No. A10-0927

STATE OF MINNESOTA

IN COURT OF APPEALS

James A. Dolphy,

Appellant,

James P. Haege,

Plaintiff,

v.

City of Minneapolis,

Respondent.

BRIEF OF AMICUS CURIAE INSTITUTE FOR JUSTICE

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INTRODUCTION AND STATEMENT OF *AMICUS CURIAE*[1]

Minnesota's judiciary has a long history of protecting the right to earn a living, from the state's founding through the present. Variously called the "right to earn a living," *In re Petition of Dolan*, 445 N.W.2d 553, 559 (Minn. 1989), the "right to conduct a business," *Connor v. Township of Chanhassen*. 249 Minn. 205, 216, 81 N.W.2d 789 (1957), or the right of "pursuing a lawful calling," *Johnson v. Ervin*, 205 Minn. 84, 89, 285 N.W. 77 (1939), in case after case the courts of Minnesota have struck down laws that unreasonably restrict the rights of individuals to work in "the common occupations of life." *Pavlik v. Johannes*, 194 Minn. 10, 13, 259 N.W. 537 (1935) (quoting *Meyer v. Nebraska*, 262 U.S. 390 (1923)). They have done so in occupations as varied as vendors, auctioneers, roofers, construction workers, and dairy farmers. Sometimes Minnesota's courts have relied upon the state constitution's equal protection clause, sometimes its due process clause, sometimes provisions of the U.S. Constitution, and sometimes they have held restrictions on common occupations to simply extend beyond permissible police powers. But, whatever the exact constitutional analysis the result has been the same:

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[1] Counsel certifies that this brief was authored in whole by listed counsel for *amicus curiae* Institute for Justice. No person or entity other than *amicus curiae* made any monetary contribution to the preparation or submission of the brief. This brief is filed on behalf of the Institute for Justice, which was granted leave to participate as *amicus curiae* by this Court's Order dated June 29, 2012.

judicially enforced constitutional protection of economic liberty—the right to earn a living.

This case is part of that rich tradition. The right to work as a tree trimmer is protected by the Minnesota Constitution. It is an occupation that those poor in years of formal training, but rich in a strong work ethic and the will to climb onto the first rung of the economic ladder, can dare to succeed in. Just as the vendors and roofers who came before him, the Appellant in this case simply wants to work in his chosen occupation free from unreasonable governmental regulations.

Amicus curiae the Institute for Justice urges this Court to reverse the decision of the district court, hold Appellant properly pleaded a violation of the Minnesota Constitution, and remand the case for the parties to pursue discovery. Challenges to the constitutionality of an ordinance under the Minnesota Constitution deserve the benefit of discovery, something the district court in this case did not allow. Appellant has pleaded a deprivation of his right to earn a living just as the plaintiffs did in other cases discussed in this brief. In none of those cases was the government allowed to prevail on a motion to dismiss. Appellant should instead have the opportunity to move forward with his case and defend this basic and fundamental right. *Amicus* has litigated similar cases in state and federal courts in Minnesota and

across the country representing entrepreneurs against the government when the government violates their right to earn a living.

The purpose of this brief is to demonstrate that Appellant's claim follows from the long history of Minnesota courts protecting the right to earn a living. *Amicus* by no means attempts to enumerate every decision in which Minnesota courts have protected economic liberty, but will discuss some of the major decisions and their overriding themes. This history of Minnesota courts protecting the right to earn a living demonstrates why Appellant has properly pleaded a violation of the Minnesota Constitution, and that this Court should reverse and remand the case to allow the parties to pursue discovery.

STATEMENT OF THE CASE AND FACTS

The Institute for Justice concurs with the Appellant's Statement of the Case and Facts and adopts and incorporates the facts set forth in the Brief of Appellant and the Appendix to Brief of Appellant.

ARGUMENT

Amicus will discuss the history of the Minnesota judiciary's protection of the right to earn a living by dividing that history into four periods: (A) the nineteenth century; (B) the early twentieth century; (C) the 1940s through 1960s; and (D) the present era. During these periods the standards of review, the terminology used, and the emphasis on certain factors and various

constitutional provisions has, of course, varied. What has not, however, are two overriding themes:

- A skeptical review of statutes and ordinances when ascertaining whether they arbitrarily burden some persons, but not others, in denying the right to earn a living; and
- The importance of courts considering actual, and not merely hypothetical, facts and whether those facts achieve the purposes the challenged law is meant to address.

