

IN THE SUPREME COURT OF MISSOURI

SC93047

ROBERT BRIAN BONE,

Respondent,

v.

DIRECTOR OF REVENUE,

Appellant.

**From the Circuit Court of Jefferson County,
The Honorable Robert G. Wilkins.**

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
ARGUMENT	1
I. Bone could make his constitutional claim in his petition.	1
II. The validity of a state law is not dependent on the validity of a federal law that motivated the state law.	1
III. Bone has not proved his alternative constitutional claims.	3
CONCLUSION.....	6
CERTIFICATE OF SERVICE AND COMPLAINT	7

TABLE OF AUTHORITIES

CASES

Charles C. Steward Mach. Co. v. Davis,
 301 U.S. 548 (1937)..... 1, 2

City of Florissant v. Rouillard,
 495 S.W.2d 418 (Mo. 1973)..... 1

City of St. Louis v. State,
 382 S.W.3d 905 (Mo. banc 2012) 5

National Federation of Independent Business v. Sebelius,
 132 S.Ct. 2566 (2012)..... 1, 2, 3

State v. Davis,
 685 S.W.2d 907 (Mo. App. E.D. 1984)..... 6

Treadway v. State,
 988 S.W.2d 508 (Mo. banc 1999) 5

Williamson v. Lee Optical of Okla.,
 348 U.S. 483 (1955)..... 6

STATUTES

§ 302.505..... 2, 3

§ 302.505.1..... 2

Art. I, § 1, Mo. Const..... 3

OTHER AUTHORITIES

Centers for Disease Control, “Effects of Blood Alcohol Content (BAC)”

[http://www.cdc.gov/Motorvehiclesafety/Impaired Driving/bac.html](http://www.cdc.gov/Motorvehiclesafety/Impaired_Driving/bac.html)..... 5

ARGUMENT

I. Bone could make his constitutional claim in his petition.

As to the timeliness of his constitutional claim, Bone makes a novel argument: that constitutional claims do not actually need to be made “at the earliest opportunity,” *City of Florissant v. Rouillard*, 495 S.W.2d 418, 419 (Mo. 1973), but merely at the earliest opportunity after the issuance of a new, favorable precedent. That would be a new rule.

Bone characterizes his argument differently, of course. He ties his constitutional claim not to the United States Constitution itself, but only to the recent favorable precedent, *National Federation of Independent Business v. Sebelius*, 132 S.Ct. 2566 (2012). In doing so he ignores a key point made by Chief Justice Roberts: that the constitutional rule applied in the portion of *NFIB* on which Bone relies was articulated 74 years earlier, in *Charles C. Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937). *See* 132 S.Ct. at 2602. That the Supreme Court relied on that rule in 2012 does not, under existing Missouri precedent, excuse Bone from having raised it in his petition.

II. The validity of a state law is not dependent on the validity of a federal law that motivated the state law.

Mr. Bone’s argument in favor of the circuit court’s holding, contained in his Point II, uses a two-step analysis: (1) the federal law that prompted the Missouri General Assembly to lower the blood alcohol content allowed by

§ 302.505.1 was unconstitutional, relying on *NFIB* (and on *Steward Machine*); and thus (2) that the Missouri law making the change, H.B. 302 (A.L. 2001, p. 423), was unconstitutional. We do not address (1); it is for the United States, not the State of Missouri, to defend federal law. But (1) simply does not lead inexorably to (2), as Bone supposes.

That Bone merely supposed that (1) leads to (2) is evident from the extent of his analysis as to (2): it consists of a single sentence—indeed, as to causation, a single conclusory word, “therefore”:

The legislation that followed as a result of federal coercion, §§302.500 and 302.700 RSMo. [is] *therefore* unconstitutional as an improper exercise of federal authority under both the Spending Clause, U.S. Const. Art. I, §8, cl. 1, U.S. Const. Art. X and Mo. Const. Art. I[,] §1.

Respondent’s Brief at 16 (emphasis added). Bone provides not a single word of explanation for the causation claimed by his use of “therefore.” Indeed, what follows his “therefore” makes no sense in the context of § 302.505: H.B. 302 was not enacted by the Missouri General Assembly as an “exercise of federal authority,” so the lack of federal authority is not implicated.

The citations that close Bone’s “causation” sentence do not give any substance to his claim that (1) leads to (2). From the Constitution of the

United States, he cites to provisions addressed by the U.S. Supreme Court in *NFIB*. But those provisions say nothing whatsoever about what our General Assembly can and cannot do. His citation to the opening section of the Missouri Constitution is baffling. That section is merely a declaration of the source of authority for the Missouri Constitution:

That all political power is vested in and derived from
the people; that all government of right originates
from the people, is founded upon their will only, and
is instituted solely for the good of the whole.

