("not less than one year") does not begin to run until the Department issues a driver's license. If a license is not, or cannot, be issued by the Department, the time on the IID order never starts to run. Whatever the length of the IID order, it can never be satisfied.

Both Wisconsin courts and the United States Supreme Court have long recognized that traffic, and by implicit extension transportation, are inexorably intertwined with interstate commerce. ***Loverin & Browne Co. v. Travis***, 135 Wis. 2d 322, 329, 115 N.W.2d 829 (1908) ("[c]ommerce undoubtedly is traffic; but it is something more. It is intercourse. It describes the commercial intercourse between nations and parts of nations in all its branches." (citing ***Gibbons v. Ogden***, 22 U.S. 1 (1824)). As such, a statute that concerns transportation fits squarely within the definition of interstate commerce, or at the very least, would "affect interstate commerce." ***Town of La Pointe v. Madeline Island Ferry Line***, 179 Wis. 727, 737, 508 N.W.2d 440 (1993) ("[t]ransportation of persons from one state to another constitutes interstate commerce." (citing ***Port Richmond & B.P.F. Co. v. Board of Freeholders***, 234 U.S. 317, 326 (1914)); ***Central Greyhound Lines, Inc. v. Mealey***, 334 U.S. 653, 655 (1947) ("[i]t is too late in the day to deny that transportation which leaves a State and enters another State is commerce among the several states.").

The manner in which a person has the ability to lawfully operate a motor vehicle across state lines therefore concerns interstate commerce. Motor vehicles, specifically the ones concerning the statute at issue here, are heavily regulated by the federal government and deal directly with transportation and highway safety, and thus, a person's ability to participate in commerce. This is especially true for courier drivers, delivery drivers, food-delivery drivers, taxi drivers, chauffeurs, caters, and rideshare subcontractors, all of whom make a living based on the ability to lawfully operate a motor vehicle across state lines but are not required to have a commercial driver license ("CDL"). *See* ***Wickard v. Filburn***, 317 U.S. 111, 127–29 (1942) (noting "that [Filburn's] own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.").

The notion of "discrimination" rests on a comparison of in-state benefits and burdens with out-of-state benefits and burdens. *See* ***Dias***, 468 U.S. at 273; *see also* ***Hughes v. Oklahoma***, 441 U.S. 322, 336 (1979) (recognizing that even statutes that purport to regulate evenhandedly may fall victim to the dormancy doctrine). Here, the discriminatory effect on an out-of-state resident is undeniable. A non-resident's Wisconsin driving privileges are forever burdened by an IID requirement (in addition to whatever impact the Wisconsin IID order may have on his or her home license). In contrast, once a license is re-issued to a Wisconsin resident the IID order ends on a date certain.

The only option for Sharpe to rid himself of the IID restriction is to become a taxpaying resident of the State of Wisconsin. Wis. Stat. § 343.06(1)(k). A state regulation that favors in-state economic interests over out-of-state interests is blatantly unlawful. *See* ***H.P. Hood & Sons v. Du Mond***, 336 U.S. 525, 526, 535 (1949) (endorsing broad state authority to protect the "health and safety" of residents but finding fault with license denial that would "protect and advance local

economic interests"); ***Brown-Forman Distillers Corp.***, 476 U.S. at 579 (1985) ("When a state statute directly regulates or discriminates against interstate commerce, *or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry*." (Emphasis added).).

3. Sharpe's challenge to the Wisconsin IID statutory scheme is ripe for adjudication because the indeterminate length of an IID Order for out-of-state residents causes actual and imminent harm.

Sharpe's constitutional challenge is ripe for adjudication because the discriminatory effect of this statutory scheme is both present and certain. Regardless of what length of time the circuit court orders, and regardless of whether Sharpe fully complies with whatever time period the court orders, Sharpe will be in the same position he is now. The length of the IID order will remain in the same posture of never having begun. There is no practical or legal reason to wait until, as the state suggests, Sharpe has complied with the IID restriction as ordered by the court. (146:9). Apart from the fact that Sharpe cannot comply with an IID order that has never begun, the discriminatory effect is both present and certain.

The issue is therefore ripe. The circuit court ordered the IID and Sharpe has sufficiently demonstrated the actual and imminent harm that has been caused to him as a result, that being his inability ever to satisfy the IID order as an out-of-state driver. ***Nat'l Treasury Emps. Union v. United States***, 101 F.3d 1423, 1428 (D.C. Cir. 1996) ("[I]f a threatened injury is sufficiently "imminent" to establish standing, the constitutional requirements of the ripeness doctrine will necessarily be satisfied.").

CONCLUSION

For the foregoing reasons, this Court should vacate and dismiss the circuit court's finding that Sharpe's refusal was improper and reinstate his Wisconsin operating privileges. Alternatively, this Court should find the statutory scheme

under Chapter 343 which governs the imposition of IID restrictions on nonresidents is either facially unconstitutional or as applied to Sharpe, and remand for an amended order which removes any IID requirement.

Dated this 14th day of June, 2022.

Respectfully submitted,

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CERTIFICATION BY ATTORNEY

I hereby certify that this brief conforms to the rules contained in §. 809.19 (8) (b), (bm) and (c) for a brief. The length of this brief is 6,484 words.

I further certify that filed with this brief is an appendix that complies with §. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under §. 809.23 (3) (a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 14th day of June, 2022.

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