These are especially important in the present procedural posture—the grant of a motion to dismiss—where every benefit of the doubt should be extended to Appellant in deciding whether the challenged law may be arbitrary. Indeed, as *amicus* will discuss, an emerging trend in recent economic liberty cases is the importance of the courts considering facts developed through the adversarial process.

Based upon the history discussed herein, *amicus* will conclude by asking this Court to reverse the decision below and remand so that the parties can move forward with discovery.

I. MINNESOTA'S JUDICIARY HAS CONTINUALLY PROTECTED ECONOMIC LIBERTY FROM THE NINETEENTH CENTURY THROUGH THE PRESENT ERA.

A. Protection of Economic Liberty from Prior to Statehood through the Nineteenth Century.

The right to earn a living free from unreasonable governmental regulation is far older than the Minnesota Constitution. Courts enforced this

right going back to the founding of the Republic, and it was widely recognized by early American legal commentators. *See generally* Timothy Sandefur, *The Right to Earn a Living*, 6 Chap. L. Rev. 207, 218-25 (2003).

Following in this tradition, in the years surrounding the adoption of the Minnesota Constitution in 1857, supreme courts in various other states, including in the Midwest, struck down laws because they violated the right to earn a living. The reasoning of many of these cases involved a narrow reading of city charters, where the court ruled a city simply lacked the power to enforce an unreasonable restriction on the right to earn a living. For example, in *Hayes v. Appleton*, 24 Wis. 542, 544-45 (1869), the Wisconsin Supreme Court invalidated an ordinance that banned auctioneering after sundown. The court said auctioneering is a "lawful business" and that because the city had not demonstrated "sufficient cause" that it needed the regulation, determined the law was "an unreasonable and unlawful interference with the freedom of trade." *Id.* at 545. Other examples appear across the Midwest close to the time of Minnesota's founding. *See, e.g.*, *Logan & Sons v. Pyne*, 43 Iowa 524 (1876) (striking down monopoly grant for buses); *Bloomington v. Wahl*, 46 Ill. 489 (1868) (ruling unreasonable a restriction on where meat could be sold); *Wreford v. People*, 14 Mich. 41 (1865) (ruling city lacked the power to prohibit slaughterhouses in a certain neighborhood

unless they are a nuisance); *Seaton Mays v. City of Cincinnati*, 1 Ohio St. 268 (1853) (holding huckster license invalid).

Therefore, it is unsurprising that this was also true in Minnesota. One of the Minnesota Supreme Court's very first cases invalidated a St. Paul ordinance requiring a license to sell fresh meat anywhere other than in the public market. *City of St. Paul v. Laidler*, 2 Minn. 190 (1858). The court narrowly construed the city's authority under its charter and ruled the ordinance invalid because it was a law in restraint of trade. *Id.* at 206. In another early case, *City of St. Paul v. Traeger*, 25 Minn. 248 (1878), the city required a license to sell vegetables on the city's streets. *Id.* at 250. The court ruled the law invalid, emphasizing the common and beneficial nature of the occupation, "The business itself is of a useful character, neither hurtful nor pernicious, but beneficial to society, and recognized as rightful and legitimate, both at common law and by the general laws of the state," *id.* at 251, and also determining that the ordinance "operates in restraint of an occupation or pursuit useful in its character." *Id.* at 252. In order words, because the law restrained the right to earn a living, the court gave the ordinance a skeptical review and did not summarily defer to legislative judgment.[2] Similar rulings followed on ordinances that restricted other

[2] It should be noted that *Traeger* was decided before Minnesota adopted, in 1906, what is now Article XIII, Section 7. That provision forbids the licensing

common occupations. *See, e.g.*, *City of Mankato v. Fowler*, 32 Minn. 364, 366, 20 N.W. 361 (1884) (auctioneers); *City of St. Paul v. Stolz*, 33 Minn. 233, 234-35, 22 N.W. 634 (1885) (merchandise peddlers).

