STATE OF WISCONSIN

IN SUPREME COURT

Nos. 2021AP1543 & 2022AP307

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SAMUEL G. SHARPE,

Defendant-Appellant-Petitioner.

RESPONSE TO PETITION FOR REVIEW

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INTRODUCTION

Defendant-Appellant-Petitioner Samuel G. Sharpe is a Minnesota resident who refused to consent to a chemical test of his breath for alcohol during a traffic stop. Consistent with Wisconsin's statutes concerning all breath refusals, the court hearing Sharpe's case imposed an ignition interlock restriction restricting Sharpe's operating privilege in Wisconsin to vehicles with an ignition interlock device (IID) installed. Sharpe complained that this restriction violates the Constitution because, as a Minnesota resident, he is ineligible for a Wisconsin driver's license, the issuance (or reinstatement) of which is a necessary condition for the IID restriction to eventually be lifted. Sharpe argued, in effect, that Wisconsin's statutes treat him differently because he is an out-of-state resident. The courts below disagreed, so Sharpe now asks this Court to take his case and consider the issue.

This Court should decline Sharpe's request for two main reasons. First, the issue is not yet ripe. There is nothing in the record to indicate that Sharpe had installed an IID in any vehicle for any period, much less for the period required by the IID order, when he sought the lifting of the restriction. Sharpe was thus not treated differently than any Wisconsin citizen when the court denied his order. It would be premature for this Court to weigh in on a legal issue that Sharpe believes will occur in the future. Second, contrary to Sharpe's argument, the IID statute does not treat out-of-state residents any differently than Wisconsin residents. In fact, the statute is entirely neutral as to a driver's state of residence. That several statutes, taken together, might combine to have a greater impact on an out-of-state resident than a Wisconsin resident does not violate the Constitution. Settled principles related to the Dormant Commerce Clause dictate this conclusion, so further review by this Court is unnecessary.

REASONS FOR DENYING THE PETITION

I. Sharpe's as-applied challenge is not ripe.

Wisconsin courts do not issue "advisory opinions" on unripe claims involving "hypothetical or future facts." *State v. Armstead*, 220 Wis. 2d 626, 631, 583 N.W.2d 444 (Ct. App. 1998). *See also Tammi v. Porsche Cars N. Am., Inc.*, 2009 WI 83, ¶ 3, 320 Wis. 2d 45, 768 N.W.2d 783; *City of Janesville v. Rock Cnty.*, 107 Wis. 2d 187, 199, 319 N.W.2d 891 (Ct. App. 1982). The court of appeals adhered to this rule when it affirmed the circuit court's ruling in this case. *See Matter of Sharpe*, Nos. 2021AP1543 & 2022AP307, 2024 WL 4274364, ¶ 39 (Wis. Ct. App. Sept. 24, 2024) (unpublished). As it properly explained, Sharpe has not established that he has yet been treated differently because he has not shown that he has had an IID installed for a period that would allow a Wisconsin resident to have the restriction lifted. Any different treatment at this point is only theoretical.

Sharpe nevertheless contends that the issue is ripe "because he is already subject to a lifetime IID order." (Pet. 7.) That is not correct. Sharpe is subject to a 12-month IID restriction. (R. 72:1.)[1] That he may prove unable to have the restriction lifted at some point in the future because he does not hold a Wisconsin driver's license is the type of "future fact" *Armstead* cautions against courts using as the basis for resolution of a case. Sharpe also compares himself to a "similarly situated Wisconsin driver," who "would know the date by which he or she would be eligible for" reinstatement of their operating privilege and satisfaction of the IID restriction. (Pet. 7.) Again, however, the IID restriction is clear on its face. No information is being withheld from Sharpe about the restriction—certainly none on account of his

[1] Citations to (R. ##:##) are to the record in 2021AP1543 unless otherwise indicated.

state of residence—he is just displeased with the result of the restriction and the possibility that it will be impractical for him to have the restriction lifted in the future. That displeasure, however, does not warrant this Court's review. Granting the petition would likely draw this Court into issuing an advisory opinion. It should decline to do so.

