

NO.15-35209

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

INTERNATIONAL FRANCHISE ASSOCIATION, INC.;
CHARLES STEMLER; KATHERINE LYONS; MARK LYONS;
MICHAEL PARK; and RONALD OH,

Plaintiffs-Appellants,

v.

CITY OF SEATTLE, a municipal corporation;
FRED PODESTA, Director of the Department of Finance
and Administrative Services,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

No. C14-848-RAJ

AMICUS BRIEF OF THE STATE OF WASHINGTON

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. INTEREST OF AMICUS CURIAE.....2

III. ARGUMENT3

 A. Plaintiffs Cannot Demonstrate a Violation of the Dormant
 Commerce Clause.....3

 B. The Plaintiffs Have No Likelihood of Success Based on the
 Washington Constitution’s Privileges and Immunities Clause.....8

IV. CONCLUSION..... 12

TABLE OF AUTHORITIES

Cases

<i>Am. Legion Post 149 v. Washington State Dep't of Health</i> , 164 Wash. 2d 570, 192 P.3d 306 (2008).....	10-11
<i>Brown-Forman Distillers Corp. v. New York State Liquor Auth.</i> , 476 U.S. 573 (1986)	4
<i>Exxon Corp. v. Governor of Maryland</i> , 437 U.S. 117 (1978)	6
<i>Fort Halifax Packing Co. v. Coyne</i> , 482 U.S. 1 (1987)	2
<i>Granholt v. Heald</i> , 544 U.S. 460 (2005)	4-5
<i>Grant Cnty. Fire Prot. Dist. No. 5 v. City of Moses Lake</i> , 145 Wash. 2d 702, 42 P.3d 394 (2002).....	8
<i>Hughes v. Oklahoma</i> , 441 U.S. 322 (1979)	5
<i>Kentucky Dep't of Revenue v. Davis</i> , 553 U.S. 328 (2008)	3-5
<i>Maine v. Taylor</i> , 477 U.S. 131 (1986)	2, 4
<i>Nat'l Ass'n of Optometrists & Opticians v. Harris</i> , 567 F.3d 521 (9th Cir. 2009).....	5
<i>Nat'l Ass'n of Optometrists & Opticians v. Harris</i> , 682 F.3d 1144 (9th Cir. 2012).....	3-4, 6
<i>Ockletree v. Franciscan Health Sys.</i> , 179 Wash. 2d 769, 317 P.3d 1009 (2014).....	10-11

Pharm. Care Mgmt. Ass'n v. Rowe,
429 F.3d 294 (1st Cir. 2005) 7

Pike v. Bruce Church, Inc.,
397 U.S. 137 (1970) 5-6

Ralph v. City of Wenatchee,
34 Wash. 2d 638, 209 P.2d 270 (1949) 10

S. Pac. Co. v. Arizona,
325 U.S. 761 (1945) 4

S.D. Myers, Inc. v. City of San Francisco,
253 F.3d 461 (9th Cir. 2001) 7

Schroeder v. Weighall,
179 Wash. 2d 566, 316 P.3d 482 (2014) 9

Yamaha Motor Corp. v. Jim's Motorcycle, Inc.,
401 F.3d 560 (4th Cir. 2005) 7

Constitutional Provisions

Wash. Const. art. I, §12 1, 4, 8, 10-11

This Amicus Brief is filed by the State of Washington pursuant to FRAP 29(a).

I. INTRODUCTION

In seeking a preliminary injunction against the City of Seattle's minimum wage ordinance, the International Franchise Association (IFA) relies on a laundry list of untenable arguments. The City has already thoroughly and convincingly rebutted each of those arguments. The State of Washington agrees with all of the City's points, and files this brief solely to address issues particularly within the State's expertise and concern: application of the dormant Commerce Clause and Article I, §section 12 of the Washington Constitution (privileges and immunities).

First, the dormant Commerce Clause does not preclude every local regulation that has some incidental consequence for interstate commerce. The District Court properly applied both tiers of dormant Commerce Clause analysis in upholding the ordinance, correctly finding that IFA's evidence was insufficient to demonstrate either discriminatory intent or effect, and that IFA failed to demonstrate that any incidental burden on interstate commerce clearly outweighed the ordinance's local benefits.