These early cases are not, of course, cited here as binding recent authority. They are cited to demonstrate that judicial protection of the right to earn a living was part of the original understanding of the state's constitution and an accepted practice from Minnesota's earliest days. Judges reviewed the facts of the cases before them and regularly invalidated ordinances when they proved to be too burdensome. As demonstrated below, that did not change as Minnesota moved into the twentieth century, and continued to be true up through the present era.

B. The Minnesota Courts' Analysis of "Class Legislation" and Other Early Twentieth Century Efforts to Protect the Right to Earn a Living.

As Minnesota's jurisprudence progressed, it became particularly concerned with what the courts of the time called "class legislation," laws that protect some businesses at the expense of others. In the first half of the twentieth century the Minnesota Supreme Court struck down numerous attempts by municipalities and the legislature to protect one politically-favored group at another's expense. The court carefully reviewed whether

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of farmers peddling their own farm products. *See State v. Hartmann*, 700 N.W.2d 449, 455 (Minn. 2005) (discussing history of Article XIII, Section 7). Thus, the impact and reasoning of *Traeger* was not limited to farmers.

treating different groups had a sound basis, or whether it was arbitrary. It also repeatedly analyzed the actual facts at issue in the case, and not hypothetical facts not in the record.

For example, in *Luria v. Wagener*, 69 Minn. 206, 72 N.W. 67 (1897), the supreme court reviewed a Minnesota statute requiring all peddlers to obtain a license, but exempted peddlers selling goods that they or their employer had made. *Id.* at 209. The court found this constituted "class legislation" because the problems that arise from peddling self-made goods are the same as those that would result from selling other goods: "It cannot be held, on any sound principle, that peddling may not become a nuisance . . . when the peddler or his employer has manufactured the wares he peddles as when someone else has manufactured them." *Id.* It concluded the "distinctions are arbitrary and no proper basis for classification" and ruled the law unconstitutional under Article IV, sections 33 and 34 of the Minnesota Constitution, the provisions of the Constitution which forbid special laws. *Id.*

Also in *Luria*, and very relevant to the instant appeal, Justice William Mitchell concurred, but stated that he found the law to be unconstitutional class legislation under Article I, Section 2, the same provision Appellant pleads in this case, not under Article IV, Sections 33 and 34. *Id.* at 210 (Mitchell, J., concurring). This foretold the court's modern practice of reading Article I, Section 2 to be an "equal protection clause," and to prefer its use in

enforcing equal protection principles over other constitutional provisions (the words "equal protection," of course, do not appear in the Minnesota Constitution). Indeed, the full court soon began to do this in another peddler case. *Greenwood v. Nolan*, 108 Minn. 170, 172-73, 122 N.W. 255 (1909) (ordinance licensing only peddlers from outside, but not inside, the city of Hastings, violates Article I, Section 2).

Other examples of the Minnesota Supreme Court protecting entrepreneurs from class legislation abound during this period. *See, e.g.*, *Mudeking v. Parr*, 109 Minn. 147, 123 N.W. 408 (1909) (striking down peddling license and stating "[a]ny interference with the competition which naturally exists among merchants in their effort to secure business is a doubtful policy, unless made necessary in the exercise of police control"); *Webb v. Downes*, 93 Minn. 457, 101 N.W. 966 (1904) (Minnesota statute that only licensed warehousemen who registered within thirty days of enactment declared unconstitutional class legislation); *McCue v. Sheriff of Ramsey County*, 48 Minn. 236, 240-41, 51 N.W. 112 (1892) (Minnesota statute banning emission of dense smoke in the city of St. Paul declared unconstitutional class legislation because it exempted manufacturers).

Minnesota's rejection of arbitrary legislative divisions between entrepreneurs continued in the 1920s and 1930s. For example, in *State v. Popock*, 161 Minn. 376, 201 N.W. 610 (1925), the legislature had forbidden

anyone employed in a "power plant or stationary boiler or engine room" from working more than six days a week. However, the law exempted a seemingly random list of different businesses, including potteries, auto shops, pharmacists, and flour mills. Applying both the Minnesota and U.S. constitutions the court concluded that the maximum hours requirement would be constitutional if applied to everyone who was similarly situated. *Id.* at 377-78. But, the presence of the various exemptions made the law constitutionally impermissible because "it brings the employees of one establishment within the law and leaves those of another outside the law with no reasonable ground for not treating them alike." *Id.* at 379. Digging into the actual requirements of the law, and applying real scrutiny to what the legislature had done, the court remarked that "[n]o differences in conditions have been pointed out, and none occur to us, that suggest a legitimate reason for saying that employees in hotels, bakeries, restaurants, factories, packing plants and machine repair shops shall have a day of rest, and that employees in places of amusement, newspaper plants, canneries, flour mills and automobile repair shops shall not." *Id.* The only conclusion was that some industries were being favored over others.

