No. 53920-5

76954-1

(King County Superior Court No. 03-2-25260-3 SEA)

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

JOSEF VENTENBERGS, KENDALL TRUCKING, INC., a Washington Corporation, RONALD HAIDER, and HAIDER CONSTRUCTION, INC., a Washington Corporation,

Plaintiffs/Appellants,

v.

THE CITY OF SEATTLE, a municipal corporation, SEATTLE PUBLIC UTILITIES, and CHUCK CLARKE, in his official capacity as Director of Seattle Public Utilities,

WASTE MANAGEMENT OF WASHINGTON, INC., d/b/a Waste Management of Seattle, a Delaware Corporation,

RABANCO, LTD., a Washington corporation,

Defendants/Respondents.

REPLY TO AMICUS CURIAE
WASHINGTON REFUSE AND RECYCLE ASSOCIATION

William R. Maurer, WSBA No. 25451
Jeanette M. Petersen, WSBA No. 28299
Charity Osborn, WSBA No. 33782
Attorneys for Plaintiffs/Appellants

INSTITUTE FOR JUSTICE
Washington Chapter
811 First Avenue, Suite 625
Seattle, Washington 98104
Telephone: (206) 341-9300

ORIGINAL

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INTRODUCTION

Amicus Curiae Washington Refuse and Recycling Association ("WRRA") is a coalition of corporations and their employees and agents seeking to protect their government-granted monopolies. Citing no evidence or authority, WRRA nakedly contends that Washington's heavily restricted solid waste industry is "much better" than the non-regulated states across the country. Amicus Brief at 12. Consumers apparently disagree: despite the allegedly model solid waste regulatory structure that "has been in place since 1961" and "works," Amicus Brief at 6, WRRA laments that it "devotes a significant amount of energy and resources in the seemingly never ending battle against illegal haulers." *Id.* at 3.

WRRA's attempt to protect the market share of its members and restrict the solid waste and recycling collection industry is evidenced by the energy and resources it expends here defending the City's disregard of the specific mandates of our state constitution. While WRRA is thankful that the "Seattle City Council [has] chosen to consider the greater good ahead of the self-serving interests of one or two particular businesses," Amicus Brief at 13, it is precisely the City's accommodation of the self-serving interests of Rabanco and Waste Management, at the expense of small businesses and Seattle consumers, that our constitution was designed to prevent.

RESTATEMENT OF THE CASE

While WRRA purports to be "very familiar with the issues in this matter," Amicus Brief at 2, its arguments are premised on critical misstatements of the facts involved here. WRRA has not provided a clear or accurate description of the CDL hauling industry. Instead, WRRA would like this Court to believe that "garbage collection" and CDL hauling are identical services. *See* Amicus Brief at 6-8. Because the hauling of CDL is radically and substantively different from the collection of commercial or residential solid waste – and is treated differently by the City itself – a restatement of these important differences is first necessary.

A. The CDL Hauling Industry

"Construction, Demolition and Landclearing Waste" is defined in the Seattle Municipal Code ("SMC") as waste comprised primarily of the following materials:

a. Construction waste: waste from building construction such as scraps of wood, concrete, masonry, roofing, siding, structural metal, wire, fiberglass insulation, other building materials, plastics, styrofoam, twine, baling and strapping materials, cans and buckets, and other packaging materials and containers.

b. Demolition waste: solid waste, largely inert waste, resulting from the demolition or razing of buildings, roads and other man-made structures. Demolition waste consists of, but is not limited to, concrete, brick, bituminous concrete, wood and masonry, composition roofing and roofing paper, steel, and

minor amounts of metals like copper. Plaster (*i.e.*, sheet rock or plasterboard) or any other material, other than wood, that is likely to produce gases or leachate during its decomposition process and asbestos wastes are not considered to be demolition waste.

c. Landclearing waste: natural vegetation and minerals from clearing and grubbing land for development, such as stumps, brush, blackberry vines, tree branches, tree bark.

SMC 21.36.012(13). CDL waste is <u>not</u> solid waste regularly produced by commercial establishments or residences. *See* SMC 21.36.012(8) and 21.36.016(4) (defining commercial waste and residential waste).