II. The lower courts correctly applied the law.

Even if the controversy presented by this case were ripe, this Court's review still would be unnecessary because the court of appeals reached the correct result: the statutory scheme does not violate the Dormant Commerce Clause.

The concept of the Dormant Commerce Clause holds "that state laws offend the Commerce Clause when they seek to 'build up . . . domestic commerce' through 'burdens upon the industry and business of other States,' regardless of whether Congress has spoken." *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 369 (2023) (quoting *Guy v. Baltimore*, 100 U.S. 434, 443 (1880)). In more recent formulations, the Supreme Court has explained "that the Commerce Clause prohibits the enforcement of state laws 'driven by . . . "economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors."'" *Ross*, 598 U.S. at 369 (citing *Department of Revenue of Ky. v. Davis*, 553 U.S. 328, 337–38 (2008)).

Simply put, Sharpe has not—and cannot—establish that Wisconsin's statutory scheme for the imposition of IID restrictions is "driven by economic protectionism." To the contrary, as the State explained below, the current structure of the statutory scheme was designed to close a loophole that allowed individuals to escape any IID requirement whatsoever by simply "waiting out" the restriction period before applying for license reinstatement. (R. 146:5.) Far from being driven by economic protectionism, the scheme is driven

by the goal of ensuring roadway safety. It applies to everyone equally, and it applies only within Wisconsin's borders. *Cf. Morley-Murphy Co. v. Zenith Elecs. Corp.*, 142 F.3d 373, 379 (7th Cir. 1998) (Dormant Commerce Clause might be implicated if Wisconsin's Fair Dealership Law "were construed to apply extraterritorially").

Sharpe attempts to flatten the Dormant Commerce Clause into the idea that any statutory scheme that might have any conceivable disparate impact on a non-resident is constitutionally void. Adopting his view would require this Court to ignore two hundred years of Supreme Court precedent tethering the Dormant Commerce Clause to its roots in concerns of economic protectionism. Notably, Sharpe offers no case from any jurisdiction to support the idea that an IID restriction of the sort at issue in this case implicates the Dormant Commerce Clause. Instead, he takes it as a given that because he can articulate a conceivable disparate effect of the statutory scheme on non-residents, it must impact commerce. He thus attempts to stretch the Dormant Commerce Clause beyond its breaking point while offering no compelling reason for this Court to take up his cause.

The regulation of driving and drivers has been around since the dawn of the automobile. Over one hundred years ago, the Supreme Court rejected the idea that such regulations burden interstate commerce:

> In the absence of national legislation covering the subject, a state may rightfully prescribe uniform regulations necessary for public safety and order in respect to the operation upon its highways of all motor vehicles,-those moving in interstate commerce as well as others. And to this end it may require the registration of such vehicles and the licensing of their drivers, charging therefor reasonable fees graduated according to the horse-power of the engines,-a practical measure of size, speed, and difficulty of control. This is but an exercise of the police power uniformly recognized as belonging to the states and

> essential to the preservation of the health, safety, and comfort of their citizens; and it does not constitute a direct and material burden on interstate commerce.

Hendrick v. State of Maryland, 235 U.S. 610, 622 (1915). Wisconsin's statutory scheme related to IID restrictions is no different: it does not constitute a direct and material burden on interstate commerce, and so it does not offend the Commerce Clause. There is no need for this Court to address the question further.

CONCLUSION

For the reasons discussed, this Court should deny Sharpe's petition for review.

Dated this 22nd day of November 2024.

Respectfully submitted,

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Electronically signed by:

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FORM AND LENGTH CERTIFICATION

I hereby certify that this petition or response conforms to the rules contained in Wis. Stat. §§ (Rules) 809.19(8)(b), (bm) and 809.62(4) for a petition or response produced with a proportional serif font. The length of this petition or response is 1,333 words.

Dated this 22nd day of November 2024.

Electronically signed by:

John A. Blimling
JOHN A. BLIMLING
Assistant Attorney General

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 22nd day of November 2024.

Electronically signed by:

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