The court later followed this with *State v. Pehrson*, which once again struck down a vendor licensing ordinance because it applied to peddlers who sold farm products purchased from others but not to peddlers who sold their

own farm products. 205 Minn. 573, 579, 287 N.W. 313 (1939). A year later the court ruled, on statutory grounds, that a filling station was not required to hold a Minneapolis soft drink serving license. *State v. Comer*, 207 Minn. 93, 96-97, 290 N.W. 434 (1940). The court explicitly did so in order to avoid the constitutional question of whether the license would violate equal protection if grocery stores were exempted when filling stations were not. *Id.* at 97. If it had read the ordinance to treat the two differently, the court warned that "[v]iolation of fundamental constitutional rights would follow. Every citizen has an absolute right to be free from the imposition of an unconstitutional license where the fee is large or small." *Id.* at 96.

The above discussion of "class legislation" cases concerns the use of equal protection guarantees against restrictions on the right to earn a living. Of course, the Minnesota Constitution also protects economic liberty through the Due Process Clause, Article I, Section 7. Two cases from the 1930s particularly stand out in this regard. These cases again demonstrate the judiciary's skepticism of arbitrary restrictions on the right to earn a living and a concern for actual facts in inquiring whether legislation actually furthers legitimate governmental interests.

First, in *Pavlik v. Johannes*, the court considered a Minneapolis ordinance mandating that all barber shops operate for no longer than between the hours of 8:00 a.m. and 6:30 p.m. 194 Minn. 10, 11, 259 N.W. 537

(1935). The city argued it did not have to justify the law and that there was "no limit to the power of the legislature to regulate business." Rejecting this in sweeping terms, the Minnesota Supreme Court expounded:

> Such a contention, if upheld, would necessitate discarding the principles set forth above, exalt the police power above all constitutional restraints, relegate the judicial branch to a position entirely subordinate to the legislative will, and ultimately put an end to American constitutional government.

Its message was clear: The Minnesota judiciary is empowered to protect economic liberties.

The *Pavlik* court went on to examine the city's purported justifications for the hours regulation. The city argued that the limit provided for more regular times when it could perform inspections. *Id.* at 18. Not impressed by this justification, or any other, the court rhetorically asked "[u]pon what ground then can we justify this interference with the freedom of the individual to operate his business in his own way and according to his own ideas of good business?" *Id.* It also stated that "[t]he occupation of barbering is a lawful business, and, so far from being an obnoxious one, it is now considered well-nigh indispensable." *Id.* (quoting *Patton v. City of Bellingham*, 179 Wash. 566, 573, 38 P.2d 364, 366 (1934)). Therefore, the fact that barbering was a needed service weighed against placing restrictions on its practice. The same would be true of tree trimming today.

The second barbering case was *Johnson v. Ervin.* 205 Minn. 84, 285 N.W. 77 (1939). There, the legislature allowed licensed beauty culturists to perform "'slight hair trimming of women as a part of women's hairdressing,'" but beyond this could not actually "cut or bob hair," reserving this to licensed barbers. *Id.* at 86. Inquiring into this, the court asked, "Is there anything in the fact that a licensed beauty culturist cuts or bobs the patron's hair instead of trimming it slightly that affects either the patron's health or safety or public health, safety or welfare? We think not." *Id.* at 89. As in *Pavlik*, the court concluded the law violated the due process clauses of the Minnesota and U.S. constitutions, stating "courts do not hesitate to declare unconstitutional a statutory provision which arbitrarily and without reasonable justification prohibits a person from pursuing a lawful calling." *Id.* at 89.

