IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Supreme Court Case No.: 2007-0134
Burleigh County District Court No.: 05-C-1945

JAMES TEIGEN, DEB LUNDGREN, GREG SVENNINGSEN, FARMERS' EDUCATIONAL AND CO-OPERATIVE UNION OF AMERICA, NORTH DAKOTA DIVISION, D/B/A NORTH DAKOTA FARMERS UNION, AND DAKOTA RESOURCE COUNCIL,

Appellants,

v.

STATE OF NORTH DAKOTA,

Appellee.

APPELLANTS' REPLY BRIEF

**APPEAL FROM ORDER FOR SUMMARY JUDGMENT ISSUED BY JUDGE THOMAS J. SCHNEIDER
BURLEIGH COUNTY DISTRICT COURT**

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I. The Court May Consider the Legislative History in Reviewing the Constitutionality of the Trade Association Clause.

1 Because the legislative history, taken as a whole, leaves no doubt that the wording of the Trade Association Clause is but a ruse to try to get around the constitutional prohibitions on special laws, special privileges, and gifts for the benefit of two specific private entities, the State takes the extreme position that the Court may not look at the legislative history in determining its constitutionality. The State claims the only time that legislative history may be considered is when a statute is ambiguous, citing N.D.C.C. §1-02-39(3). While that section does allow consideration of legislative history as an aid in construing ambiguous statutes, it in no way limits the use of legislative history to statutes that are ambiguous. Use of legislative histories is not so limited. *See, e.g.*, Singer, 2A Sutherland Statutes and Statutory Construction, (6th ed. 2000) ("Sutherland"), §48.01, *Extrinsic Aids*: "[A]mbiguity is not always considered a prerequisite to the use of extrinsic aids. . . .[A]mbiguity is not the *sine qua non* for a judicial inquiry into legislative history." (Internal citations omitted.)

2 While ordinarily legislative history is not necessary for statutory interpretation, it is relevant and necessary when determining whether a special law is simply masquerading as a general law. A flat rule excluding extrinsic aids in all circumstances would be a "license" for the legislature to violate the constitutional bans on special laws, equal protection, and donations. Artful drafting would be sufficient to avert court challenges. This case presents compelling reasons to consider extrinsic aids as part of the Court's primary duty to uphold the Constitution.

3 The State has not attempted to distinguish or refute the line of North Dakota cases requiring an analysis going beyond the form of the statute in determining whether the statute is a special law. See Appellants' Brief ¶¶33, 44.

4 Although it is not necessary to find the statute ambiguous for the Court to consider the legislative history, this statute is not without ambiguities. The strongest ambiguity arises from the requirement that the trade associations "have as their primary purpose the representation of wheat producers."

5 Plaintiffs contend that the "purpose" of an incorporated association in this context means the purpose provided the Secretary of State in incorporation documents or in corporate annual reports. Appellants' Brief, ¶¶75, 77. That the classification is a sham is shown by evidence that neither Grain Growers nor Durum Growers has as its "primary purpose" the representation of North Dakota wheat producers. The State fails to provide evidence of the "primary purpose" of either entity and relies on the self-identification of the entities as "the only 2 wheat specific trade associations in this state." App. 227. The State ignores other circumstances where Grain Growers stated its "purpose" in broader terms and that Durum Growers (as indicated by its name) also represents growers from other states. See Appellants' Brief ¶¶75, 72. Further, the State deems it irrelevant that other entities were not allowed the chance to provide services, even though the favored two groups were not wheat specific (Grain Growers) or were not North Dakota wheat specific (Durum Growers). North Dakota Farmers Union ("NDFU"), for example, has more wheat farmer members than the two favored

groups combined and has a long history of representing wheat farmers on domestic issues. App. 19-23.

6 The ambiguity of "purpose" is not resolved by the addition of the word "primary." "Primary" may mean "first or highest in rank or importance" or "first in order of any series" or "first in time, earliest." Random House Dictionary (unabridged 1971). Grain Growers was initially organized to exclusively promote wheat products, but in recent years changed its mission to more generically "promote grain products," to "promote use and development of all grain and all products" or promote "use and development of wheat and barley and related products." Appellants' Brief ¶75.

7 "Representation" and "representation of wheat producers" are also ambiguous. Whether this wording allowed Grain Growers and Durum Growers' to use funds to "represent" the agenda of only their wheat farmer members (a tiny fraction of all North Dakota wheat producers) was the subject of heated debate. See Plaintiff Jim Teigen's testimony that he had deliberately chosen not to join Grain Growers and Durum Growers because of significant policy differences. App. 208. See, also Marcy Svenningsen's testimony that "the grower groups have used those wheat tax dollars in the past to promote farm policies that many farmers don't agree with, myself included." App. 211. For similar comments, see Appellants' Brief, ¶¶52, 59-61.

