No. 19-328

IN THE
SUPREME COURT OF THE UNITED STATES

David BRENNAN
Petitioner

vs.

WHITE COUNTY, ARKANSAS
Respondent

****

On Petition for Writ of Certiorari
to the Arkansas Court of Appeals

PETITION FOR WRIT OF CERTIORARI

Submitted by:

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pro se

QUESTIONS PRESENTED FOR REVIEW

1. Is Arkansas' local option law, which social science research shows is ineffective at reducing alcohol consumption and actually increases DWI fatality rates, rationally related to the legitimate governmental purpose of controlling the ill effects of alcohol when viewed in light of a highly-developed highway system, the ubiquity of the automobile, and the affordability of gasoline?

2. Has Arkansas' local option law acquired an unconstitutional irrationality under federal substantive due process standards by way of subsequent legislation allowing the serving of alcohol by the drink in an unlimited number of "private clubs," including restaurants, in dry jurisdictions?

3. Is Arkansas' local option law unconstitutional under federal substantive due process standards as a mere artifice for the unconstitutional imposition of the morality of local majorities on those whose conduct does not harm others?

PARTIES TO THE PROCEEDING

The parties to the proceeding are the Petitioner, David Brennan, and the Respondent, White County, Arkansas.

Because this case presents challenges to the constitutionality of an Arkansas statute, 28 U.S.C. § 2403(b) may apply, and the Petition has been served upon the Arkansas Attorney General.

RELATED PROCEEDINGS

David Brennan v. White County, Arkansas, Circuit Court for the 17th Judicial Circuit – White County, Arkansas, No. 73CV17-502. Order of Dismissal April 24, 2018.

David Brennan v. White County, Arkansas, Arkansas Court of Appeals, No. CV-18-638. Opinion entered March 6, 2019. Rehearing denied April 3, 2019.

David Brennan v. White County, Arkansas, Supreme Court of Arkansas (Petition for Review), No. CV-19-228. Review denied May 23, 2019.

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BASIS FOR JURISDICTION

Petitioner seeks review of the final Opinion of the highest Arkansas court in which a decision could be had. The case challenges the constitutionality of an Arkansas statute.

The Arkansas Court of Appeals has decided important questions of federal law that have not been but should be decided by this Court.

The Arkansas Court of Appeals has decided a question of federal law in a manner that is inconsistent with precedents of this Court.

The Opinion for which review is sought was entered on March 6, 2019. The Arkansas Court of Appeals denied rehearing on April 3, 2019, and the Supreme Court of Arkansas denied review, with one Justice voting to grant, on May 23, 2019.

Petitioner applied August 21, 2019, to the Honorable Neil M. Gorsuch, Associate Justice, for an extension of time in which to file this petition. The application was granted on August 26, 2019, extending the filing date to September 5, 2019.

Jurisdiction is conferred on this Court by 28 U.S.C. § 1257(a).

LAWS INVOLVED

United States Constitution, Amendment V App. 15

STATEMENT OF THE CASE

Prior to the 18th Amendment and national prohibition, many states had "local option" laws giving their political subdivisions authority to determine the legality of the manufacture and sale of alcoholic beverages. Since the end of national prohibition with the 21st Amendment, many states re-adopted such laws. State maps indicating "dry" and "wet" jurisdictions came to resemble patchwork quilts. Arkansas has had some sort of local option since 1935, and the State's current local option framework allowing political subdivisions to determine prohibition by petition and popular vote was adopted, itself by popular vote, in 1942 and has been amended numerous times since. Ark. Code Ann. § 3-8-803(a) (App. 15) establishes that prohibition may be determined by the voters of any "county, township, municipality, ward, or precinct." This framework creates a situation where prohibition may exist literally on one side of the street but not the other.

After failed attempts in 1956 and 1958, White County was voted dry under the local option law on November 8, 1960. In 1969, Arkansas passed its private club law allowing for the service of alcohol by the drink for on-premise consumption at "private clubs" in dry jurisdictions without numerical limit on the number of such clubs in any given county, township, municipality, ward, or precinct. (Ark. Code Ann. § 3-9-221) (App. 16) As amended and as interpreted, the definition of "private club" includes restaurants serving alcohol.

On September 11, 2017, Petitioner filed his action for a determination as to the constitutionality of White County's prohibition and Arkansas' local option framework in the Circuit Court for the 17th Judicial Circuit (White County, Arkansas) pursuant to Ark. Code Ann. § 16-111-102 (App. 21). The statute provides a cause of action for the determination of the constitutionality of a law by any person affected by the law in their "rights, status, or other legal relations." The County defended, but the State elected not to exercise its statutory right to be heard and defend the local option.