As will be explained in the next section, whether under an equal protection or due process approach, the *Pavlik* and *Johnson* courts' practice of reviewing the actual reasons legislatures have in passing laws, and inquiring whether they actually further the goals asserted, has continued to the present day.

C. The Protection of Economic Liberty in the Second Half of the Twentieth Century and through the Present: A Judiciary as Engaged as It Always Has Been in Protecting Economic Liberty.

1. The 1940s into the 1960s.

Minnesota's protection of the right to earn a living did not change as the twentieth century rolled on. The state's judiciary has rejected the extremely deferential approach to economic legislation that sometimes characterizes the "rational basis" jurisprudence of the U.S. Supreme Court.[3] *See, e.g.*, *Williamson v. Lee Optical*, 348 U.S. 483, 487 (1955). Minnesota's courts have continued to require the government to provide actual facts that actually advance legitimate governmental interests. Therefore, in Minnesota there is no "pre-1940" versus "post-war" jurisprudence on the right to earn a living. There is only a long understanding that the judiciary has a duty to protect the right by seriously inquiring into whether a law is arbitrary, reviewing the actual facts in a case, and deciding whether they further the actual motives of the legislature.

A prime example of this continuing protection is *City of St. Paul v. Dalsin*, 245 Minn. 325, 71 N.W.2d 855 (1955). There, St. Paul required a

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[3] We say "sometimes characterizes" because in practice the U.S. Supreme Court often applies a functionally higher standard of review than the extreme deference of *Lee Optical*. *See, e.g.*, *Allegheny Pittsburgh Coal Co. v. Comm'n of Webster City*, 488 U.S. 336 (1989) (ruling a property tax regime violated the Fourteenth Amendment's Equal Protection Clause through arbitrary setting of tax rates).

license to perform warm air heating, ventilation, and sheet metal work. *Id.* at 326-27. An employee of the Dalsin firm performed roofing work which necessitated the installation of copper flashing, and Mr. Dalsin was prosecuted for his company engaging in sheet metal work without a license. In order to have obtained a license, a member of the firm would have had to pass an exam which would have tested "warm air heating, ventilation, *and* general sheet metal work." *Id.* at 327 (italics in original). The court ruled the law unconstitutional.

The court's reasoning was straightforward. To get a license required command of all three of the above areas. All Dalsin's firm did, however, was one of those three: sheet metal work. The court determined that requiring a license where only a third of the tested subjects were relevant to a man's work was "unnecessary, unreasonable, and oppressive" and therefore unconstitutional as applied to him. *Id.* at 330. In short, it had too attenuated a connection to the government's interest of protecting public health and safety. The court indicated this regulation *could* be applied constitutionally to others who performed more of the three covered subjects, pointing out, "A regulation valid for one sort of business may be invalid for another business

. . . since the reasonableness of a regulation depends upon the relevant facts." *Id.* at 331.[4]

Dalsin is by no means the only example from this period of Minnesota courts protecting the right to earn a living. In 1948 the supreme court examined a state law fordidding hard liquor wholesalers from also wholesaling in wine. *George Benz Sons, Inc. v. Erickson*, 227 Minn. 1, 34 N.W.2d 725 (1948). Even though the business of selling alcoholic beverages is a highly regulated occupation—much less of a "common occupation" than tree trimming, for example—the court did not summarily defer to the government, but engaged with the facts of the case and concluded there was no justification for banning liquor wholesalers from also selling wine, and vice versa. It examined each purpose put forward by the state and concluded that in each case the regulation was an unreasonable method to further that interest. *Id.* at 14-19. For example, it explained that since *retailers* were not forbidden from selling both liquor and wine, the law did not further the interest of restricting the amount of hard liquor available to the public. *Id.* at 15-16. It also addressed an asserted interest that the law was intended to

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[4] The court also separately found another regulation in the ordinance to violate the Fourteenth Amendment's Equal Protection Clause. *Dalsin*, 245 Minn. at 332. Each holding was necessary to the court's decision. *Id.* at 328 ("There are two reasons why the judgment of conviction cannot be sustained.").

protect against monopolies, stating that if it were true the legislature "would have done so by a more direct and effectual method." *Id.* at 18.

