STATE OF WISCONSIN

IN SUPREME COURT

Case No(s). 21 AP 1543, 22 AP 307

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SAMUEL G. SHARPE,

Defendant-Appellant-Petitioner.

PETITION FOR REVIEW

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INTRODUCTION

Samuel G. Sharpe petitions this Court to review the court of appeals' decision in *State v. Sharpe,* 2024 WI App ___. (Pet-App. 4.) The court of appeals' opinion was decided by a single judge pursuant to Wis. Stat. § 752.31(2) and was therefore unpublished. (*Id.*)

Following acquittal by jury in the companion criminal OWI prosecution,[1] the circuit court held a refusal hearing, ultimately ruling against Sharpe and entering judgment under Wis. Stat. § 343.305(10)(a) for Mr. Sharpe's refusal to permit an evidentiary breath test. (R. 55; Pet-App. 94.)

Ignition interlock device ("IID") orders are mandatory consequences of refusal adjudications. Wis. Stat. § 343.301(1g)(a)1. Thus, following adjudication in the refusal, Sharpe filed a motion challenging the constitutionality of 2017 Wisconsin Act 124's ("the Act") amendment of the IID statute. (R. 89; Pet-App 119.) In short, the basis for Sharpe's motion is that the new IID statute creates a *lifetime* IID restriction … *but only for out-of-state residents*. Wisconsin residents, on the other hand, enjoy the opportunity to rid themselves of the restriction. (*Id.*)

This disparate treatment occurs because with 2017 Wisconsin Act 124 ("the Act"), the Wisconsin

[1] St. Croix County case number 19CT92 is not a subject of this appeal due to judgment of acquittal therein.

legislature amended Wisconsin Statutes secs. 343.301(2m)(a), 347.413(1), and 347.50(1t). Prior to the Act, an IID restriction began on the date that the DOT issued an operator's license. *See* 2017 Wis. Act 124 (containing the prior version of the statute, which provided, "the court shall restrict the operating privilege . . . *beginning on the date the department issues any license granted under this chapter*.") (emphasis added).

However, after this amendment, IID restrictions begin "on the date the order . . . is issued." Wis. Stat. § 343.301(2m), and time does not begin to count against the 12 – or however many – months are ordered by the court for the length of the restriction. Wis. Stat. § 343.301(2m)(a) ("If the court enters an [IID] order … the restriction … shall … extend for a period of not less than one year.").

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 even begin to run until the Department issues a driver's license. If a license is not, or in the case of an out-of-state driver, cannot be issued by the Department, the time on the IID order never starts to run. Whatever the length of the IID order, an out-of-state driver can never satisfy the order.

The State acknowledges that out-of-state residents are subject to a lifetime IID restriction. (Resp. Br. At 15.; Sept. 12, 2022.) However, the State

also argues, without meaningful explanation, that the practice constitutes "equal treatment." (*Id.* at 16.) Also following scant discussion, the court of appeals reached the same conclusion. (Pet-App. 21.)

Sharpe therefore petitions this Court for review and relief from the discriminatory (facially and as-applied) lifetime IID restriction imposed upon him. Wisconsin residents are afforded the opportunity to obtain "a license granted under this chapter," but Sharpe, as a Minnesota resident, is not. He is forever burdened with the IID restriction, where a Wisconsin driver is only so burdened should they sleep on their right to obtain a license following an OWI conviction.

The issue is ripe as a matter of law, that is, by simple operation of statute. Mr. Sharpe has suffered harm because he is already subject to a lifetime IID order. The similarly situated Wisconsin driver, on the other hand, would know the date by which he or she would be eligible for (1) reinstatement, and therefore (2) satisfaction of the IID order.

"Forever" and "limited/defined" are different. They are not equal. One is more burdensome than the other; thus, the IID statute needs this Court's intervention.

ISSUE PRESENTED

1. WHETHER THE IGNITION INTERLOCK STATUTORY SCHEME DISCRIMINATES AGAINST OUT-OF-STATE ECONOMIC INTERESTS WHERE IT IMPOSES A LIFETIME RESTRICTION ONLY AGAINST OUT-OF-STATE DRIVERS.

CRITERIA FOR REVIEW

This case warrants review because it satisfies the criteria set forth in Wis. Stat. § 809.62(1r).

First, review is appropriate because real and significant questions of federal or state constitutional law are presented. Wis. Stat. § 809.62(1r)(a). This case offers this Court the opportunity to decide whether 2017 Wisconsin Act 124's alterations to Wis. Stat. §§ 343.301(2m)(a), 347.413(1), and 347.50(1t) violate the Dormant Commerce Clause by imposing a lifetime IID restriction on out-of-state drivers, while offering Wisconsin drivers the special chance to rid themselves of the restriction.

