No. ______

In the
Supreme Court of the United States

INTERNATIONAL FRANCHISE ASSOCIATION, INC.;
CHARLES STEMPLER; KATHERINE LYONS;
MARK LYONS; MICHAEL PARK; AND RONALD OH,
Petitioners,

v.

CITY OF SEATTLE, a Municipal Corporation; AND
FRED PODESTA, Director of the Department of
Finance and Administrative Services,
Respondents.

**On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The City of Seattle enacted an ordinance that will increase the minimum wage to $15 per hour. Seattle recognized that the ordinance imposes particularly steep costs on small businesses and so gave almost all small businesses seven years to phase in the increased wage, while businesses with over 500 employees must phase in the increase over just three years. The only small businesses that must comply with the accelerated schedule are those with ties to an interstate franchise network that collectively employs more than 500 employees throughout the country. The costs for a small business that associates with an interstate franchise network are high: In 2017, for example, a small franchisee with just five employees will need to pay its employees $15 an hour (the same rate that will apply to Boeing), while the wholly-local business with five employees will need to pay just $11 an hour. That amounts to a $160 per week, per employee penalty for associating with an interstate franchise network. Seattle recognized the substantial impact this discriminatory wage law would have on small franchise businesses, but lawmakers forged ahead in the belief that such businesses were "economically extractive, civically corrosive and culturally dilutive" and that they could seek relief from "corporate headquarters."

The question presented is:

Whether a state or local law that discriminates against certain in-state businesses based solely on their ties to interstate commerce discriminates against interstate commerce.

PARTIES TO THE PROCEEDING

Petitioners are the International Franchise Association, Inc., Charles Stempler, Katherine Lyons, Mark Lyons, Michael Park, and Ronald Oh. They were Plaintiffs below.

Respondents are the City of Seattle and Fred Podesta who was sued in his official capacity as Director of the Department of Finance and Administrative Services. They were Defendants below.

CORPORATE DISCLOSURE STATEMENT

The International Franchise Association, Inc., has no parent corporation and has issued no stock to any publicly held corporation.

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Seattle's new minimum wage ordinance raised the minimum wage to $15 per hour. While there is a healthy policy debate about the proper level for the minimum wage, the legal issues and relief sought here focus only on the facially discriminatory aspects of the Seattle ordinance. Seattle recognized that the ordinance imposes a particularly steep cost on small businesses, so while large employers (those with more than 500 employees) have only three years to phase in the new minimum, small employers (those with 500 or fewer employees) are provided a seven-year phase-in period. But not all small businesses are treated the same or get the benefit of the delayed implementation schedule. Instead, small businesses associated with franchise networks are deemed to be "large employers" if all of the separately owned businesses operating under the franchisor's brand or trademark across the country collectively employ more than 500 employees. The effect on small franchisees is dramatic: a small sandwich shop with a handful of employees will need to pay its employees $11 an hour in 2017 if it stays independent, but $15 an hour if it signs a franchise agreement. That amounts to a $160 per week per employee. The effect on interstate commerce is undeniable: Each of the 623 franchise businesses operating in Seattle is associated with an interstate franchise network, as 600 have out-of-state franchisors and the other 23 are affiliated with out-of-state franchisees. Thus, in clear violation of the Commerce Clause, Seattle has intentionally imposed a discriminatory burden on certain businesses based solely on their ties to interstate commerce.

The Ninth Circuit recognized that Seattle's ordinance discriminates against certain small businesses based solely on their "out-of-state relationships." App.21. And the Ninth Circuit agreed that the city's purpose was to place a disparate burden on these businesses precisely because of their ties to interstate franchise networks. But rather than hold that the ordinance plainly discriminates against interstate activity in both purpose and effect, the Ninth Circuit instead upheld the law. It found that the ordinance had no discriminatory effect on interstate commerce because it burdened only "in-state franchisees …, not the wheels of interstate commerce." App.21. This mistaken conclusion ignores nearly 200 years of this Court's precedent dating back to the invalidation of a discriminatory tax on importers, not to mention basic economics. It has long been settled that, "the imposition of a differential burden on any part of the stream of commerce … is invalid" because "a burden placed at any point will result in a disadvantage to" interstate commerce. *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 202 (1994) (citing *Brown v. Maryland,* 25 U.S. 419, 444, 448 (1827)).

The Ninth Circuit's ruling on discriminatory purpose was also irreconcilable with this Court's precedents. The Court of Appeals agreed that the city intended to place a special burden on franchisees based on their "out-of-state relationships." That is the definition of intentional discrimination and should have ended the court's inquiry. But the Ninth Circuit went on to hold that the ordinance did not flunk the purpose prong because the city had no "intent to harm franchises," App.15, but merely targeted them because of "their relative ability to accommodate increased costs." App.11. But purposefully targeting a business with ties to interstate commerce because of the perception that those interstate ties will enable the business to shoulder the discriminatory burden remains purposeful discrimination. This Court has long recognized that if a law intentionally discriminates against interstate commerce, the second-order purposes underlying the discrimination do not wash away that discriminatory intent. *See Bacchus Imps., Ltd. v. Dias*, 468 U.S. 263, 273 (1984). In other words, a discriminatory tax on those with ties to interstate commerce is unconstitutional without regard to whether the government expects the companies to pay the tax or break the ties.