The supreme court again reaffirmed the importance of the right to earn a living in *Connor v. Township of Chanhassen*. 249 Minn. 205, 81 N.W.2d 789 (1957). The court reviewed whether Chanhassen could constitutionally fail to consider a repair shop a lawful nonconforming use after the shop had been moved due to a separate use of eminent domain. The court stated the shop owner's right to conduct his business was protected by Article I, Section 7 of the Minnesota Constitution, as well as by the Fourteenth Amendment. *Id.* at 214. This right could not be denied simply because eminent domain had disrupted his nonconforming use. Thus, Chanhassen's ordinance "constitutes an unreasonable police regulation restricting the right to use of the plaintiffs' property for business purposes contrary to the provisions of the constitution." *Id.* at 216. It should be emphasized that the court did *not* rule Chanhassen committed a taking, but that—just as Appellant argues in this case—it had exceeded its police powers by violating the right to conduct a business.

Perhaps the best example from this period of the state judiciary critically analyzing the actual facts in a case's record is *Fairmont Foods Co. v. City of Duluth*, 260 Minn. 323, 110 N.W.2d 155 (1961). There, the supreme court considered whether a Duluth milk ordinance violated Article I, Section

7 of the Minnesota Constitution, as well as the Fourteenth Amendment. The ordinance set a maximum bacterial count for raw milk delivered from a farm to a processor. The count (170,000 per milliliter) was stricter than that in the model ordinance (200,000 per milliliter) many other municipalities had adopted. *Id.* at 324. The court considered the testimony of two expert witnesses who stated that the more restrictive standard of 170,000 bacteria per milliliter "has 'no public health significance.'" *Id.* at 326. The city countered that its higher standard would notify the authorities of a problem on a farm sooner than the more lenient standard, but the court stated that given the frequency of inspections (four samples every six months) that was not a sufficient justification. *Id.* The court concluded the ordinance was unconstitutional because "the more rigid requirement exceeds the police power of the city of Duluth in that it goes beyond the reasonable demands of the occasion." *Id.*

Fairmont Foods is important for two reasons. First, it demonstrates the importance of courts reviewing actual facts, not simply deferring to the government or to hypothetical facts that the legislature may have believed but that may or may not actually be true. Because the court demanded to know whether the more restrictive bacterial count was *actually* related to public health it was able to conclude that the law was arbitrary.

Second, *Fairmont Foods* demonstrates the need for discovery in a constitutional challenge. Because the challenging party was able to submit expert testimony it was able to demonstrate the disconnect between the law's purported goals and its outcome. Without expert testimony, the difference between 200,000 and 170,000 bacteria per milliliter, of course, has no context and a court would, understandably, be extremely reluctant to rule the difference is arbitrary. This point is very relevant to the instant appeal where Appellant seeks to demonstrate what subjects are relevant to the practice of tree trimming and what are not.

2. The Present Era.

Cases over the last few decades have continued the Minnesota judiciary's protection of the right to earn a living. They have continued to pay close attention to (1) whether laws which impede that right are arbitrary and (2) the actual facts in a case and whether they further the government's asserted purpose.

An example of this continuing focus is *Nelson v. Peterson.* 313 N.W.2d 580 (Minn. 1981). There, the supreme court considered a new statute banning the hiring of certain publicly-employed workers compensation attorneys as workers compensation judges. The legislature banned the Department of Labor from hiring attorneys who, within the prior two years, had represented employees while themselves being employed by the state, known as "section

176.261" attorneys. *Id.* at 580. Although section 176.261 attorneys could not become workers compensation judges, private attorneys representing either employees or employers could, as could public attorneys representing the state itself. *Id.* at 581.

The court rejected several "rational bases" that the state proffered in defense of the law. One supposed basis was that before this law judges primarily had been former section 176.261 attorneys, and that this change was an attempt to correct the bias that had caused. *Id.* at 583. In rejecting this argument, the court carefully analyzed the record and discovered that many such attorneys who served as judges had also worked in many other legal capacities, including representing the state or insurance companies. *Id.* These facts demonstrated that there was no need for the ban in order to protect against bias. *Id.* Therefore, the court found the law unconstitutional. *Id.* Although the case did not concern private-sector workers, it did consider what qualifications the government may demand of someone before they can work—exactly what Minneapolis is doing with tree trimmers.