Second, the question presented is novel and has statewide impact. The court of appeals disposed of this issue of first impression by dodging it entirely with misapplication of the ripeness doctrine. The question raised in this petition requires an answer. No case has addressed the (likely unintended) impacts of 2017 Wisconsin Act 124's creation of a lifetime IID restriction for out-of-state residents.

Finally, this is a legal rather than factual question that is likely, and even certain, to recur unless resolved by this Court. Each time an out-of-state driver is convicted of an OWI calling for an IID order, that driver's rights are violated. This is a common, likely daily occurrence in desperate need of a solution.

STATEMENT OF THE CASE

On February 16, 2019, Sharpe was issued a Notice of Intent to Revoke Operating Privilege. Sharpe, by counsel, timely demanded a refusal hearing on February 26, 2019. The circuit court held a refusal hearing on February 12, 2021, and, after briefing, ruled in favor of the State.

Following adjudication on the refusal, the circuit court entered a conviction status report ("CSR") with the Wisconsin Department of Transportation ("DOT") on August 18, 2021, which ordered an ignition interlock device ("IID") restriction for 12 months.

On September 7, 2021, Sharpe filed a motion with the circuit court challenging the constitutionality of the IID order and the underlying statute. 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. Put another way, for out-of-state residents, a Wisconsin IID order is for life, even where, as here, the circuit court orders it only for 12 months.

This is because 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*." Wis. Stat. § 343.301(2m)(a) (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) (prohibiting the DOT from issuing a license to a nonresident).

After briefing, the circuit court denied Sharpe's motion. The facial challenge to Wisconsin's IID statutes failed because, according to the circuit court, Sharpe did not "show that Wisconsin's IID law is unconstitutional beyond a reasonable doubt." The court said that it "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."

The court noted that Sharpe's challenge "has some initial appeal in terms of its unconstitutionality." However, noting that courts are required to "indulge every presumption favoring constitutionality," the circuit court concluded that the IID restrictions apply equally to residents and nonresidents. The court did not explain the basis for this conclusion aside from expressing its position that the law "furthered a purpose identified by the legislature."

Of course, Sharpe did not raise a rational-basis or strict-scrutiny-type argument where the issue is whether the law advances a compelling government interest. Rather, Sharpe raised a challenge based upon a Dormant Commerce Clause theory about disparate treatment of in-state and out-of-state drivers. The circuit court proclaimed that Sharpe "should [not] enjoy more protections under the statute than Wisconsin residents because he is an out-of-state resident." However, the circuit court did not explain how Sharpe would enjoy "more protections" if the statute were struck down facially and thus made inapplicable to all. Nor did the circuit court address the reality that Sharpe would forever need to drive in Wisconsin with an IID installed.

The court of appeals materially echoed the circuit court's reasoning, which was not responsive to the arguments and issues herein. Thus, Sharpe now petitions this Court for review.

ARGUMENT

I. The new IID statute imposes a lifetime restriction only upon out-of-state drivers while allowing Wisconsin citizens the opportunity to satisfy such an order.

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.

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…").

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).

In this case, the court of appeals disposed of the facial challenge by claiming without legal support that the IID "requirement applies to both in-state and out-of-state drivers." Of course, Sharpe has agreed in both lower courts that the restriction applies to both classes of drivers. The very simple problem concerns *how they apply* to each class, disparately and respectively. Out-of-state drivers are restricted forever; Wisconsin drivers are restricted for a defined period of time.

"Forever" is not the same as, for example, "12 months from relicensure." To the extent that either the circuit court or court of appeals engaged in a process of logical decision-making on this issue of "equality" or "sameness," the logic is inherently flawed and thus calls for this Court's attention, given the novelty and statewide impact of the issue.

Moreover, in reaching its conclusion on the facial challenge, the court of appeals reasoned – well aside from the point – that "an IID restriction imposed by a Wisconsin court on an out-of-state driver does not prohibit that person from obtaining or maintaining a driver's license in another state." (Pet-App. 21.) Nothing about this issue concerns a person's ability to obtain a driver's license or operating privilege in Wisconsin or in any other state. Rather, of course, this case is about the *discriminatory burdens placed upon the use of those privilege as to both in- and out-of-state drivers.*

The court of appeals further reasoned: "For both in-state and out-of-state drivers, the IID restriction

begins on the date the court issues its order, and *the restriction lasts for a given time period after the person has been issued a Wisconsin driver's license* by the DOT" – a sentence which generously makes Sharpe's argument for him. (Pet-App. 21.)

This is because for out-of-state drivers, the length of the order is not "given." [2] The word "given" means "particular" or "specified." That is the problem with this law. For out-of-state drivers, the period of time is not particular or specified; therefore, it is not "given." Wisconsin drivers, on the other hand, enjoy the right.

The State's repeated suggestions that out-of-state drivers enjoy a more lenient outcome lack arguable merit.

Out-of-state drivers will never be "issued a Wisconsin driver's license." Therefore, the "given time period" is not *given* at all. Rather, it is an undefined, indefinite, and indeterminate; that is, the person's lifetime. That is not what "equality" means.