The Ninth Circuit's departure from this Court's teaching and the urgent need for review are underscored by the obvious and acknowledged split the Ninth Circuit has created with the Eleventh Circuit. Seattle is not the first jurisdiction to discriminate in favor of purely local business and against formula or franchise businesses. The Eleventh Circuit correctly recognized that similar discrimination against "formula" restaurants and stores violates the Commerce Clause because it "disproportionately targets restaurants operating in interstate commerce." *Cachia v. Islamorada*, 542 F.3d 839, 843 (11th Cir. 2008); *see also Island Silver & Spice, Inc. v. Islamorada*, 542 F.3d 844 (11th Cir. 2008). With candor (and understatement), the Ninth Circuit acknowledged that its contrary view was "not clearly reconcilable" with the Eleventh Circuit's decisions, App.17 n.7, and was also "somewhat difficult to reconcile" with this Court's Commerce Clause holdings, App.16.

That candid acknowledgement underscores the need for this Court's review. Franchise businesses are critical to interstate commerce, because they allow small businesses to thrive and offer consumers familiar brands and trademarks as they cross state lines. Thus, discrimination against franchisees is discrimination against interstate commerce, and the facts of this case make clear that the discrimination here was no accident. "Buy local" is a fine philosophy for an individual consumer, but when it becomes the official policy of a City and produces a $160 per employee per week tax on small employers who affiliate with interstate franchise networks, then a constitutional line has been crossed. The Eleventh Circuit and this Court's cases recognize as much. The Ninth Circuit's failure to follow suit demands this Court's review.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Ninth Circuit is reported at 803 F.3d 389 and reproduced at App.1-34. The opinion of the U.S. District Court for the Western District of Washington is reported at 97 F. Supp. 3d 1256 and reproduced at App.35-91.

JURISDICTION

The Ninth Circuit issued its opinion on September 25, 2015. App.1. On December 15, 2015, this Court extended the time to file this petition for a writ of certiorari to January 25, 2016. The jurisdiction of the Ninth Circuit was based on 28

U.S.C. §1292(a)(1). App.5. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The text of the Commerce Clause, U.S Const. art. I, §8, cl. 3, and Seattle's minimum wage ordinance are reproduced at App.92-117.

STATEMENT OF THE CASE

A. The Franchise Business Model

The franchise business model refers to the relationship between franchisors and franchisees. Franchisors license their brands and methods of doing business to franchisees. As licensees, franchisees generally pay a continuing licensing fee or royalties for the use of the franchisor's brand and intellectual property as well as certain services. ER141-42.

Even though franchisors share a common brand with their franchisees, franchisors are not the owners of their franchisees' independent businesses and do not necessarily share in their profits or losses. Franchisors and franchisees are separate business entities. A franchisee is not the employee of the franchisor. And the employees of a franchisee are not employees of the franchisor. ER142.

Each franchisee is an independently owned and operated business. Franchisees manage and operate all of the day-to-day aspects of their business, including making their own human resource decisions on which and how many workers to hire, the benefits they offer, and how much each of them can afford to pay their staff—just like any other small, independent business owner. Franchisees independently invest in and pay the operating costs of their businesses—as would any other small business owner—including but not limited to rent, wages, taxes, and debt. No other party shares in these small business obligations. ER141.

Of the 623 franchises operating in Seattle, 600—or 96.3%—have out-of-state franchisors. ER19. And all of the 23 franchisees with in-state franchisors are affiliated with franchisees in other states through the operation of their franchise networks. *Id.* Thus, each of the city's franchise businesses has "out-of-state relationships." App.21.

B. Legislative History of the Seattle Minimum Wage Ordinance

In December 2013, then Mayor-elect Edward Murray formed an advisory committee to advise him on raising the minimum wage in Seattle. This committee was known as the Income Inequality Advisory Committee ("IIAC"). The IIAC was co-chaired by David Rolf, the president of local 775 of the Service Employees International Union ("SEIU").

In early 2014, the IIAC made certain recommendations to the Mayor. According to the recitals in the ordinance, the IIAC recommended a $15 per hour minimum wage with a significantly slower phase-in for small employers compared to large employers. *See* Seattle City Ordinance 124490, §1(9) ("Ordinance") (App.93-117). The IIAC determined that "a benchmark of 500 employees is appropriate as distinguishing between larger and smaller employers in recognition that smaller businesses and not-for-profits would face particular challenges in implementing a higher minimum wage." *Id*. The IIAC as a body did not, however, make any recommendation that small franchisees be treated as large employers or otherwise subject to discriminatory treatment.