Nothing in § 1 even hints at the possibility that a piece of legislation validly enacted by the Missouri General Assembly and signed by the governor would become invalid if the General Assembly were motivated by federal law that was held, years later, to be unconstitutional.

In his Point II, then, Bone fails completely to identify any constitutional flaw in H.B. 302 as it was enacted or in § 302.505 as it now reads. If federal law now allows Missouri to amend its blood alcohol content limits, it is for the legislature, not the courts, to take that step.

III. Bone has not proved his alternative constitutional claims.

In his Point III, Bone moves briefly to due process and equal protection claims that he stated in his petition but on which the circuit court did not rule. Although circuit court decisions can be upheld on alternative bases,

Bone does not provide a sufficient basis for either a due process or an equal protection challenge to the commercial drivers license disqualification statute that he challenges.

a. *Due process.* Bone begins with a paragraph stating the rule that “due process of law be provided before an individual can be deprived of life or liberty.” Respondent’s Brief at 18. But in that section, he never returns to the concept of due process, and identifies no “process” to which he was “due” that he did not receive.

In his Statement of Facts, Bone hints at what his due process claim might be: “Bone was not notified at the time of the request to submit to a chemical breath test that his CDL [commercial drivers license] would be disqualified if he tested over the legal limit.” Respondent’s Brief at 6 (emphasis in original). But he does not claim that he was left unwarned concerning his non-CDL driving privileges, and never explains why the State was required to specifically explain that revocation of his regular driving privileges would also affect his commercial driving privileges. As discussed in the Director’s opening brief, the State is allowed to presume that he knows the law. Appellant’s Brief at 13-14.

b. *Equal protection.* Bone moves quickly to equal protection, stating that “[t]he rational basis test” applicable here “requires only that the challenged law bear some rational relationship to a legitimate state interest.”

Respondent's Brief at 18. But he minimizes his burden. As a "challenger," Bone "bears the burden to show that the law is wholly irrational." *Treadway v. State*, 988 S.W.2d 508, 511 (Mo. banc 1999), quoted with approval, *City of St. Louis v. State*, 382 S.W.3d 905, 913 (Mo. banc 2012). Rather than cite anything from the record sufficient to support a claim that the statutes he challenges are "wholly irrational," he makes two statements.

First, he claims that "the reduction from .1 to .08 is not related to 'impairment.'" Respondent's Brief at 18. He then cites testimony from a police officer that there is no study showing that drivers are "impaired" at .08. Respondent's Brief at 19, citing Tr. 34-35, 37. But that is not sufficient to meet Bone's burden: the lack of a study showing that drivers are "impaired" specifically at .08 does not prove that they are not factually, if not legally, impaired at that level. Nor does it prove that it is irrational to conclude that there is a relationship between a .08 blood alcohol level—just below the previous legal limit—and impaired driving.

Indeed, the relationship seems obvious, for at least two reasons. The first is the physical impact: as the Centers for Disease Control reports, a driver's judgment and visual functions are affected at .02. Centers for Disease Control, "Effects of Blood Alcohol Content (BAC)" http://www.cdc.gov/Motorvehiclesafety/Impaired_Driving/bac.html (last viewed April 25, 2013). The second is the deterrent effect: it is at least

rational to suppose that telling those who drink that they cannot drive when their BAC is .08 makes it less likely that they will reach .1 and then drive—and Bone seems to concede that drivers are impaired at .1.

Second, Bone observes that “other types of commercial drivers, such as pilots” (Respondent’s Brief at 18) and boaters (*id.* at 19) are not subjected to the same standard. But that is not enough to prove a “rational basis” claim. After all, “the legislature is not required to remedy all of a given kind of evil or none at all.” *State v. Davis*, 685 S.W.2d 907, 912 (Mo. App. E.D. 1984), citing *Williamson v. Lee Optical of Okla.*, 348 U.S. 483, 488–89 (1955). Moreover, drivers, pilots, and boaters are subject to different regulatory regimes and pose different threats to public safety; they are not so similarly situated as to demand identical treatment.

CONCLUSION

For the reasons stated above and in the Appellant’s Brief, the decision of the circuit court should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLAINT

I hereby certify that a true and correct copy of the foregoing was filed electronically via Missouri CaseNet and served electronically this 26th day of April, 2013, to:

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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule 84.06(b) and that the brief contains 1,541 words.

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