Second, Washington's privileges and immunities clause is no barrier to the City's decision to define large employers to include those in a substantial franchise relationship. The difference in treatment among employers does not implicate a "privilege or immunity" as those terms have been construed by the Washington Supreme Court. But even if a franchisee employer's interest in being treated as a small employer for purposes of the longer phase-in period of Seattle's law were a privilege or immunity, the City has reasonable grounds for that different treatment.

II. INTEREST OF AMICUS CURIAE

Under our system of federalism, the States retain "broad regulatory authority to protect the health and safety of [their] citizens." *Maine v. Taylor*, 477 U.S. 131, 151 (1986). This includes the authority of state and local governments to adopt minimum wage standards and other worker protections. *See, e.g., Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 21 (1987) ("[T]he establishment of labor standards falls within the traditional police power of the State."). The Plaintiffs' arguments in this case threaten to undermine the ability of state and local governments to adopt reasonable distinctions in their minimum wage policies and ultimately to adopt worker protection measures at all. The State of Washington files this brief to protect its own ability, as well as

the ability of state and local governments throughout the Ninth Circuit, to adopt minimum wage standards and to include reasonable distinctions in those standards.

The State of Washington also has an interest in consistent and predictable interpretation of the Washington Constitution. Where, as here, a party in federal court raises arguments based on a misreading of a state constitutional provision, the State has an interest in informing the Court of the controlling understanding of that provision in state court.

III. ARGUMENT

A. Plaintiffs Cannot Demonstrate a Violation of the Dormant Commerce Clause

Modern dormant Commerce Clause jurisprudence is driven primarily by concern about economic protectionism, i.e., “regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.” *Kentucky Dep’t of Revenue v. Davis*, 553 U.S. 328, 337-38 (2008) (quoting *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 273-74 (1988)). But dormant Commerce Clause restrictions are not absolute, because our federalism favors state and local autonomy. *Davis*, 553 U.S. at 338; *Nat’l Ass’n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1148 (9th Cir. 2012). States “retain authority under their general police powers to regulate matters of

legitimate local concern, even though interstate commerce may be affected.” *Maine*, 477 U.S. at 138 (quoting *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 36 (1980)); *see also S. Pac. Co. v. Arizona*, 325 U.S. 761, 767 (1945) (a state regulation does not become vulnerable to invalidation under the dormant Commerce Clause merely because it affects interstate commerce); *Nat’l Ass’n of Optometrists*, 682 F.3d at 1148 (“not every exercise of local power is invalid merely because it affects in some way the flow of commerce between the States.”) (quoting *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366, 371 (1976)).

In recognition of our federalism, the Supreme Court has articulated a two-tiered approach for assessing a dormant Commerce Clause challenge. *See Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 578-79 (1986). The District Court in this case faithfully followed that analysis and concluded that Plaintiffs failed to support their challenge under either tier.

The Court first “ask[s] whether a challenged law discriminates against interstate commerce.” *Davis*, 553 U.S. at 338. Discriminatory laws are those that “mandate ‘differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.’” *Granholm v. Heald*, 544 U.S. 460, 472 (2005) (quoting *Oregon Waste Sys., Inc. v. Dep’t of Env’tl.*

Quality of Oregon, 511 U.S. 93, 99(1994)). A discriminatory law is presumed unconstitutional, and that presumption may be overcome only by showing that the challenged law serves a legitimate local purpose that could not be served by alternate, nondiscriminatory means. *Granholm*, 544 U.S. at 472. “The burden to show discrimination rests on the party challenging the validity of the statute[.]” *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979).

In this case, following this Court’s direction in *National Association of Optometrists & Opticians LensCrafters, Inc. v. Brown*, 567 F.3d 521, 525 (9th Cir. 2009), the District Court asked whether the challenged statute discriminates facially, has a discriminatory purpose, or has a discriminatory effect against interstate commerce. ER 9. After carefully reviewing the language of the ordinance and the evidence presented by the parties, it concluded that the ordinance is not discriminatory. ER 10-26. The District Court applied the correct legal standards, and this Court should affirm its findings and conclusion.