The discrimination against small franchisees was introduced in the bill that the Mayor proposed to the Seattle City Council. While the IIAC as a body never recommended such discrimination, certain members of the IIAC knew why the Mayor's bill introduced this discrimination. Indeed, one member, Nick Hanauer, appeared to have greater knowledge than any city official about the origins of the discriminatory provision and provided the only record evidence that sheds light into how the discrimination was introduced into the ordinance. On May 3, 2014, for example, he sent an email to Tim Burgess, the President of the Seattle City Council, addressing Burgess's apparent concern that the ordinance would harm small business owners associated with franchises. Hanauer explained that this was exactly the point. The Mayor's bill treated small franchise businesses as large businesses in order to protect local businesses from competition from national businesses:

> I am well aware that the compromise we fashioned classified most franchise owners as **Large**. This was our intent and I believe that there are very good reasons for this. … The truth is that franchises like subway and McDonalds really are not very good for our local economy. They are economically extractive, civically corrosive and culturally

> dilutive. … To be clear, the net amount of food people in Seattle will consume will not change if we have fewer franchises. What will change is what they consume and from whom. A city dominated by independent, locally owned, unique sandwich and hamburger restaurants will be more economically, civically and culturally rich than one dominated by extractive national chains.

ER67-68. Hanauer stated that these local benefits outweighed any "trade-offs … regarding franchise owners." ER67. Further, the ordinance was designed not merely to prop up "independent, locally owned, unique" business, ER68, it was also part of a nationwide crusade against the interstate franchise model. As Hanauer explained, "[o]ur new ordinance may force [franchisors] to change their practices and business models, something which I think is a great contribution to our nations economy and democracy." ER67.

Robert Feldstein and Brian Surratt are members of the Mayor's staff who were responsible for the IIAC and minimum wage matters. On May 5, 2014, they discussed Mr. Hanauer's email. They did not contest his premises or explanation nor suggest he was ill-informed. Rather, in an email to Mr. Surratt, Mr. Feldstein recognized that it was "likely the individual owners will be hurt" by the ordinance and "may well face personal bankruptcy." ER70. This did not bother the Mayor's staffer, who stated that "[i]f we lose franchises in Seattle, I won't be sad—for all the reasons [Hanauer said]." ER70. But "channeling th[e] argument" for franchise owners, he asked "are there ways for the cost to be born not on those franchise owners? Are they simply going to be a casualty of this transition?" ER70. The answer to that last question turned out to be yes.

On May 15, 2014, the Mayor publicly unveiled his minimum wage bill, complete with its discrimination against small franchisees, and formally transmitted it to the City Council. ER65. On May 30, 2014, the *Seattle Times* published an editorial urging the City Council to "strike the definition of franchises" from the legislation. ER92. The *Times* observed that "these businesses are not arms of corporations. Franchises have their own tax ID numbers and payroll—they are independent business units separate from the franchiser." ER91.

Hanauer responded to the *Seattle Times* editorial by sending an email to all nine members of the City Council with a copy to IIAC co-chair Rolf and Mayor's office staffers Feldstein and Surratt. Mr. Hanauer wrote: "The hard truth is, that these national franchises like McDonalds, or Burger King or KFC, or Subway, simply are not beneficial to our city. … [O]ur city has no obligation to continue policies that so obviously advantage them and disadvantage the local businesses that benefit our city and it's [*sic*] citizens more." ER94-95. City Council President Burgess responded by thanking Mr. Hanauer for his "direct and pithy comments" and his "leadership on this important issue." ER51.

Kshama Sawant is a Member of the City Council and was the leading force on the Council for a $15 per hour minimum wage. At a public hearing on May

22, 2014, she supported the provisions of the bill treating small franchisees as large businesses. She stated: "[I]n order to be a franchisee, you have to be very, very wealthy. Just a small business person of color from Rainier Beach is not going to be able to afford to open a franchise outlet." ER99. On May 23, 2014, during the Council's consideration of the bill, she wrote on her official website that "It's clear that the current franchise model is rigged against workers." ER101.

In June 2014, the City Council passed and the Mayor signed the minimum wage bill.

C. The Ordinance's Arbitrary and Irrational Discrimination Against Small Franchise Businesses

Seattle's minimum wage ordinance expressly discriminates against small franchise businesses. The ordinance phases in a $15 per hour minimum wage over time according to various schedules. The differential minimum wage hikes began on April 1, 2015. The ordinance recognizes the special challenges faced by small employers by phasing in the minimum wage increases faster for "large" employers than for "small" employers. *See* Ordinance §1(9) ("a benchmark of 500 employees is appropriate in distinguishing between larger and smaller employers in recognition that smaller businesses and not-for-profits would face particular challenges in implementing a higher minimum wage"). But after recognizing the unique challenges of small employers, the ordinance then by fiat treats small franchise businesses as if they were large employers.

The ordinance defines a "Schedule 1 Employer" as "all employers that employ more than 500 employees in the United States, regardless of where those employees are employed in the United States." §2(T). Significantly, the definition of a "Schedule 1 Employer" also includes "all franchisees associated with a franchisor or network of franchises with franchisees that employ more than 500 employees in aggregate in the United States." *Id.*

The ordinance defines a "Schedule 2 Employer" as "all employers that employ 500 or fewer employees regardless of where those employees are employed in the United States." §2(U). The ordinance also states that "Schedule 2 employers do not include franchisees associated with a franchisor or a network of franchises with franchisees that employ more than 500 employees in aggregate in the United States." *Id.* Thus, the ordinance makes doubly sure that a small, independently owned and operated franchisee, no matter how few workers it actually employs, is deemed a "Schedule 1"—*i.e.*, large—employer.