Unlike haulers of commercial or residential solid waste, haulers typically collect CDL on an on-call basis. CP 552, 559-60, 883-4. A customer fills the container with CDL and the hauler later returns to remove the container, either at an agreed upon time or upon request. In contrast to commercial and residential solid waste collection, CDL is collected irregularly and is dependent on construction and demolition site schedules. CP 552, 561, 884-6. Also unlike commercial and residential solid waste haulers, CDL haulers typically are not assigned designated routes. CP 553, 885.

Because the hauling of CDL is project specific, the traffic and noise impact of CDL collection typically does not vary based on the number of haulers available to provide hauling services. CP 553, 887-8.

Regardless of the number of haulers, one truck must drop off a container and one truck must collect it. *Id.*

WRRA offers no justification for its assertion that restriction of the CDL hauling industry is necessary to "ensure[] that a community's streets are not assaulted daily by a fleet of garbage trucks from companies that may or may not reappear for next week's pick-up." Amicus Brief at 6. In fact, the evidence establishes the opposite. CP 553, 887-8. Because CDL hauling is conducted both on a project specific and on-call basis, the number of trucks "assaulting community streets" remains the same whether the words "Rabanco," "Waste Management," or "Kendall Trucking" are printed on the truck's exterior. *Id.*

B. City Does Not Monitor Ultimate Disposal of CDL

Without citation to the record, WRRA asserts that the City closed the CDL hauling market to all companies except Rabanco and Waste Management in order to be secure in the "knowledge that Seattle's solid waste will forever rest in a modern, safe facility, thereby virtually eliminating the City's exposure to "SuperFund" liability . . . ." Amicus Brief at 9.

Again, the record refutes WRRA's assertion. Once Rabanco and Waste Management collect CDL, the City does not mandate where the material must be taken or ultimately disposed. CP 607, 691, 890-1, 918.

The City does not even attempt to monitor the location of the ultimate disposal of CDL. CP 889-90, 934. And although the City's contracts with Rabanco and Waste Management grant the City the right to direct CDL to a specific transfer station, the City has not exercised that contractual right. CP 607, 691, 918. Thus, the City does not exert any control over (or even monitor) the ultimate disposal of CDL by Rabanco and Waste Management. CP 607, 691, 918. If the City were concerned with avoiding Superfund liability, it would likely exercise control over, or at least monitor, the ultimate disposal of CDL hauled by its approved transporters. It does not.

Similarly, the City does not exercise any control or oversight as to where self-hauled CDL is taken or ultimately disposed. CP 574, 889-90, 918, 934. This is critical, as WRRA notes that the City's regulatory scheme and its contracts with Rabanco and Waste Management permit private parties to transport CDL to a disposal site and "[m]any contractors do so." Amicus Brief at 11. This leads to the incongruous conclusion that while the hauling and disposal of CDL by the generators of such waste is completely unregulated, CDL is somehow dangerous enough to warrant restricting the market to just two companies if someone else besides the generator is to do the hauling. One would think that the proper determinant of how waste is treated would be the waste itself, not the

identity of the person hauling it. The underlying irrationality of this scheme illustrates that its purpose is not public health and safety.

C. "Universal Service" Does Not Justify City's Actions

As justification for the City's restriction of the CDL hauling market in Seattle, WRRA rationalizes:

> One of the major goals is universal service, i.e., anyone who wants solid waste service will receive it, at a reasonable price, by a fully licensed and certified carrier. A single home <u>miles from an urban area</u> will be given the same service, at the same rate, as someone on a city block. This prevents . . . "cream skimming," the practice of servicing only those customers whose homes are close together . . . <u>while ignoring the nonprofitable rural customer</u>.

Amicus Brief at 5-6 (emphasis added).

WRRA does not explain which portions of the City of Seattle are located "miles from an urban area" or demonstrate where such "nonprofitable rural customer[s]" are located inside the city limits. Seattle is, of course, a major metropolitan city. A goal of preventing "cream skimming" for rural customers simply has no applicability in a case such as this dealing with a major urban area like Seattle.