Next, the court of appeals disposed of the as-applied challenge by claiming without legal support that the "circuit court's IID order permits Sharpe to drive in this state provided that the has a valid driver's license and has an IID installed in his vehicle. These

[2] *Given, adj.* Merriam-Webster "*Particular*, specified," "at a given time." (https://www.merriam-webster.com/dictionary/given, last accessed October 24, 2024) (emphasis added).

are the same restrictions that an IID order under § 343.301 would impose on an in-state driver."

The constitutional infirmity, of course, concerns the differing lengths of time for which they would do so. Wisconsin drivers' privileges would be so restricted for a defined length of time. Sharpe's operating privilege is so restricted *forever*. Neither the circuit court nor court of appeals explained how "12 months from relicensure" is the same as "forever," as such an explanation would be impossible to articulate.

The circuit court noted that Sharpe's challenge "has some initial appeal in terms of its unconstitutionality." However, noting that courts are required to "indulge every presumption favoring constitutionality," the circuit court concluded that the IID restrictions apply equally to residents and nonresidents.

The court did not explain the basis for this conclusion aside from expressing its position that the law "furthered a purpose identified by the legislature." Of course, Sharpe did not raise a rational-basis or strict-scrutiny-type issue where the issue embraces whether the law advances a government interest. Rather, Sharpe raised a challenge based upon a Dormant Commerce Clause theory about disparate treatment of in-state and out-of-state drivers. The circuit court proclaimed that Sharpe "should [not] enjoy more protections under the statute than Wisconsin residents because he is an out-of-state resident." However, the circuit court did not explain

how Sharpe would enjoy "more protections" if the statute were struck down facially and thus made inapplicable to all. Nor did the circuit court address the reality that Sharpe would always need to drive in Wisconsin with an IID installed.

The court of appeals disposed of the facial challenge by claiming without legal support that the IID "requirement applies to both in-state and out-of-state drivers." Of course, Sharpe has agreed in both lower courts that the restriction applies to both classes of drivers. However, the simple issue is that the Dormant Commerce Clause argument concerns the different ways that it applies to out-of-state drivers (whose privileges are restricted forever) and in-state drivers (whose privileges are affected for a defined period of time following relicensure). Forever is not the same as, for example, 12 months from relicensure. To the extent that either the circuit court or court of appeals engaged in a process of logical decision-making on this issue of "equality" or "sameness," that logic is difficult to follow and the issue wants for this Court's clarification.

However, in reaching this conclusion on the facial challenge, the court of appeals reasoned, again, well aside from the point, that "an IID restriction imposed by a Wisconsin court on an out-of-state driver does not prohibit that person from obtaining or maintaining a driver's license in another state." (Pet-App. 21.) Nothing about this case concerns a person's ability to obtain a driver's license or operating privilege in Wisconsin or in any other state. Rather, of

course, this case is about the *restriction* that attaches to the use of those privileges.

The court of appeals further reasoned that "For both in-state and out-of-state drivers, the IID restriction begins on the date the court issues its order, and the restriction lasts for a given time period after the person has been issued a Wisconsin driver's license by the DOT." (Pet-App. 21.)

That sentence concisely proves Sharpe's point.

Out-of-state drivers will never be "issued a Wisconsin driver's license." Therefore, the "given time period" is not given at all. Rather, it is an undefined, indefinite, and indeterminate; that is, the person's lifetime. That is not what "equality" means.

Next, the court of appeals disposed of the as-applied challenge by claiming without legal support that the "circuit court's IID order permits Sharpe to drive in this state provided that the has a valid driver's license and has an IID installed in his vehicle. These are the same restrictions that an IID order under § 343.301 would impose on an in-state driver."

The constitutional infirmity, of course, concerns the differing lengths of time for which they would do so. Wisconsin drivers' privileges would be so restricted for a defined length of time. Sharpe's operating privilege is so restricted *forever*. Neither the circuit court nor court of appeals explained how "12 months from relicensure" is the same as "forever," as such an explanation would be impossible to articulate.

To prevent irreparable harm, Sharpe asked the circuit court to stay the operating-privilege revocation, ignition interlock order, and other penalties pending appeal. The court granted that request over the State's objection.

CONCLUSION

For these reasons, Samuel G. Sharpe petitions this Court to accept review of the court of appeals' decision in these matters.

Dated this 24th day of October, 2024.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this petition conforms to the rules contained in s. 809.19(8)(b), (bm) and 809.62(4). The length of this petition is 4,030 words.

CERTIFICATION OF ELECTRONIC FILING

I hereby certify that: I have submitted an electronic copy of this document, including the appendix, which complies with the requirements of Wis. Stat § 809.19(12).

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this petition is an appendix that complies with s. 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 s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rules 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 or 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 24th day of October, 2024.

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