Although the ordinance subjects franchisees to a categorical rule that all employees, including those of other franchisees in other States, will be aggregated, the ordinance provides a general standard to govern when the employees of separate non-franchisee businesses will be aggregated. Under the ordinance, "separate entities" will be considered a "single employer" if they are an "integrated enterprise." §3(B). But the ordinance expressly excludes franchise businesses from these provisions.

The ordinance provides that for "purposes of determining whether a non-franchisee employer is a

Schedule 1 employer or a Schedule 2 employer, separate entities that form an integrated enterprise shall be considered a single employer …." *Id.* "Separate entities will be considered an integrated enterprise and a single employer under this Chapter where a separate entity controls the operation of another entity." *Id.* The ordinance requires consideration of the "[d]egree of interrelation between the operations of multiple entities," "[d]egree to which the entities share common management," "[c]entralized control of labor relations," and "[d]egree of common ownership or financial control over the entities." *Id.* The ordinance also adopts a presumption that "separate legal entities, which may share some degree of interrelated operations and common management with one another, shall be considered separate employers for purposes" of the integrated enterprise determination so long as "(1) the separate legal entities operate substantially in separate physical locations from one another, and (2) each separate legal entity has partially different ultimate ownership." *Id.* The ordinance does not, however, apply the integrated enterprise test or the presumption of separateness to franchise businesses. The test and presumption apply only to "a non-franchise employer." *Id.* Thus the ordinance makes triply sure that even the smallest and most independent franchise business will be treated as a large, Schedule 1 employer.

The ordinance defines a "Franchise" as a written agreement by which:

> 1. A person is granted the right to engage in the business of offering, selling, or distributing goods or services under a marketing plan prescribed or suggested in substantial part by the grantor or its affiliate;
>
> 2. The operation of the business is substantially associated with a trademark, service mark, trade name, advertising, or other commercial symbol; designating, owned by, or licensed by the grantor or its affiliate; and
>
> 3. The person pays, agrees to pay, or is required to pay, directly or indirectly, a franchise fee.

§2(I). The ordinance defines a "Franchisee" as "a person to whom a franchise is offered or granted," §2(J), and a "Franchisor" as "a person who grants a franchise to another person," §2(K).

The ordinance phases in the $15 per hour minimum wage much faster for franchisees and other Schedule 1 employers than for Schedule 2 employers. §§4(A), 5(A). On April 1, 2015, Schedule 1 employers were forced to pay at least $11 per hour. §4(A). On January 1, 2016, the minimum wage for Schedule 1 employers rises to $13 per hour. *Id.* On January 1, 2017, the $15 per hour minimum wage takes effect for Schedule 1 employers. *Id.* On January 1, 2018, and every January 1 thereafter the minimum wage for Schedule 1 employers "increase[s] annually on a percentage basis to reflect the rate of inflation." *Id.*

In contrast to the treatment of franchisees and other Schedule 1 employers, the minimum wage increases for Schedule 2 employers are phased in much more slowly on the following schedule:

Year	**Schedule 1**	**Schedule 2**	Δ
2015	$11	$10	10%
2016	$13	$10.50	24%
2017	$15	$11	36%
2018	$15.26[1]	$11.50	33%
2019	$15.52	$12	29%
2020	$15.78	$13.50	17%
2021	$16.05	$15	7%
2022	$16.32	$15.75	4%
2023	$16.60	$16.50	1%
2024	$16.88	$16.88	0%

§5(A). In the above-listed years, Schedule 2 employees "shall pay each employee an hourly minimum wage that is the lower of (a) the applicable hourly minimum wage for Schedule 1 employers or (b) the hourly minimum wage shown in the [above] schedule." *Id.* As of January 1, 2025, the minimum wage for Schedule 2 employers "shall equal the hourly minimum wage applicable to Schedule 1 employers." *Id.* Thus, franchisees are not guaranteed equal treatment until 2025, nearly a decade from now.

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[1] Assuming 1.7% inflation rate based on the average inflation rate for the last five years. *See* U.S. Bureau of Labor Statistics, Consumer Price Index Report, Table 24, http://1.usa.gov/1SCmjbM.

Under the foregoing provisions of the ordinance, small franchisees will pay a higher minimum wage than similarly situated non-franchise businesses for the six years from April 1, 2015, to January 1, 2021. §4(A), §5(A). Franchisees may also pay a higher minimum wage for an additional four years—from the start of 2021 to the end of 2024—depending on the inflation rate. *Id.* Only in 2025 will the discrimination against small franchise businesses have to stop. §5(A). Over this six to 10 year period, the ordinance will put small franchisees at a competitive disadvantage with greater labor costs relative to similarly situated Schedule 2 employers.

D. Additional Public Comments of City Officials

On June 2, 2014, after the enactment of the ordinance, the International Franchise Association ("IFA") publicly announced its intention to challenge the constitutionality of those provisions of the ordinance that discriminate against small franchise businesses. ER113. That same day, Councilmember Sawant responded in a tweet from her official Twitter account that small franchisees should blame their franchisors, not the city government, for the hardship the ordinance imposes: "Franchise owners: enough with the blame game! Organize, go to CorpHQ & renegotiate your rents." ER116.

When the action was filed, Mayor Murray responded with a public statement justifying the ordinance's discrimination against franchises in expressly protectionist terms. He pointed to a franchisee's relationship with "a corporate national entity" as the reason for favoring "local" businesses.