WRRA also mistakenly assumes that the City's grant of monopolies to Rabanco and Waste Management results in better service to consumers. In fact, the only thing standing between Appellant Ventenbergs' customers and the type of service WRRA describes (offered

"at a reasonable price, by a fully licensed and certified carrier") are the City's unjust regulations. The independent hauling industry developed in spite of (and perhaps in response to) decades of state restrictions on entry into the market. CP 573. Moreover, after the City assumed jurisdiction, the percentage of the CDL market controlled by independent haulers increased dramatically. CP 845. Thus, Seattle consumers themselves have conclusively refuted the argument that the City's scheme is somehow beneficial to them.

Kendall Trucking survived because it met the needs of customers like Appellant Haider, who prefers Kendall Trucking's less expensive and more responsive service to that of Rabanco or Waste Management. CP 560. Moreover, Ventenbergs has made every effort to comply with all applicable regulations; he pays his business and occupation taxes and he has never been cited or ticketed for operating his business. CP 551, 553, 555. The only reason Ventenbergs is not a certified carrier is because the City has shut the door to this market.

D. City v. WUTC Jurisdiction

WRRA makes much of the fact that Appellant Ventenbergs was not authorized by the WUTC to haul CDL within the City. Yet WRRA acknowledges that the execution of the City's contracts with Rabanco and Waste Management preempted WUTC regulation. Amicus Brief at 8

("RCW 81.77.020 exempts cities from WUTC regulation of solid waste if the city chooses to either contract or operate its own municipal system."). That Appellant Ventenbergs was not authorized to haul CDL within the City pursuant to a previous regulatory regime bears no relevance to the instant suit.

What is relevant, however, is the timeline of events that resulted in the passage of SMC 21.36.012(5). The City entered into separate contracts with Rabanco and Waste Management to haul commercial solid waste in the City and each became effective on April 1, 2001. CP 417, 596, 680. As WRRA acknowledges, the execution and implementation of these contracts terminated the jurisdiction of the WUTC within the City as of April 1, 2001. Notably, the City did not amend SMC 21.36.012(5) until October 7, 2002 – over eighteen months after the termination of the WUTC's jurisdiction within the City. Thus, Appellant Ventenbergs' hauling was legal for the period of over eighteen months during which the WUTC no longer exercised jurisdiction within the City and no City ordinance prohibited him from hauling CDL.[1]

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[1] WRRA also asserts that Appellants seek to force the City to "consider contract awards to anyone and everyone who may want the job." Amicus Brief at 2. This is not what Appellants seek. There may be legitimate health and safety rationales for denying entry into the CDL hauling market – such as under-capitalization, lack of insurance, or inability to properly operate a truck or machinery. Unfortunately, the City has not put forth any such legitimate reasons for denying entry into the CDL hauling market.

ARGUMENT

A. CDL Hauling is Not a Public Utility

Like Waste Management, WRRA contends that CDL hauling is a public utility, similar to the provision of electrical and sewer services. Amicus Brief at 6-7. CDL shares none of the attributes of these industries and WRRA's argument is simply inconsistent with the legal and economic definition of a public utility.[2]

Sewage and electricity are industries with high fixed capital costs involving the connection of large central transmission or transportation facilities to distribution facilities that physically enter a multitude of homes and businesses. *See* Charles F. Phillips, Jr., *The Regulation of Public Utilities* 54-55 (3d ed. 1993) (describing economies of scale requiring large fixed investments in the electric industry). Industries with such high fixed capital cost facilities are typically regarded as public utilities. *See id.* at 4 (public utilities can be divided into two major classes: "those enterprises which supply, directly or indirectly, continuous or

[2] Most of WRRA's brief omits citations to the record, legal authority, public records, scholarly treatises, or any other form of authority or reference. Assuming facts or authority support WRRA's claims, WRRA has a duty to produce or at least reference such facts or authority. That WRRA has not argues strongly in favor of this Court disregarding WRRA's unsupported arguments and bald factual assertions.

repeated services through more or less permanent physical connections between the plant of the supplier and the premises of the consumer" and public transportation agencies, such as railroads, pipelines, and buses) (emphasis added).

