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1851 CENTER FOR CONSTITUTIONAL LAW

April 4, 2012 Interested Party Testimony of Maurice A. Thompson to the United States Civil Rights Commission on use of the Civil Rights Agenda to reduce barriers to Entrepreneurship in Ohio

This testimony is offered on behalf of the 1851 Center for Constitutional Law, a public interest law firm dedicated to defending Ohioans from regulations with widespread, deleterious effects, and an organization that advocates for assistance of disadvantaged groups through (1) freeing workers from labor market restrictions such as licensing laws, wage controls, and union junkets; and (2) freeing children from public school monopoly and spreading educational choice and opportunity.

Our testimony today is intended to *briefly* explain why this Commission should focus on these techniques, rather than short-term redistribution of wealth and market *intervention*, to break down barriers to entrepreneurship that confront historically disadvantaged Ohioans. I will also provide some discrete examples of how issues the 1851 Center has confronted confirm this proposition.

The Revised Civil Rights Agenda has failed.

First, the Revised Civil Rights Agenda has failed. The *original* civil rights agenda, advanced by Frederick Douglas early on, and then by others all of the way through the Civil Rights Act of 1964, sought equality of *opportunity* rather than equality of *outcome*. This goal catalyzed the civil rights movement to focus on eliminating government regulations that treated disadvantaged groups differently and threatened economic independence, rather than on seeking special privileges from government.

In stark contrast to the vision of Frederick Douglas and others who formulated the original civil rights agenda, a recent National Urban League president, John E. Jacob, remarked that the civil rights agenda should (1) obtain "racial parity;" (2) convince government to provide "basic income, health, housing, and educational guarantees;" and (3) hold racial preferences up as the "the litmus test of civil rights."

Between 1940 and 1980, minority groups in the United States made tremendous progress: for example, average wages of black males increased 52 percent faster than wages of their white counterparts. But you might be surprised to learn that 80 percent of this progress occurred *before* 1965, prior to the advent of racial preferences and the modern welfare state.

By 1980, the employment rate in the black community, once the same as in the white community, had experienced a sharp decline, wage rate differences between whites and Latinos began to grow for the first time this century and scholars had concluded that "affirmative action apparently has had no significant long-run effect on the racial wage gap." (Smith and Welch). Scholars have since further concluded that "racial preferences increase the demand for highly qualified blacks, who probably would succeed even without them."

Note: This applies to native-born black-Americans; black immigrants actually earn as much as their white counterparts.

As just one example of the failure of racial preferences in Ohio, this Commission should study Ohio's EDGE ("Encouraging Diversity Growth & Equity") Program. This program professes to "provide an edge to small businesses" run by Ohioans from "socially disadvantaged groups" given their race, ethnic origin, gender, or rural/Appalachian upbringing by awarding state contracts to these groups even if they aren't the lowest bidder or otherwise most qualified. However, any Department of Administrative Services Report on the program demonstrates that it fails to meet its goals. And attend any public meeting of any state agency that awards public contracts and you will hear constant lamenting over the lack of such businesses that actually exist in the first place, are qualified to do the work, and have done the work in the past without incident. Tantamount local programs feature gamesmanship, with loose conglomerations of Ohioans setting up fly-by-night organizations with minority figure-heads to intercept valuable public contracts.

We believe that the Revised Civil Rights agenda, as Supreme Court Justice Clarence Thomas, once put it "stifles . . . meaningful discussion of the countless problems facing blacks today."

And we further believe that the quest for positive law and special privilege has hindered entrepreneurship amongst other disadvantaged groups. In short, we believe that there is some truth in the running race analogy: certain Ohioans are running a race with a ball and chain attached to their ankle. But unlike some of our counterparts here today, we believe that the solution is to unshackle these Ohioans from that ball and chain, rather than to pick them up and place them on the finish line.

To advance genuine entrepreneurship, this Commission should focus on the elimination of government regulations that disparately impact disadvantaged Ohioans.

To effectively break down barriers to entrepreneurship confronted by disadvantaged Ohioans, this Commission should instead focus on regulations that disparately impact these Ohioans. Disparate

impact discrimination involves practices that the United States Supreme Court describes as "facially neutral in their treatment of different groups, but falling more harshly on one group."

In the employment law context, courts scrutinize whether "employers use neutral decision-making mechanisms that in fact work to eliminate a greater portion of otherwise-qualified protected group members than they do members of other groups," dispensing with the requirement of proving discriminatory motive.

This is consistent with the observations of African-American economist Thomas Sowell, who admonishes us, when determining the impact of government on disadvantaged groups, to recognize that "such impact does not depend upon whether government policy is *explicitly* racial, but only on whether its *effects* are different for different groups."

When attempting to start a business, disadvantaged Ohioans suffer from several types of facially neutral government regulation that fall more harshly on them. In particular, economic regulations that limit voluntarily exchange tend to favor advantaged Ohioans who may have succeeded before the regulations were enacted to choke off their competition, and tend to disfavor those who are just coming to the table.

First, occupational licensing laws have a disparate impact on disadvantaged Ohioans. Licensing laws have meteorically risen - - 50 years ago, only about five percent of the workforce was required to be licensed, as opposed to over 30 percent today, and increasingly, "irrational occupational licensing laws – which restrict entry into jobs that don't require a great deal of education or capital to enter – affect each of us in our daily lives."[1]

These barriers to entry coincide with the interest and capacity of disadvantaged groups to participate more fully in the modern economy: they accord preferential treatment to those already in the regulated industry while imposing burdens on those seeking entry.