The court's concern for laws restricting the right to earn a living continued three years later in examining a Duluth ordinance requiring a new property owner to pay for a prior owner's unpaid utility bills before it could receive services. *Cascade Motor Hotel, Inc. v. City of Duluth*, 348 N.W.2d 84 (1984). The new owner of a hotel sued the city in order to receive city

services after buying a property. The city had not placed a lien on the property; it just demanded payment from the new owner for the old owner's debts. *Id.* at 85. Reviewing this imposition on the new owner's ability to run its business, the court found the ordinance "arbitrary and unreasonable" because the new owner was in no way responsible for the prior owner's debt.

Since this Court's creation it has also added to Minnesota's rich history of protecting the right to earn a living. For example, *State v. Stewart*, 529 N.W.2d 493 (Minn. App. 1995), continued the focus on actual facts and the need for discovery and a complete record when reviewing the constitutionality of a law. *Stewart* concerned a Minneapolis ordinance that, as enforced, banned the unlicensed cutting and fabrication of pipe used in sprinkler systems when the cutting or fabrication was performed on a job site. Although the ordinance did not distinguish between on- and off-site work, it was the city's position that an unlicensed construction worker could perform the work when off a job site, but not when on a job site. *Id.* at 495. The city argued that because of the "'hectic conditions'" on construction sites it was safer to have unlicensed work performed elsewhere. This Court considered the testimony of a journeyman who stated that "the equipment on the job site was *not* more likely to be inaccurate than equipment used off the job site" and that on-site cutting and fabrication was the most economical method. *Id.* (emphasis in original). The court ruled that the defendant—an

unlicensed worker who the city had cited for on-site work—did not violate the ordinance, but also explicitly ruled that the ordinance itself violated the worker's due process and equal protection rights. *Id.* at 497.

In ruling, the *Stewart* court relied upon *City of St. Paul v. Dalsin*, discussed above. It rejected the government's arguments, pointing out that the ordinance had the arbitrary effect of making conduct illegal based upon what side of a street it was performed on: "We cannot accept the city's argument that a skilled laborer legally can fabricate pipe just across the street from a job site using portable equipment, while the same person doing the same activity on the job site a few feet away violates the ordinance." *Id.* Therefore, "Because the city does not assert a plausible reason or explanation justifying the disparate application of the ordinance as to similarly situated persons who may be the distance of mere feet away, the regulation is unconstitutional." *Id.*

Taken together, an additional theme that has emerged out of these more recent cases—even more clearly than in the past—is the need for factual development through the adversarial process. For example, in *Stewart*, *Nelson*, *Fairmont Foods*, and *Connor* the courts specifically referred to a factual record developed in the trial court. The facts developed in the court below were crucial to whether the appellate court ruled the law in question to be arbitrary. *See Stewart*, 529 N.W.2d at 495 (relying upon

testimony in the trial court for health and safety dangers); *Nelson*, 313 N.W.2d at 583 (relying upon record evidence for the experience of job applicants); *Fairmont Foods*, 260 Minn. at 326 (relying upon expert testimony for health and safety dangers); *Connor*, 249 Minn. at 215 (relying upon record evidence in determining degree of plaintiff's burden). This stands in stark contrast to the instant case where Appellant was not allowed to even attempt to build a record of his own.

In summary, state courts have routinely protected the rights of Minnesotans to earn a living free from unreasonable governmental regulations. The Minnesota judiciary has continuously applied a careful review of whether laws that restrict the right to earn a living are arbitrary. Further, their accepted practice, especially in modern cases, is to examine the actual facts in a case, developed through the adversarial process, and whether those facts advance the government's actual justifications, not to merely recite purported facts advanced by the government. Across the decades—and, indeed, the centuries—if the facts demonstrate that a law does not actually further the public interest, then Minnesota's judiciary has not hesitated from striking it down as unconstitutional.