Because the challenged ordinance does not discriminate against out-of-state businesses, the District Court proceeded to the second tier of dormant Commerce Clause analysis: the balancing test laid out in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). *See Davis*, 553 U.S. at 338. Under the *Pike*

test, when a statute or ordinance addressing a legitimate state or local interest “has only indirect effects on interstate commerce and regulates evenhandedly,” the Court will uphold the law against a dormant Commerce Clause challenge “unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.” *Pike*, 397 U.S. at 142. The burden to be analyzed is the burden on interstate commerce, not the burden on an individual or an individual company. *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127-28 (1978). There is no need to examine the actual or putative benefits of the challenged statute unless, at a minimum, there has been a showing of some significant burden on interstate commerce. As this Court explained, that is the implicit lesson of the Supreme Court’s decision in *Exxon*: “Once the *Exxon* Court determined that there was no discrimination and no significant burden on interstate commerce, it ended its dormant Commerce Clause analysis without assessing the value of the statute’s purported benefits or actual benefits.” *Nat’l Ass’n of Optometrists*, 682 F.3d at 1155 (citing *Exxon*, 437 U.S. at 125-29).

If there is a burden on interstate commerce, the “putative local benefits” are evaluated under the rational basis test, which requires the Court to proceed with deference to the state legislature. *Yamaha Motor Corp. v. Jim’s*

Motorcycle, Inc., 401 F.3d 560, 569 (4th Cir. 2005) (citing *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 92 (1987)). As the First Circuit has explained, “under *Pike*, it is the *putative* local benefits that matter.” *Pharm. Care Mgmt. Ass’n v. Rowe*, 429 F.3d 294, 313 (1st Cir. 2005), *cert. denied*, 547 U.S. 1179 (2006). “It matters not whether these benefits actually come into being at the end of the day.” *Pharm. Care Mgmt. Ass’n*, 429 F.3d 294. Courts normally accept the legislative assertion of “putative” benefits unless they are entirely speculative. *See S.D. Myers, Inc. v. City of San Francisco*, 253 F.3d 461, 471 (9th Cir. 2001) (“courts should not second-guess the empirical judgments of lawmakers concerning the utility of legislation”) (quoting *Pac. Nw. Venison Producers v. Smitch*, 20 F.3d 1008, 1017 (9th Cir. 1994)).

The City’s stated reason for increasing the minimum wage was to reduce income inequality, which would “promote the general welfare, health, and prosperity of Seattle by ensuring that workers can better support and care for their families and fully participate in Seattle’s civic, cultural and economic life.” ER 1-2 (quoting ordinance). Without question, that is a legitimate local governmental interest, and the ordinance clearly articulated the benefits to be achieved by raising the minimum wage. The District Court, after reviewing all the evidence in the record, concluded that the Plaintiffs failed to prove that any

incidental burden imposed on interstate commerce would “clearly exceed” the purported local benefits the ordinance sought to achieve. ER 26-27.

Again, the District Court applied the correct legal standards and carefully reviewed the proffered evidence, and this Court should affirm.

B. The Plaintiffs Have No Likelihood of Success Based on the Washington Constitution’s Privileges and Immunities Clause

The Washington Supreme Court has construed Article I, section 12 of the Washington Constitution¹ to provide more protection than the federal Equal Protection Clause in certain circumstances. *Grant Cnty. Fire Prot. Dist. No. 5 v. City of Moses Lake (Grant Cnty I)*, 145 Wash. 2d 702, 731, 42 P.3d 394 (2002) (“[A]rticle I, section 12 of the Washington State Constitution provides greater protection than the equal protection clause of the United States Constitution when the threat is not of majoritarian tyranny but of a special benefit to a minority and when the issue concerns favoritism rather than discrimination.”). This broader protection applies, however, “only where a law implicates a ‘privilege’ or ‘immunity’ as defined in our early cases

¹ Article I, section 12 of the Washington Constitution provides:

No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens or corporations.

distinguishing the “‘fundamental rights’” of state citizenship.” *See Schroeder v. Weighall*, 179 Wash. 2d 566, 572, 316 P.3d 482 (2014) (quoting *Grant Cnty. Fire Prot. Dist. No. 5 v. City of Moses Lake (Grant Cnty II)*, 150 Wash. 2d 791, 812-13, 83 P.3d 419 (2004) (quoting *State v. Vance*, 29 Wash. 435, 458, 70 P. 34 (1902))).