In contrast, CDL hauling involves none of these properties. Construction waste hauling is a relatively low-capital enterprise, as demonstrated by the fact that Joe Ventenbergs is able to operate his company with two trucks and thirty-five dumpsters. CP 551, 579. It does not require continuous or repeated service and it does not involve physical connections between a plant and the premises of a consumer. In fact, as demonstrated above, CDL hauling is done on an as-needed basis for temporally limited projects. CDL hauling, thus, naturally tends towards multiple carriers, even in the face of government restrictions on entry into the market. CP 574-75. In contrast, the utilities referred to by WRRA tend toward the monopolistic or operate more efficiently as monopolies. Phillips, *supra* at 4 (public utilities tend toward monopoly or operate more efficiently as monopolies). Thus, one often sees unlicensed CDL haulers, but not unlicensed electric companies.

In short, CDL hauling does not fit into the "public utility" box. It is not characterized by permanent connections and does not tend toward monopoly – in fact, it tends very much away from monopoly even in the

face of government attempts to impose a monopoly, as the record in this case demonstrates. The CDL industry, in which a mobile service is provided for a short period of time (perhaps only once), is entirely different from the sewage industry, which is characterized by continued service through permanent connections directly into the consumer's home or business. WRRA's "public utility" arguments should therefore be disregarded.

B. WRRA's Precedent Does Not Control

WRRA mistakenly contends that this case is controlled by "some thirty years of case law, both state and federal." Amicus Brief at 2. As Appellants demonstrate in their Reply to the City, the cases cited by the proponents of the City's actions simply do not resolve the issues before this Court.[3]

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[3] In a case not even relied upon by the City, WRRA cites *AGG Enterprises v. Washington County*, 281 F.3d 1324 (9th Cir. 2002) for the proposition that the Ninth Circuit "approved the County's restriction of solid waste collection and transportation to a single contractor . . . ." Amicus Brief at 9-10 (emphasis added). The Ninth Circuit's decision does not address or even implicitly endorse the solid waste collection system in place in *AGG Enterprises*. *AGG Enterprises* is simply a preemption case. In addressing the issue of federal preemption, the Ninth Circuit cautioned, "The historic responsibility of local governments to ensure safe and comprehensive garbage collection posts a strong caution against the possibility that Congress lightly would preempt local regulation in this field." *Id.* at 1328. After this observation, the Ninth Circuit addressed the application of the Federal Aviation Administration Authorizing Act of 1994, with the court holding that the FAAAA did not preempt local regulation of the collection of mixed solid waste. *Id.* at 1330. The court did not address the constitutionality of – and certainly did not "approve" of – a system of exclusive collection franchises in *AGG Enterprises*.

WRRA's critical analytical flaw is their summary disregard of Appellants' primary claim that the City's actions violate Washington's privileges or immunities clause. It writes:

> Amicus WRRA will leave the constitution [*sic*] arguments concerning privileges and immunities to the defendants . . . . Amicus would suggest that, in view of the clearly applicable statutory and precedential authority regarding a city's right to contract, that argument seems, at best, a transparent attempt to direct the Court's attention from the real issues.

Amicus Brief at 10. WRRA simply cannot provide this Court with a cogent analysis of "applicable authority" when that analysis is divorced from the constitutional foundations of Appellants' claims.

C. Legislature – Not Courts – Must Expressly Provide Municipalities with Authority

WRRA attempts to justify the City's practice by stating that it "has been approved time and again by the courts, which clearly recognize and approve of a local jurisdiction's exercise of its police powers in granting exclusive solid waste contracts." Amicus Brief at 8.

As Appellants have previously demonstrated, municipalities have only those powers expressly granted, necessarily or fairly implied in or incident to the powers expressly granted, or essential to the declared objects and purposes of the municipality. *Port of Seattle v. Washington Util. and Transp. Comm'n,* 92 Wn.2d 789, 794-95, 597 P.2d 383 (1979).