8 NDFU's testimony to the Senate Appropriations Committee described its membership base and activities funded from membership funds, and questioned whether private membership organizations should come before the legislature to

secure funding for their membership activities. In addition, NDFU protested the expenditure of two mills "for lobbying activities of the two trade associations as described in this bill." App. 259-260.

9 Grain Growers and Durum Growers Executive Director Wogsland testified that the funds were needed for the Associations' "current intended level of operations." This testimony supports a finding that the funds were needed for the organizations' own private purposes. App. 265.

10 The State's position that the Court cannot consider legislative history or legislator's testimony at committee hearings is suspect. After saying that it can't be done, the State proceeds to cite to the testimony of a citizen before the Senate Agriculture Committee (page 11) and the testimony of Representative Gene Nicholas to the House Agriculture Committee (page 15). Further, despite the State's arguments to the contrary, the Court may consider the testimony of legislators at committee hearings. Sutherland, (6th ed.) §§48.13, 48.14, and 48.15. Little v Tracy, 497 N.W.2d 700, 705 (ND 1993).

11 Based on these and other[1] ambiguities, the Court's review of the legislative history not only is permissible, but is required.

II. The Trade Association Clause Is an Unconstitutional Special Law Containing an Unreasonable Classification.

12 Notwithstanding the State's claim that "[t]he statute doesn't create a special class" (page 3), the Trade Association Clause does create a special classification –

[1] State law generally provides that an association is not incorporated. N.D.C.C. §§10-15-01(3). 16.1-08.1-01. The word "trade" is not defined. The phrase "trade associations" is not defined. but is listed as a type of unincorporated association. N.D.C.C. §16.1-08.1-01.

"trade associations that are incorporated in this state and which have as their primary purpose the representation of wheat producers." This classification was carefully crafted to apply to only two entities – Grain Growers and Durum Growers. *See, e.g.*, Wogsland testimony, App. 227 ("There are only 2 wheat specific farm organizations in this state, thus the directive in the legislation."); and Nicholas testimony, App. 90 ("The bill allocates 2 mills to the North Dakota Grain Growers and the Durum Growers."). Further the State's brief has multiple contradictory statements, e.g., compare page 4, "the language of the statute does not apply strictly to the Grain Growers and Durum Growers" with pages 7-8, "no other North Dakota organization *currently* has as its primary purpose the representation of wheat producers."

13 While the legislature has authority to make reasonable classifications, any classification that is drafted in such a way as to include only two specific entities is per se unreasonable. It is on its face a special law masquerading as a general law. This Court has repeatedly held such laws violate Article IV, Section 13. See Appellants' Brief ¶¶31-35. It is also an unreasonable classification creating a special privilege violating Article I, Section 21. See Appellants' Brief, ¶¶70-85.

III. The Trade Association Clause Is a Special Law that also Violates the Anti-Gift Clause.

14 A large part of the State's gift clause discussion is extraneous and irrelevant because Plaintiffs do not challenge the amount (2 mills), the means (contracts with private entities) or the purpose of those funds (for domestic wheat policy

work).[2] Further, Plaintiffs do not object to the timing of the contractual payments, but rather to the fact that the amount of compensation to be paid under the contract is not determined until after the end of the contract term and is unrelated to either the quantity or quality of services provided.

15 The State asserts flatly that if *any services at all* were provided to the State under the contracts, there was consideration and there cannot be a "donation" as a matter of law, citing a definition of "donate" under which "no consideration" whatsoever may be provided in exchange for a transfer of property. The State's restrictive definition of "donate" may apply in the private sector, but in the public sector, a gift can arise if the consideration paid is less than "a fair market value bargained-for-exchange" or is less than "actual cost or fair market value." See, N.D.C.C. §16.1-08.1-01(1)(d), (f). See also, Adams County Record v. GNDA, 529 N.W.2d 830, 837-838 (N.D. 1995) (if payment exceeds quid pro quo, it is in support of organization and not for services rendered). The State's definition is also in conflict with the recognition that the gift clause is violated where only partial compensation is paid. See, Herr v. Rudolf, 25 N.W.2d. 916 (N.D. 1947) and Solberg v. State Treasurer, 53 N.W. 2d 49 (N.D. 1952).

16 Regardless of the findings of other state's courts, the word "donate" in North Dakota has a "peculiar and appropriate meaning in law" as provided in N.D.C.C. §1-02-03, that includes implicit gifts by virtue of inadequacy of consideration.