He also stated that "[t]here is a problem in the franchise business model." Echoing the tweet of Councilmember Sawant, the Mayor said that the "economic strain" of the faster phase-in of the minimum wage for franchises "is a discussion franchise owners should be having with their corporate parents." ER118.

E. Proceedings Below

On June 11, 2014, the IFA and several Seattle small business owners filed suit in the district court challenging the validity of the ordinance. ER156. IFA is a membership organization of franchisors, franchisees, and suppliers. ER137, ER140. The Individual Plaintiffs include (1) Charles Stempler, the owner of a small franchise printing and marketing services business called AlphaGraphics, which has two business centers in Seattle that employ 69 employees in total, ER126; (2) Katherine Lyons and Mark Lyons, who own and operate BrightStar Care of North Seattle, a small franchise business that employs 22 people and provides skilled and unskilled private duty home care and home services in Seattle and surrounding areas, ER146; (3) Ronald Oh, the general manager of a Holiday Inn Express in Seattle, which employs 28 people, ER152; and (4) Michael Park, the general manager of a Comfort Inn hotel in Seattle, which employs 19 people, ER160. While each of the Individual Plaintiffs and some IFA members own and operate small franchise businesses in Seattle that employ far fewer than 500 employees, the ordinance deems all of their small businesses to be "large" Schedule 1 employers merely because they are associated with interstate franchise networks that collectively employ more than 500 employees.

Plaintiffs explained, in relevant part, that singling out Seattle franchises for adverse treatment ran afoul of the Commerce Clause and threatened their businesses. On August 5, 2014, Plaintiffs moved for a limited injunction that—if granted—would allow the ordinance to take effect but ensure that small franchise businesses were subject to the same phase-in schedule as all other small businesses in Seattle. The District Court denied Plaintiffs' motion. App.38.

The Court of Appeals affirmed. The Ninth Circuit acknowledged that 96.3 percent of Seattle franchisees were affiliated with out-of-state franchisors and that the ordinance's "primary or perhaps exclusive effect is to harm … franchisees" while benefitting their local counterparts. App.20. And the court assumed for the purpose of its decision that franchisees and their non-franchise competitors were similarly situated. App.20 n.8. Even so, the court held that the ordinance's facial discrimination against small franchisees did not show that the ordinance had any "discriminatory effects on out-of-state firms" or interstate commerce. App.21. The court reasoned that IFA established only that the ordinance harmed "in-state franchisees" and that evidence of their "out-of-state relationships" did not establish that franchisors or interstate commerce would be affected. App.21. Because "[t]he ordinance's effects appear to be highly local," only "in-state franchisees are burdened, not the wheels of interstate commerce." App.21.

Despite recognizing this burden on franchisees, the Ninth Circuit further held that even if "a disparate impact on national chains discriminates against interstate commerce," there was insufficient evidence that "interstate franchise networks will face higher costs or reduce their investment and operations in Seattle … or that franchisors will suffer adverse effects." App.22.

The Ninth Circuit also held that the IFA failed to establish a discriminatory purpose. The court accepted that the text of the ordinance "does not provide a rationale for the franchise classification" and that city officials and IIAC members "questioned the merits of the franchise business model." App.10. The Ninth Circuit nonetheless held that the city's overall purpose for raising wages was to "improve public health and welfare and reduce economic inequality," and "the ordinance's context and structure" "support[] an inference" that Seattle intended to place a disparate burden on franchisees because of their "relative ability to accommodate increased costs." App.10-11. The court concluded that the evidence of anti-franchise views from IIAC members and city officials could not "overcome the evidence of the provision's permissible purpose." App.15. Thus, the court held that the ordinance was not motivated by a discriminatory purpose because, while the city intended to impose higher costs on franchisees than on their purely local competitors, it did so only because it thought they could better bear the heavier burden, not because Seattle "inten[ded] to harm franchises." App.15.

The Ninth Circuit recognized that its decision was "somewhat difficult to reconcile" with "decisions interpreting the dormant Commerce Clause." App.16. The court also conceded that "the measure arguably imposes costs on a class of businesses said to be highly correlated with out-of-state firms or interstate commerce," but stated that it "lack[ed] Supreme Court authority assessing whether a regulation affecting franchises ipso facto has the effect of discriminating against interstate commerce." App.16.

The Ninth Circuit also acknowledged that it was not the first appellate court to "consider[] whether measures that affect national chains violate the dormant Commerce Clause" and that those that had considered such challenges were in conflict. App.17 n.7. The Ninth Circuit noted that the Eleventh Circuit had twice struck down laws that discriminated against franchises. *See* App.17 n.7 (citing *Cachia*, 542 F.3d at 843 and *Island Silver*, 542 F.3d at 846). The Ninth Circuit held that the Eleventh Circuit decisions were not persuasive because, while Seattle's ordinance imposed burdens on franchisees, it did not go as far as the laws in *Cachia* and *Island Silver*, which fully "prohibit[ed] chain retailers and restaurants." App.18 n.7.