In his complaint, Petitioner alleged that he was affected in his rights, status, or legal relations by Arkansas' local option law and White County's prohibition established thereunder. Some of Petitioner's original claims regarding the laws' impact to his legal relations have been rendered moot by the granting of a small but growing number of private club licenses to restaurants in his county and city of residence. His central claims, however, survive – specifically his claim that the laws deny

him the ability to even apply to engage in the business of owning and operating a package store, which is not prohibited as a matter of state law, and that the laws expose him to unnecessary danger on the streets and highways by increasing the distances driven by impaired drivers and thereby the number of DWI fatalities.

Petitioner brought novel arguments that the laws are invalid under federal substantive due process standards. Specifically, Petitioner argued that these laws are unconstitutional as mere artifices for the imposition of the morality of local majorities on those whose conduct does not harm others, that they lack any rational basis because they are ineffective at reducing alcohol consumption and actually increase DWI fatalities, and that any rational basis these laws may have had at the time of their passage has been obliterated by the subsequent private club legislation.

The County did not challenge Petitioner's standing to bring the action. Petitioner alleged and the County did not challenge that the local option is completely ineffective at reducing alcohol consumption, that the local option actually increases the distances driven by impaired drivers, and that states with local-level prohibition actually have higher DWI fatality rates than states with statewide legal alcohol.

The County moved to dismiss due to the fact that local option laws have been held constitutional under a variety of other challenges and are therefore constitutional as a matter of law. The Circuit Court agreed and dismissed.

Petitioner filed a *de novo* appeal to the Arkansas Court of Appeals. In an opinion dated March 9, 2019, the Arkansas Court of Appeals affirmed the Circuit Court. The Arkansas Court of Appeals held that, because the local option and White County's prohibition are nominally aimed at the regulation of alcohol, they have a rational basis. That court held that whether the laws are ineffective or even harmful or counterproductive is irrelevant to rational basis analysis. (App. 8-9) That court also flatly rejected Petitioner's novel argument that the local option was robbed of its rationality under federal due process standards by subsequent legislation at cross purposes, holding that Arkansas' local option, which pursues the aim of reducing alcohol consumption, and its private club law, which mandates the serving of alcohol by the glass at limitless numbers of "private club" restaurants in dry jurisdictions can be "read in harmony." (App. 12)

Rehearing was denied April 3, 2019 (App. 13), and the Supreme Court of Arkansas denied review on May 23, 2019 (App. 14).

ARGUMENT

Introduction

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of

> liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.

Lawrence v. Texas, 539 U.S. 558, 578 (2003).

Today another important component of liberty and due process cries out to this Court. It cries out from the multitudes who do not believe the consumption of alcoholic beverages is inherently harmful or immoral and who yet chafe under oppressive laws which require them to drive across one or more counties for a legal bottle of wine to enjoy over dinner with their families or a legal six-pack to enjoy while watching the game with their friends in the comfort of their homes. It cries out from the underfunded health, safety, and welfare programs of the counties that send tens of millions of dollars in tax revenue away to be collected in the county line liquor megastores. It cries out from the homes of the children whose families have been destroyed by the loss of a parent to a drunk driver coming home to a dry county from a wet county. It cries out through the life-long struggles of those who have been grievously injured by such impaired drivers, and it cries out from the graves that have been filled by such drivers in the name of the

untouchable local option.

It cries out, too, from the shattered homes, the broken bodies, and the funerals yet to come which could be avoided by the simple, uniform, nationwide application of the principles of substantive due process to local option laws in the light of social science, our modern culture and infrastructure, and subsequent legislation which can only be seen as giving lip service to the local option while actually undermining its purposes.

Alcohol has long been one of the most divisive issues in America. When it comes to prohibition, we have a long and inglorious history of pointedly ignoring the historically obvious – that it just doesn't work and that it is, in bitter truth and stark logic, an artifice for one segment of the population to impose its morality on the rest ... or at least feel like it has. Perhaps with this case, we can as a nation at long last abandon the pretense that there is a *rational* basis for prohibition at any level.

Alcohol has its issues to be sure, and when it is misused and abused, it wreaks havoc. It is rational and just to want to address the evils attendant to alcohol misuse and abuse. It is, in fact, noble. The Noble Experiment failed, however, and it only took thirteen years for America to recognize its utter futility. Eighty-six years hence, we have occasion to conduct a sober rational basis analysis of three novel federal questions and, in so doing, end our long national delusion that these laws have any *rational* relation to any *legitimate* governmental purpose.

Reasons for Granting the Writ

The Arkansas Court of Appeals has decided important questions of federal constitutional law that have not been *but should be* decided by this Court (Rule 10(c)) and has decided one of these questions in a way that conflicts with decisions of other state courts of last resort (Rule 10(b)). The Arkansas Court of Appeals has also decided two of these questions in a way that conflicts with decisions of this Court concerning the rational basis test (Rule 10(c).