The United States Supreme Court has held that if the legislature does not expressly provide municipal corporations with the power to grant an exclusive franchise, such a grant by the municipality is impermissible. *Water, Light & Gas Co. v. Hutchinson*, 207 U.S. 385, 397, 28 S. Ct. 135, 52 L. Ed. 257 (1907); *see also City of Walla Walla v. Walla Walla Water Co.,* 172 U.S. 1, 14, 19 S. Ct. 77, 43 L. Ed 341 (1898) ("Had the privilege granted been an exclusive one, the contract might be considered objectionable upon the ground that it created a monopoly without an express sanction of the legislature to that effect.").

WRRA relies upon general language in RCW 35.21.152, which it argues grants the City "'full jurisdiction and authority' to collect and transport solid waste." Amicus Brief at 8. WRRA contends that this general language authorizes a local jurisdiction to grant exclusive solid waste contracts. *Id.*

But WRRA points to no portion of RCW 35.21 – or any other controlling legislative authority – that <u>expressly</u> grants the City the right to restrict the CDL hauling market to all but two companies chosen by the City. Instead, like Respondents, WRRA simply points to distinguishable case law to support its claim that the City properly doled out exclusive franchises and closed the CDL hauling market. The United States Supreme Court has made clear that it is the <u>legislature</u> – not the courts –

that must expressly provide municipal corporations with the power to grant exclusive franchises. As WRRA fails to cite any legislative authority authorizing the City to restrict the CDL hauling market to all but two companies, its argument necessarily fails.

D. This Court Should Examine the Facts and the Record to Determine Whether Things are Really "Better Here"

Without citing to any authority or evidence in the record, WRRA declares that "it [*sic*] is much better here" than in non-regulated states. Amicus Brief at 12. Although WRRA fails to identify to which non-regulated states it refers in its *ipse dixit* pronouncement, it is at least clear that things <u>are</u> much better here for WRRA and its members than it would be if such companies were forced to compete for customers and business. However, whether "it is much better here" for consumers and entrepreneurs is an altogether different question. This Court should examine the record to determine whether consumers benefit from this system, whether the public health and safety goals espoused by the City are actually met by the market restriction, and whether such restriction exists for any other reason than to protect Rabanco and Waste Management from competition and insulate the City from a lawsuit. The record demonstrates that the answer to these questions is "no."

Restrictions such as the one implemented by the City are not necessary for, and are often unrelated to, the promotion of public health and safety. Professor David Bernstein summarizes how even well-intentioned restrictions, such as licensing schemes, often maintain the market for those benefiting from restrictions rather than protect the public:

> In fact, despite public-spirited rhetoric, states and municipalities frequently passed licensing laws at the behest of organized members of the licensed profession to grant them a state-sponsored monopoly at the expense of those who would not be able to meet licensing requirements. Even in cases of "hostile" licensing, when the licensing process was originated to regulate an industry in the public interest, the licensed group generally quickly gained control of the licensing process. The group used the process to benefit its members by limiting the number of new entrants, thus assuring higher incomes to those already in the field.

David E. Bernstein, *Only One Place of Redress: African Americans, Labor Regulations, and the Courts from Reconstruction to the New Deal* 28 (Neal Devins ed. Duke Univ. Press 2001). The end result is that ordinary citizens are excluded from markets for no other reason than the preservation of the economic status quo.[4] *See* Timothy Sandefur, *The*

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[4] Moreover, a considerable amount of literature has developed showing how such restrictions have a disproportionate impact on full participation in the economic system and political rights of late-comers, such as minorities, women, immigrants and the young. *See, e.g.,* David E. Bernstein, *Licensing Laws: A Historical Example of the Use of Government Regulatory Powers Against African-Americans,* 31 San Diego L. Rev. 89, 94-104 (1994) (discussing the effect of licensing laws in the field of plumbing and barbering); Ruth Bader Ginsburg, *Constitutional Adjudication in the United States as a Means of Advancing the Equal Stature of Men and Women Under the Law,* 26 Hofstra L. Rev. 263, 270 (1997) (describing how laws preventing women from working at certain

Right to Earn a Living, 6 Chap. L. Rev. 207, 255 (2003) ("Today, licensing statutes are all too frequently used as a method of monopolizing trade for a few privileged individuals or corporations.").