This approach dovetails with the "Minnesota rational basis test" that the Minnesota Supreme Court has enforced in recent decades in various areas. *See, e.g.*, *State v. Russell*, 477 N.W.2d 886, 888 (Minn. 1991); *State v.*

Garcia, 683 N.W.2d 294, 299 (Minn. 2004). In these cases the court has explicitly rejected the standard of the federal courts and reaffirmed that when litigating under the Minnesota Constitution the actual facts, and whether those facts demonstrate that the government is truly furthering a legitimate governmental interest, matter. *Russell*, 477 N.W.2d at 889 ("[W]e have required a reasonable connection between the actual, and not just the theoretical, effect of the challenged classification and the statutory goals."). Minnesota is simply a state that takes its constitution seriously, including the constitutional right to earn a living.

II. THE HISTORY OF MINNESOTA'S PROTECTION OF THE RIGHT TO EARN A LIVING DICTATES THIS COURT MUST REVERSE AND REMAND THE JUDGMENT OF THE DISTRICT COURT.

The extensive caselaw detailed above demonstrates that the district court erred in dismissing Appellant's case without allowing the parties to proceed with discovery. The challenged ordinance arbitrarily burdens Appellant and other small tree trimmers overwhelmingly more than their larger competitors. Every tree trimming company must hire one, *but only one*, certified arborist. *See* Minneapolis City Code § 347.35. For a one-man business, that means doubling the firm's payroll. However, for a business with one hundred employees it means merely adding one percent to the firm's payroll. Thus, a company with dozens of tree trimmers in the field needs to hire the same number of certified arborists—one—as a one-man business.

This arbitrary difference in the law's impact makes it unconstitutional class legislation, as explained above. *See* Part I.B, *supra*. Further, the requirement that all licensed tree trimming companies hire a certified arborist does not actually further the government's purported interests. As in the *Dalsin*, *Pavlik* and *Johnson* cases, *see* Parts I.B & I.C.1, *supra*, when the actual facts are examined (which at this point must be the facts alleged in the complaint), the requirement arbitrarily prevents Appellant from pursuing his occupation with little or no public benefit. As Appellant has explained in his brief, only a small portion of what arborists are trained in and tested on is relevant to tree trimming.

The caselaw discussed above dictates that Minnesota courts must take a skeptical view of the government's assertions when they are not backed up by actual evidence. *See* Part I.C.2, *supra*. Given that this case comes before this Court before any discovery has been performed, the caselaw demands that, at the least, Appellant should be given the benefit of the doubt in the context of a motion to dismiss, not the government. Yet that is not what the district court did. For these reasons this Court should reverse the judgment of the district court.

CONCLUSION

The weight of over a hundred years of Minnesota courts protecting the right to earn a living demands that Appellant be given a chance to make his

case to the district court. Just as the vegetable peddler, the warehouse auctioneer, the dairy farmer, and the roofer had the chance to protect their economic liberties before Minnesota's courts, so must Appellant be given the chance here. This Court should engage with the alleged facts of this case, carefully examine whether the law furthers the city's asserted interests or instead arbitrarily regulates some at the expense of others, and in this review of a motion to dismiss it should reverse the district court's decision and remand for the parties to pursue discovery.

DATED: July 30, 2012

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CERTIFICATE OF COMPLIANCE WITH RULE 132.01, Subd. 3

I, Anthony B. Sanders, certify that the Brief of Amicus Curiae Institute for Justice complies with the length limitation and font size requirements of Rule 132.01, subd. 3 of the Minnesota Rules of Civil Appellate Procedure. I further certify that, in preparation of this brief, I used Microsoft Word Version 2010, and this word processing program has been applied specifically to include all text, including headings, footnotes, and quotations in the following word count, excluding only the caption, signature text and certificates of counsel. I further certify that the above-referenced brief contains 6,004 words.

ANTHONY B. SANDERS

STATE OF MINNESOTA

IN COURT OF APPEALS

James A. Dolphy,

Appellant,

James P. Haege,

Plaintiff,

v.

Case No. A10-0927

City of Minneapolis,

CERTIFICATE OF SERVICE
BY U.S. PRIORITY MAIL

Respondent.

TO: Clerk of the Appellate Courts

STATE OF MINNESOTA)
) ss:
COUNTY OF HENNEPIN)

I, Anthony B. Sanders, being first duly sworn, depose and state that on July 30, 2012, I served the enclosed Brief of Amicus Curiae Institute for Justice by mailing two copies thereof by U.S. Priority Mail to each of the following:

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