Petitioner presented three novel questions to the Arkansas courts which are important enough in their impact and their consequences as to require at the present moment and henceforth one uniform national rule announced by this Court.

An Ineffective and Deadly Law

The first question presented for review is a novel one: is Arkansas' local option law, which social science research shows is ineffective at reducing alcohol consumption and actually increases DWI fatality rates, rationally related to the legitimate governmental purpose of controlling the ill effects of alcohol when viewed in light of a highly-developed highway system, the ubiquity of the automobile, and the affordability of gasoline? The Arkansas Court of Appeals has held that whether a law is wholly ineffective or even counterproductive is irrelevant to rational basis analysis. (App. 8-9)

This question may be broken down into four

component questions, three of which are just questions of degree. First, can a law which is *ineffective* to its purpose be held to be rationally related to that purpose? Second, can a law which is counterproductive to its purpose be held to be rationally related to that purpose? Third, can a law that actually harms the public good and increases loss of human life in pursuit of its purpose be held to be rationally related to that purpose? The fourth component question is one of context. Must the rationality of a law be determined in the context of the time when it it was passed or the time in which it is challenged?

This court has not yet directly weighed these considerations. The question of whether an ineffective or counterproductive law or a law which actually costs innocent human life in pursuit of its purpose can be rationally related to that purpose is an important aspect of the rational basis standard which is sorely in need of development by this court.

At least one state has invalidated a local law under the rational basis standard where it was shown to be counterproductive to its purpose. In *Red River Constr. Co. v. City of Norman*, 624 P.2d 1064 (Okla. 1981), the Supreme Court of Oklahoma held that an ordinance which was counterproductive had no rational relation to its purpose and enjoined its enforcement. The Arkansas Court of Appeals determination that whether a law is ineffective or even counterproductive is irrelevant to rational basis analysis is directly contradictory. This court should settle the question.

Petitioner alleged without contradiction or

challenge at any point that recent social science research shows local enactments of prohibition to be ineffective at reducing alcohol consumption – not partially effective or barely effective but *ineffective*.

Petitioner alleged without contradiction at any point that recent social science research shows the local option actually increases DWI fatality rates. It isn't sensationalist to say that the local option kills. It is simply bluntly factual. What must be determined is whether a law – even if passed with the best of intentions – which actually costs innocent human life, is rational under federal substantive due process standards.

Do people harm themselves and others through the misuse and abuse of alcohol? It is an obvious and sad fact that they do. Do people die due to the misuse and abuse of alcohol? Without a doubt they do. The misuse and abuse of alcohol has many more detrimental effects on society than these few. Is it rational, though, to pursue a diminution of those tragic effects by means of a law which actually brings about its own danger and death? That is a question presented for the first time in this case. The Petition should be granted so that this Court may determine this very important and novel question.

Assuming *arguendo* that the local option had a rational relation to reducing alcohol consumption at the time it was enacted, we must recognize that times change and infrastructure develops. Compared to 1935, 1942, and even 1960, Arkansas and the rest of the country have a vastly more developed highway system. In addition, the automobile has become ubiquitous, and gasoline is

cheap. Travel from one political subdivision to another is phenomenally easier today than it was when these laws came on the books. Thus, another aspect of this first question is whether the rationality of these laws must be judged by the times and circumstances in which they were enacted or by the times and circumstances as they have changed. This Court's words from *Lawrence v. Texas*, *Supra*, quoted above, indicate that the constitutionality of a law must be judged by the circumstances of our time – not by the circumstances of a bygone time.

It seems this Court already knows that a law may acquire an unconstitutional irrationality with the passage of time. It should now decide if a law can acquire irrationality in another way.

Acquired Irrationality

The second question presented for review is also a novel one: has Arkansas' local option law acquired an unconstitutional irrationality under federal substantive due process standards by way of subsequent legislation allowing the serving of alcohol by the drink in an unlimited number of "private clubs," including restaurants, in dry jurisdictions? This question of acquired irrationality has not until now come before this Court, but it begs for a resolution binding throughout our nation. This Court should now decide if a state robs one statute of its rational basis by subsequently wholly and knowingly undermining that statute by legislating directly against its purpose.

With its local option law and its private club

law both in force, the State is pursuing reduced alcohol consumption with one law while mandating the availability of alcohol in dry jurisdictions with another. The laws are not just incompatible – they serve diametrically opposed purposes. Arkansas can only rationally pursue one purpose at a time – either the purpose to reduce alcohol consumption or the purpose to increase its availability in dry jurisdictions. It cannot do both. At least one judge on the Arkansas Court of Appeals has recognized this obvious reality, stating that the private club law, as amended and interpreted to include as "private clubs" restaurants serving alcohol in dry jurisdictions, "effectively nullifies" the local option. *Barnes v. Ark. Dep't of Fin. & Admin.*, 2012 Ark. App.237,419 S.W.3d 20, 29 (2012) (Gruber, J., dissenting). In that dissent, Justice Gruber recognized that the purpose of the local option law is the reduction of the consumption of alcohol and that the private club law is anathema to that purpose.