For this reason, this Court should decline WRRA's invitation to decide this case without reference to the record in this case, the City's motivations, or Appellants' constitutional rights. As the United States Supreme Court has said:

> The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty, indeed, are under a solemn duty, to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the constitution.

Mugler v. Kansas, 123 U.S. 623, 661, 8 S. Ct. 273, 31 L. Ed. 205 (1887).

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professions and funneling them into certain fields act to suppress wages in such fields); Walter E. Williams, *The State Against Blacks* 75-88 (New Press 1982) (describing the effect of monopolies on taxicab service and African-American entrepreneurs in New York and Philadelphia).

Here, the City decided to offer contracts for CDL hauling based on a fear of a lawsuit from those companies possessing pre-existing certificates of convenience and necessity. CP 903-4, 910-11, 929. Those certificates were awarded in 1961, before the civil rights explosion, the woman's liberation movement, the massive influx of immigrants to Seattle, and the maturity of the "baby boom" generation. For the recent immigrant, the woman entrepreneur, the young adult like Appellant Ventenbergs, or anyone else who was unable to stake a claim to a certificate in 1961 but now wishes to form a low-capital business hauling CDL, WRRA's justification for protecting its members from competition must seem hollow indeed.

Luckily, those who founded this state drafted a constitution that prevents the awards of special privileges and protects the people of this state from imposing restrictions on constitutional rights absent a public need to do so. While WRRA claims it is seeking to protect the "greater good," Amicus Brief at 13, it provides no evidence that the "greater good" is not advanced by requiring its members to genuinely compete to serve the interests of Seattle consumers dissatisfied with their current (government-mandated) choice of CDL haulers. Consequently, the plain language of article I, section 12 and the intent of our framers should prevail.

CONCLUSION

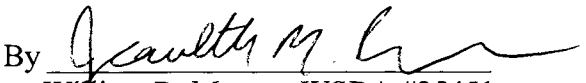
WRRA misstates several crucial facts and relies on distinguishable cases and an unsupportable assumption that monopolization protects consumers. Appellants respond to each of WRRA's unsubstantiated contentions in this Reply.

Notably, WRRA does not address whether the challenged ordinances grant special privileges to corporations in contravention of the Washington Constitution. WRRA does not challenge Appellants' evidence and authority that the constitution protects the freedom of all citizens to pursue the professions and livelihoods of their choosing unmolested by irrational and unjustified government interference. This is

the pivotal issue in this case and one about which WRRA has nothing to say.

RESPECTFULLY submitted this 27th day of August 2004.

INSTITUTE FOR JUSTICE
Washington Chapter

By 
William R. Maurer, WSBA #25451
Jeanette M. Petersen, WSBA #28299
Charity Osborn, WSBA #33782
811 First Avenue, Suite 625
Seattle, Washington 98104
(206) 341-9300
Attorneys for Plaintiffs/Appellants

DECLARATION OF SERVICE

I, Yvonne Maletic, declare:

I am not a party in this action. I reside in the State of Washington and am employed by Institute for Justice in Seattle, Washington. On August 27, 2004, a true copy of the foregoing Reply was placed in envelopes addressed to the following persons:

Polly McNeill
Summit Law Group, PLLC
315 Fifth Avenue South, Suite 1000
Seattle, WA 98104-2682

Andrew Kenefick
Waste Management of Washington, Inc.
801 Second Avenue, Suite 614
Seattle, WA 98104-1599

James K. Sells
Ryan Sells Uptegraft, Inc. PS
9657 Levin Rd. NW, Ste. 240
Silverdale, WA 98383

David W. Wiley
Dana A. Ferestein
Williams, Kastner & Gibbs, PLLC
Two Union Square, Suite 4100
Seattle, WA 98111-3926

Will Patton
Assistant City Attorney
The City of Seattle
600 – 4th Ave., 4th Floor
P.O Box 94769
Seattle, WA 98124-4769

which envelopes with postage thereon fully prepaid were then sealed and deposited in a mailbox regularly maintained by the United States Postal Service in Seattle, Washington.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 27th day of August 2004 at Seattle, Washington.

Yvonne Maletic