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[2] Although the State did not express dissatisfaction with Plaintiffs' Statement of Issues, as allowed by N.D.R. App. P., Rule 28(c), it inaccurately restates the issue on appeal as a challenge to the constitutionality of "Section 4-28-07." See, Appellee's Brief, p. 3 and passim.

17 The State does not respond to Plaintiffs argument that the trial court erred by finding that the Wheat Commission was engaged in the "wheat industry" and that the contracts were under the business and industry exemption to the gift clause.

18 The State cites many out-of-state cases. However, the courts in these decisions conducted an analysis of the particular facts regarding adequacy of consideration and whether the contracts were bona fide, before ruling on constitutionality. "Each [gift clause] case is dependent on its own unique facts and circumstances." N.D.Att'y.Gen.Op. 96-L-93, p. 3.

19 It is true that there is a high burden to show that a contract is not supported by adequate consideration. However, even the State recognizes by its quotation on pp. 13-14, n.1, that this burden is met where a "contract was so improvident that it amounts to a palpable abuse of discretion" or was "so inequitable and unreasonable that it amounts to an abuse of discretion." City of Tempe v. Pilot Properties, Inc., 527 P.2d 515, 522 (Ariz. App. 1974). That burden is met here.

20 As "mandated" by the legislature, the Wheat Commission awarded the contracts without any semblance of using the competitive bidding practices that have been the hallmark of state purchasing since statehood. Funds were split between the two entities based on production of HRS wheat (82%) and durum wheat (18%), not on the nature and value of services to be provided by each entity. App. 331. Despite widely disparate compensation, the listed services in the two entities' contracts are identical.[3] See also Appellants' Brief ¶¶86-100.

[3] See 2005 contract provisions regarding services by Grain Growers (App. 33-33A) and Durum Growers (App. 44-45).

21 Even before competitive bidding practices were codified in N.D.C.C. ch. 54-44.4, disregard of those practices was sufficient to find that a special benefit afforded to one segment of citizens was unconstitutional as a gift. *See,* Herr, 25 N.W.2d at 921.

22 The Trade Association Clause is a special law that also violates Article X, §18.

IV. NDFU and DRC Have Standing.

23 The State asserts that NDFU and DRC lack standing and "stumble" by failing to allege concrete injury to their members *in the Complaint,* (p. 22) citing a federal case dismissing a complaint under Rule 12. However, the motion to dismiss NDFU and DRC was not under N.D.R.Civ.P. Rule 12, but under N.D.R.Civ.P. Rule 56 (see Docket No. 12). Ample facts were presented by NDFU and DRC to support each element of organizational and representational standing during the Rule 56 briefing. See Docket Nos. 16, 61, 63, 67 (esp. pp. 6-8), 69, 75 and materials attached thereto.

24 The trial court found that NDFU and DRC's failure to previously apply for and receive domestic wheat policy contracts was fatal to standing. However, had NDFU and DRC submitted bids, they would have lost (not gained) standing. "A party seeking to enjoy the benefits under a law cannot thereafter, in the same proceedings, question the constitutionality of the act." Frieh v. City of Edgeley, 317 N.W.2d 818, 819 (N.D. 1982).

25 The State asserts that "allegations of loss of opportunity to contract with a government agency are insufficient to confer standing," relying on an unpublished

federal opinion.[4] The State asserts it may use this unpublished opinion because "there is no published opinion that would serve as well." However, there is such an opinion - International Printing Pressmen v. Meier, 115 N.W.2d 18 (N.D. 1962), where this Court granted standing to unions whose members worked for a printing company that lost business because of a law that required printed materials to bear the label of a different union. The Court found standing for the unions and declared the law unconstitutional.

26 State law provides "fair and equal opportunity to all qualified persons" to sell services to the state. N.D.C.C. §54-44.4-01. DRC and NDFU, among many others, are qualified to provide domestic wheat policy services. When a government adopts illegal and anticompetitive laws, as here, an injured business has standing to challenge such a law. *See, e.g.*, Webster Groves Trust Co. v. Saxon, 370 F.2d 381, 388 (8th Cir. 1966) (although banks may not have standing to contest fair competition, they "surely have the standing to object to illegal competition").

CONCLUSION

27 The Trade Association Clause is an unconstitutional law under one or more of the constitutional prohibitions against special laws and special privileges and immunities, and in violation of the gift clause. It must be declared void. Further, NDFU and DRC have standing to contest the constitutionality of the Trade Association Clause.

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[4] Space does not permit full discussion of this case, however, a white contractor's challenge of a 10% minority set aside while having full access to 90% of funds is not analogous to the facts here.

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Dated this 2nd day of August, 2007.

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The following document was electronically served on this date to Dean Haas at dhaas@nd.gov:

Appellants' Reply Brief

Dated this 2nd day of August, 2007.

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