After holding that Plaintiffs were unlikely to succeed on the merits, the Ninth Circuit addressed the remaining preliminary injunction factors. The court agreed that the franchisees had demonstrated irreparable harm because the ordinance put them "at a competitive disadvantage," App.31, and that the balance of hardships favored the franchisees, as "the

City did not make a persuasive showing that it would experience hardships from the issuance of a preliminary injunction," App.33. The court, however, found that the public interest disfavored an injunction, rejecting Plaintiffs' argument that it would not be in the public's interest to allow Seattle to violate the Commerce Clause. App.33.

REASONS FOR GRANTING THE PETITION

For nearly two centuries, this Court has held that the Commerce Clause forbids local governments from discriminating against interstate commerce, including in-state businesses tied to interstate commerce, in favor of purely local interests. Yet Seattle's recently enacted ordinance imposes significantly higher costs on certain businesses based solely on whether they have ties with interstate franchise networks. The Ninth Circuit agreed that the ordinance intentionally imposed a disparate burden on these businesses based solely on their "out-of-state relationships." App.21. The court thus should have held that the law violated the Commerce Clause in both purpose and effect.

Instead, the Ninth Circuit concluded that while Seattle's ordinance clearly harmed franchisees because of their ties to interstate commerce, only "in-state franchisees are burdened, not the wheels of interstate commerce." App.21. But this Court has long affirmed the commonsense point that a disparate burden on any portion of the stream of commerce has an impermissible discriminatory effect on interstate commerce. For that reason, the Marshall Court struck down a discriminatory tax on "local" importers as impermissible discrimination against interstate commerce. And ever since, the Court has invalidated numerous state and local efforts to discriminate against interstate commerce by imposing differential burdens on those within their limited reach based on their ties to interstate commerce.

The Ninth Circuit's holding regarding the ordinance's impermissible purpose is just as incompatible with the Commerce Clause and this Court's cases. Though the Ninth Circuit acknowledged that the ordinance targeted businesses based on their ties to interstate commerce, it held that the city did not intend to discriminate against these businesses because it did not "inten[d] to harm" them. App.15. But that conclusion is both contrary to precedent and underscores that the law impermissibly burdens interstate commerce. A law that intentionally targets in-state businesses tied to interstate networks and imposes higher burdens on them is impermissible whether or not they can actually shoulder the higher burden. If the law forces the in-state franchisees into bankruptcy or to break their ties to interstate commerce, it is plainly protectionist. And if the burdens are in fact passed on to out-of-state business networks, then the negative effects on the "wheels of interstate commerce" are undeniable. But either way the purposeful targeting of in-state entities with ties to interstate commerce for discriminatory treatment is impermissible.

By deviating from this Court's clear precedent, the Ninth Circuit has created a square conflict with the Eleventh Circuit, which has correctly recognized that discrimination against formula or franchise businesses is discrimination against interstate commerce. The Ninth Circuit acknowledged the split, and its tepid effort to distinguish the cases is unavailing. The differences between imposing a $160 per week, per employee penalty on franchise businesses, limiting the size of formula stores and barring formula restaurants altogether are at most differences of degree, not kind. This Court has never required penalties on interstate commerce to be prohibitory in order to be impermissible. Nor is the damage of this mistaken decision limited to the Ninth Circuit. Other municipalities are looking to Seattle's law as a model, and if its model for discriminating against interstate commerce is approved, they will follow suit. And even in the interim, because of the interconnected nature of interstate commerce, the Ninth Circuit's decision threatens to expose businesses nationwide to discriminatory laws passed anywhere in the Ninth Circuit. Nor can the importance of the issue here be doubted. Franchise businesses are central to facilitating interstate commerce, especially in the increasingly important service sector. The franchise model not only allows small businesses to get started, it allows interstate consumers to see familiar trademarks and products when they cross state lines. Discrimination against franchise businesses is discrimination against interstate commerce. The Ninth Circuit's decision to allow such discrimination, in conflict with the Eleventh Circuit and this Court's precedents, plainly merits this Court's review.

I. The Ninth Circuit's Decision Cannot Be Reconciled With This Court's Clear Precedent.

The Ninth Circuit's decision that Seattle's ordinance did not discriminate against interstate commerce in either purpose or effect flies in the face of this Court's precedent. As this Court has long recognized, the Commerce Clause "denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of Or.*, 511 U.S. 93, 98 (1994). The test for discrimination is clear: "'[D]iscrimination' simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Id.* at 99.

"[L]aws that discriminate against interstate commerce face a virtually *per se* rule of invalidity," *Granholm v. Heald*, 544 U.S. 460, 476 (2005) (quotation marks omitted). That is so whether the law is facially discriminatory, discriminatory in effect, or discriminatory in purpose. *See Chem. Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 344 n.6 (1992) (noting three types of discrimination); *Bacchus*, 468 U.S. at 268-70 (same); *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 352-53 (1977) (finding evidence of discriminatory purpose "[d]espite the statute's facial neutrality"). Such laws face the "strictest scrutiny," *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979), and can only be sustained in the rare circumstance where a state or municipality can carry the "extremely difficult burden" of demonstrating that its discriminatory law "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 581-82 (1997) (quotation marks omitted).

A. Discrimination Against In-State Entities Based on Their Ties to Interstate Commerce Is Discrimination Against Interstate Commerce.