Legislation is subject “to a two-part test under this ‘privileges’ prong of article I, section 12 analysis.” *Schroeder*, 179 Wash. 2d at 572-73.

First, we ask whether a challenged law grants a ‘privilege’ or ‘immunity’ for purposes of our state constitution. *Grant County II*, 150 Wash. 2d at 812, 83 P.3d 419. If the answer is yes, then we ask whether there is a ‘reasonable ground’ for granting that privilege or immunity. *Grant I*, 145 Wash. 2d at 731, 42 P.3d 394.

Id. Plaintiffs’ claim fails both prongs of this test.

Plaintiffs claim that a slower phase-in schedule is a privilege based on the assumption that any aspect of operating a business is a privilege. AB at 54. They misread Washington case law and ignore the Washington Supreme Court’s more recent holdings. “[N]ot every legislative classification constitutes a ‘privilege’ within the meaning of article I, section 12, but only those where it is, ‘in its very nature, such a fundamental right of a citizen that it may be said to come within the prohibition of the constitution, or to have been had in mind by the framers of that organic law.’” *Ockletree v. Franciscan Health Sys.*, 179

Wash. 2d 769, 778, 317 P.3d 1009 (2014). Article I, section 12 cannot be used to “second-guess the distinctions” in nearly every statute because “a privilege in this context *is limited to those fundamental rights of citizenship.*” *Ockletree*, 179 Wash. 2d at 779 (emphasis added).

In *American Legion Post 149 v. Washington State Department of Health*, 164 Wash. 2d 570, 192 P.3d 306 (2008), the court held that a person’s interest in operating a business is *not* a bootstrap for claiming a “privilege” is affected by every regulation of business. Specifically, the case held that a business’s ability to allow smoking on its premises did not amount to a “privilege” protected by Article I, section 12 of the Washington Constitution. *Id.* at 607-08. In reaching this holding, the court clarified that the very case relied upon by Plaintiffs, *Ralph v. City of Wenatchee*, 34 Wash. 2d 638, 209 P.2d 270 (1949), involved a “privilege” only because the ordinance there effectively prohibited nonresidents from engaging in the photography business. *Id.* That is simply not the case with Seattle’s ordinance. There is no “privilege” involved because the law does not prohibit franchise businesses and there is no fundamental right to have seven years to phase-in a new minimum wage law.

Second, even if having some time to phase-in a new minimum wage law were a fundamental right of state citizenship, the City’s phase-in schedule is

constitutional because reasonable grounds distinguish the Plaintiffs from other businesses. The reasonable grounds prong of Article I, section 12 examines the relationship between the distinction and the purposes of the law to avoid irrational favoritism. *Am. Legion Post 149*, 164 Wash. 2d at 607-08. Distinctions must rest on “real and substantial differences bearing a natural, reasonable, and just relation to the subject matter of the act.” *Ockletree*, 179 Wash. 2d at 783. The longer phase-in time period for small businesses reflects the unique circumstances and challenges faced by small businesses. But the City acting as a legislative entity reasonably found that a business with the contractual benefits of a franchise model will be better able to handle the normal phase-in period for the new minimum wage. Dkt. 92, page 31. Distinguishing businesses with contractual franchise rights is a reasonable, objective, and factual distinction that is related to the purpose of the two phase-in periods, and the distinction does not irrationally favor one group of Washington businesses over another.

In light of these established principles of Washington constitutional law, this Court should hold that Plaintiffs do not have a likelihood of success with regard to their claim under the state privileges and immunities clause.

IV. CONCLUSION

This Court should affirm the District Court.

RESPECTFULLY SUBMITTED this 22nd day of May 2015.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify the following:

This brief complies with the page limitations of Fed. R. App. P. 29(d) because it contains no more than one-half the maximum length authorized by this Court's rules for a party's principal brief, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of May, 2015, a true and correct copy of the foregoing was filed with the Clerk of the United States Court of Appeals for the Ninth Circuit via the Court's CM/ECF system, which will send notice of such filing to all counsel who are registered CM/ECF users.

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