On merits, Petitioner will show that, when, due to changing times and state governmental priorities, an antiquated law has been effectively nullified by the passage of another, the old law no longer bears a rational relation to any purpose, legitimate or not. It is therefore unconstitutional under federal substantive due process standards.

Arkansas' local option is simply not *rationally* related to any public health, safety, or welfare purpose, because it is simply not effective at reducing alcohol consumption if it ever even was. It is, however, rationally related to something ... local majority moral attitudes toward alcohol.

Legislation of Morality

Like the two questions before it, the third question presented for review is also novel: is Arkansas' local option law unconstitutional under federal substantive due process standards as a mere artifice for the unconstitutional imposition of the morality of local majorities on those whose conduct does not harm others? It is an important question which is presented to this Court now for the first time. In fact, no federal court of appeals or state court of last resort has decided this specific question.

With *Lawrence v. Texas*, it became abundantly and explicitly clear that the imposition of morality is not a legitimate governmental purpose. Petitioner has argued that the *only thing* to which the local option is *rationally* related is the local majority attitudes about the morality of alcohol. Understanding that the local option is no longer even remotely effective at reducing alcohol consumption if it ever had been, the question is what, if anything, it and White County's prohibition are rationally related to. Petitioner has consistently argued that the only thing the local option is rationally related to is the local majority moral attitudes toward alcohol. The incontrovertible ineffectiveness of prohibition at reducing alcohol consumption at any level and the undeniable origins of the prohibition movement in America's protestant Great Awakening bear this out. They therefore serve only as a suppression of liberty - to codify into law the moral attitudes of local majorities and impose the strictures of those attitudes on the whole - even if only nominally.

Contravention of Supreme Court Precedent

From the outset, the Arkansas Court of Appeals applied a standard that has been expressly disavowed by this Court. That court clearly proceeded conducting its rational basis review applying the added presumption of validity from *California v. laRue*, 409 U.S. 109, 93 S.Ct. 390 (1972). (App. 7) If the increased presumption was not applied, there would have been no occasion to cite the case. Its application runs afoul of this Court's explicit rejection of that added presumption in *44 Liquormart, Inc. v. Rhode Island*, 5 17 U.S. 484, 116 S.Ct. 1495 (1996).

Further, the Arkansas Court of Appeals held that the actual rational relation of a statute is irrelevant and all that matters is that "there is any rational basis that demonstrates the possibility of a deliberate nexus with state objectives so that the legislation is not the product of arbitrary and capricious government purposes." (App. 8-9) With respect to the rational basis test, this Court has held that

> ... even in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained. The search for the link between classification and objective gives substance to the Equal Protection Clause ...

Romer v. Evans, 517 U.S. 620, 632, 116 S.Ct. 1620

(1996). That search also gives substance to the Due Process Clause. Absent knowledge of the actual relation, substantive due process analysis (and equal protection analysis) would be nothing more than an exercise in speculation without regard for the realities of the subject. This Court, on the other hand, has held: "True, even the standard of rationality as we so often have defined it must find some footing in the realities of the subject addressed by the legislation." *Heller v. Doe*, 509 U.S. 312, 321, 113 S.Ct. 2637 (1993).

Conclusion

It is true enough that courts are not to sit as superlegislatures judging the wisdom or rightness of laws; however, in order for rational basis analysis and the word *rational* to have real meaning in our time, this Court should grant the requested writ so that the important and novel federal questions set out herein can be decided in accordance with this Court's precedents on substantive due process and the rational basis standard.

Given the disagreement between states, this Court should settle the question of whether a law which is ineffective or counterproductive to its purpose is actually rationally related to that purpose. Given that the Arkansas Court of Appeals has decided this matter in a manner which conflicts precedent of this Court regarding the application of the rational basis standard, this Court should grant the Petition in order to vindicate federal law in this important context.

Most importantly, this Court should grant the petition so that the States will henceforth know that laws which kill and endanger innocents in the name of the public health, safety, and welfare – no matter how well-intentioned - are not rationally related to their purpose, lack substantive due process, and are repugnant to the Constitution.

Time passes. Things change. It isn't the 1930s or 1940s anymore. It isn't even the 1960s anymore. This Court should grant the Petition to, weigh these laws and measure their rationality in the light of our times and not those of a bygone era, applying the timeless principles of substantive due process embodied in the rational basis standard. This Court should now determine, once and for all, if these laws are rational attempts to combat the ravages of alcohol or mere artifices for the codification of the morality of the majority.

Respectfully submitted,

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