Seattle's ordinance unquestionably discriminates against interstate commerce. Unlike many laws challenged under the Commerce Clause, Seattle's ordinance facially discriminates. It does not impose a facially neutral requirement, such as railroads may have no more than ten cars or all apples must be packaged in a particular way. Rather it expressly treats certain businesses more favorably than others when it comes to the most important input for a small service business, namely wages. If Seattle had simply imposed a discriminatory wage requirement on companies with "out-of-state relationships" or those engaged in interstate commerce, it would be the most straightforward Commerce Clause violation imaginable. But Seattle does not escape the reach of the Commerce Clause by expressly discriminating against "franchises," rather than "interstate business networks" or "businesses engaged in interstate commerce." If the effects prong adds anything to the prohibition on facial discrimination against interstate commerce, it surely reaches facial discrimination against "franchise" businesses that overwhelming are interstate business networks.

This Court has noted the close nexus between franchise agreements and interstate commerce and "the manifold benefits that would derive from" the individual franchisee's "affiliation with a nationwide organization." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 480 (1985). That connection is undeniable in Seattle where of the 623 franchises in operation 600—or 96.3%—have out-of-state franchisors. ER19. And all of the 23 franchisees with in-state franchisors are affiliated with franchisees in other states through the operation of their franchise networks. *Id.* For these small businesses, the penalty for affiliating with an interstate franchise network is severe. Today small franchisees must pay their employees $2.50 more an hour than their purely local competitors. Starting January 1, 2017, the difference will be $4 an hour, what amounts to a $160 per week (or $8320 per year) penalty for each employee just for affiliating with a franchise network.

This differential minimum wage requirement is tantamount to a tariff on interstate business activity and thus is clearly proscribed by the Commerce Clause. The law would be the same in substance from the view of the franchisee and the franchise network if Seattle imposed a $160 per week, per employee tax on franchise businesses. But imposing such a tax based on its affiliations with out-of-state entities and interstate business networks is the "paradigmatic example of a law discriminating against interstate commerce." *W. Lynn*, 512 U.S. at 193. And "tariffs have long been recognized as violative of the Commerce Clause," as have laws that have "the same effect as a tariff." *Id.* at 193-94 (citing cases).

That the ordinance disadvantages franchisees through a minimum wage and not a direct tax is of no moment. "Commerce Clause jurisprudence is not so rigid as to be controlled by the form by which a State erects barriers to commerce." *Id.* at 201. The Commerce Clause "forbids discrimination, whether forthright or ingenious." *Best & Co. v. Maxwell*, 311 U.S. 454, 455-56 (1940). Repackaging a tax on interstate commerce and business affiliations as an increased and accelerated minimum wage requirement cannot salvage it, especially given the centrality of wages as a necessary cost for small service-oriented businesses.

The Ninth Circuit did not dispute that the ordinance's "primary or perhaps exclusive effect is to harm … franchisees" while benefitting similarly situated, purely-local small businesses. App.20. And the court correctly acknowledged the harm caused by "a higher wage requirement relative to … nonfranchisees," agreeing with IFA that "the ordinance can be viewed as harming … franchisees" while benefitting competitors that lack similar "out-of-state relationships." App.20-21. The Ninth Circuit took a wrong turn, however, when it concluded that "[t]he ordinance's effects appear to be highly local" with only "in-state franchisees [being] burdened, not the wheels of interstate commerce." App.21. The court's reasoning conflicts with basic economic principles and this Court's longstanding precedent.

"For over 150 years," this Court's "cases have rightly concluded that the imposition of a differential burden on any part of the stream of commerce—from wholesaler to retailer to consumer—is invalid, because a burden placed at any point will result in a disadvantage to the out-of-state producer." *W. Lynn*, 512 U.S. at 202-03 (citing *Brown v. Maryland,* 25 U.S. 419, 444 (1827)). Chief Justice Marshall had little difficulty recognizing that a tax and license fee directed at "local" importers impermissibly burdened interstate commerce. *Brown*, 25 U.S. at 444. And more recently, this Court recognized that "[t]he idea that a discriminatory tax does not interfere with interstate commerce 'merely because the burden of the tax was borne by [entities]' in the taxing State was thoroughly repudiated in *Bacchus Imports, Ltd. v. Dias,* 468 U.S., at 272." *W. Lynn*, 512 U.S. at 203. The Ninth Circuit thus turned a blind eye to nearly two centuries of precedent when it gave Seattle's discriminatory ordinance a free pass on the grounds that it merely "harm[s] one type of in-state entity (franchisees) while benefitting another type of in-state entity (nonfranchisees)." App.20-21. A law imposing a discriminatory burden on in-state businesses based on their "out-of-state relationships" will necessarily have discriminatory effects outside the state. After all, "[t]he cost of a tariff is also borne primarily by local consumers, yet a tariff is the paradigmatic Commerce Clause violation." *W. Lynn*, 512 U.S. at 203.