As African-American economist Walter Williams has observed "when blacks became urbanized . . . they very often found avenues of traditional upward mobility closed through various forms of business and occupational regulation."

In particular, economists have found that disadvantaged groups "are more likely than others to fail written licensing examinations, even though they do not appear to be less able than others who are admitted [to do the work]."

Here in Ohio, my firm has represented plumbers trying to start their own business: even plumbers must pass a written examination before they can become licensed and run their own business.

My firm has also studied taxicab regulations: Ohio's major cities all artificially cap the number of cabs that may operate within their cities, impose expensive up-front fixed costs that are unnecessary and unaffordable for disadvantaged Ohioans (such as requiring a minimum of 25 cars and a fixed dispatch

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[1] Morris M. Kleiner, Licensing Occupations: Ensuring Quality or Restricting Competition?, Upjohn Institute Press (2006).

station not run out of the home). Our case study several years ago revealed that Dayton regulations add as much as $70,000 to the cost of starting a taxicab business in that city.

These regulations particularly harm disadvantaged inner-city Ohioans, because this is where the business is, while start-up costs would otherwise be low. Indeed, when Indianapolis entirely deregulated the taxicab industry, 32 new cab businesses started up within the first six months - - and 24 of these were minority and female-owned businesses. In Washington D.C., without regulation, 90 percent of cabs are independently owned, and 70 percent are owned by blacks.

We would also be remiss if we did not mention the effect of raw milk prohibition and "retail food establishment" licensing laws on rural and Appalachian Ohioans, and particularly Amish and Mennonite sects. My firm has represented rural small business owners shut down for running such businesses from their rural home properties, businesses that are not just shut down, but even raided by SWAT teams for a licensing infraction even though their customers are private members who voluntarily choose to transact with them.

Finally, supposed "public health" regulations, such as smoking bans often hit independent owner-operators in not-so-trendy parts of Ohio the hardest, and have caused many such bars to shut their doors over the past five years.

Second, wage regulations protecting labor union privileges have a disparate impact on disadvantaged Ohioans. The federal Davis-Bacon Act establishes Prevailing Wage rates and Project Labor Agreements, and forces these concepts down the throats of states, because federal labor law preempts states from enacting their own labor law.

Since 1979, the U.S. General Accounting Office has advised that "The Davis-Bacon Act should be repealed." Specifically, the GAO found:

- Prevailing wage rates, which are artificially high, "actually resulted in fewer construction job opportunities for low-skilled minorities and those just starting in construction."

- Prevailing wage rates and project labor agreements "give an unfair advantage to union employers over nonunion employers in bidding for government construction contracts, and impedes entry of minority groups into the construction industry."

- Prevailing wage hurts rural and Appalachian workers because applying these rates to construction projects resulted in "nonlocal contractors working on the majority of these projects" because "local [rural] contractors would not bid on projects because they did not want to disrupt their wage structures and worker classification practices."

Supporters of the Davis-Bacon Act derided "cheap colored labor that is in competition with white labor" as one reason for the law. Indeed, the history of the labor movement in American is riddled with racial tension. During the New Deal Era, labor leaders conceded that they could not exclude minority workers, and instead made concerted efforts to appeal to the government for artificially high wage rates,

so as to exclude start-up minority workers from undercutting them (African American workers continuously and successfully did so, pursuing employment opportunities while white workers were on strike, and often proving their value in the process).

Likewise, under the Strickland Administration, government officials explicitly acknowledged using project labor agreements on school construction projects to suppress "Mexican" labor.

Labor leaders support minimum wage laws for the same reason. The resulting effect is particularly high unemployment amongst young black males.

Finally, the virtual government monopoly over elementary and secondary education has a disparate impact on disadvantaged Ohioans. Ohioans are, of course, less likely to start a successful business if they are poorly educated.

Bringing school choice to urban areas can rectify this disadvantage. However, school choice, in Ohio, means that one component of school funding, state foundation funding of approximately $5,700 per student, is redirected from public schools to the charter or community school of the student and parents' choice. Public school boards and teachers' unions, jealous of this loss in funding, often attack charter and community schools, attempting to shut them down, even though they obtain better results for disadvantaged students.

As just one example, my firm represented a charter school against such an attack in a case recently heard by the Ohio Supreme Court. Theodore Roosevelt Public Charter School, offering a unique, individualized, and technology-centered curriculum, is located in Cincinnati's Fairmount neighborhood. This neighborhood represents precisely the type of community that the Ohio General Assembly envisioned assisting through the Ohio Community Schools Act: (1) 36 percent of its households make less than $10,000 per year, and 77 percent make less than $35,000 per year; (2) 70 percent of its residents are minorities; (3) 90 percent of the schools' students would belong to a socioeconomic status that is eligible for free and reduced price lunches; and most importantly (4) local Cincinnati Public Schools that serve this low income minority community are in *academic emergency*, giving Fairmount residents little opportunity to escape poverty through educational opportunity.

Recommendations

This Commission should embrace a philosophy of civil rights that values equality of opportunity, the original intention of the Civil Right movement, and accordingly, should scrutinize fields where government regulation has imposed disparate harm on disadvantaged Ohioans, such as licensing laws, supposed public health regulations, labor law, and public education. In particular this Commission should move towards recommendations that would repeal the Davis-Bacon Act, and condition receipt of federal funds by states on proof that states are rolling back licensing and educational regimes that impose harm on disadvantaged groups.