The Court has repeatedly reaffirmed this obvious point. For example, in *Camps Newfound/Owatonna*, Maine granted a tax exemption to in-state summer camps that served primarily in-state campers. 520 U.S. at 568-69. The reality that the only entities benefitted or harmed by the discrimination were in-state summer camps hardly saved the law. "As a practical matter, the statute encourage[d] affected entities to limit their out-of-state clientele, and penalize[d] the principally nonresident customers of businesses catering to a primarily interstate market." *Id.* at 576. Under the Ninth Circuit's reasoning, the Maine law would have been upheld on the basis that it could be construed as merely "harming one type of in-state entity … while benefitting another type of in-state entity," App.20-21. But the *Camps* Court instead held that Maine's law "functionally serves as an export tariff that targets out-of-state consumers by taxing the businesses that principally serve them," 520 U.S. at 580-81. Seattle's ordinance is no different. Any franchisor seeking to sell its marketing services to a small business in Seattle now faces, in effect, a steep tariff, as the ordinance "encourages [small businesses] to limit their out-of-state" connections. *Id.* at 576. "[T]his sort of discrimination is at the very core of activities forbidden by the dormant Commerce Clause." *Id.* at 581.

Thus, only by ignoring well-settled precedent was the Ninth Circuit able to erroneously conclude that there were discriminatory effects on in-state franchisees but not interstate commerce. *See* App.21-22. Indeed, "'[i]t is too obvious for controversy, that [such burdens] interfere equally with the power to regulate commerce.'" *W. Lynn*, 512 U.S. at 203 (quoting *Brown*, 25 U.S. at 448). Any further evidence of discriminatory effects would have "go[ne] only to the extent" of the harm, and the Court has long held that it "'need not know how unequal the Tax is before concluding that it unconstitutionally discriminates.'" *Bacchus*, 468 U.S. at 269 (quoting

Maryland v. Louisiana, 451 U.S. 725, 760 (1981)). Rather, it is enough that Seattle's "scheme creates an incentive for [small businesses] to opt for intrastate rather than interstate economic activity." *Comptroller of Treasury of Md. v. Wynne*, 135 S. Ct. 1787, 1792 (2015). Thus, the Court should review the Ninth Circuit's decision and "reconcile" it with the Court's case law.

B. Targeting Businesses Based on Their Ties to Interstate Commerce Is Purposeful Discrimination Against Interstate Commerce Whether or Not They Are Better Able to Pay Because of Those Ties.

The ordinance's discriminatory impact on interstate commerce is no accident—the ordinance specifically targets small franchise businesses because of their ties to interstate commerce. The Ninth Circuit did not contest that the ordinance intended to place a disparate burden on franchisees based solely on their ties to interstate commerce. The court, however, concluded that the ordinance's purposeful discrimination was constitutionally permissible because Seattle had no "intent to harm franchises," App.15, but instead merely believed that these interstate ties improved franchisees' "relative ability to accommodate increased costs." App.11. But that analysis is wrong twice over. First, a discriminatory tax on businesses with ties to interstate commerce is no more constitutional if the government thinks those ties will allow the companies to pay the tax instead of breaking the ties. Second, to the extent the government believes the out-of-state ties will enable the local entity to pay higher wages, that utterly belies the Ninth Circuit's conclusion that the effect of the differential wage law is purely in-state and does not slow the "wheels of interstate commerce."

The Ninth Circuit cannot save a purposefully discriminatory law by concluding that the discrimination reflected a belief that businesses with out-of-state ties would be better able to shoulder the differential burden. Every protectionist local law stems from the belief that out-of-state businesses or in-state entities tied to interstate networks have advantages over purely-local businesses. Counterbalancing or taxing those perceived advantages is no "permissible purpose," App.15; it is textbook protectionism. "Preservation of local industry by protecting it from the rigors of interstate competition is the hallmark of the economic protectionism that the Commerce Clause prohibits." *W. Lynn*, 512 U.S. at 205. Equally important, Seattle's second-order purpose for its intentional discrimination does not make that discrimination any less discriminatory or any more constitutional. Thus, the Ninth Circuit's holding on discriminatory purpose is every bit as incompatible with this Court's precedents as its holding on discriminatory effects.

The Ninth Circuit went to great lengths to write off clear evidence of discriminatory purpose. For example, IIAC member Nick Hanauer explained to City Council President Burgess that some of the "very good reasons for" discriminating against franchisees included "fewer franchises"; creating "[a] city dominated by independent, locally owned" businesses rather than "than one dominated by extractive national chains"; and "forc[ing] [franchisors] to change their practices and business models," which would be "a great contribution to our nations economy and democracy." ER67-68. Despite the unmistakable thrust of these statements, the Ninth Circuit concluded that "they do not show that Hanauer intended to burden out-of-state firms or interfere with the wheels of interstate commerce." App.13. Short of declaring war on interstate commerce itself, it is difficult to see how Hanauer could have made his intent any clearer.

While Hanauer's comments provide the only record evidence of precisely why the discriminatory provision was added (the City has never presented evidence of a counter-narrative), the Mayor's own public statement on this very lawsuit justified his law's discrimination against franchises in protectionist terms. The Mayor cited a franchisee's relationship with "a corporate national entity" as the reason for treating it less favorably than a "local" business. Fully aware of the interstate consequences of the ordinance, the Mayor said that the "economic strain" from a faster phase-in of the minimum wage for franchises "is a discussion franchise owners should be having with their corporate parents." ER118. Councilmember Sawant likewise advised franchise owners in Seattle to "Organize, go to CorpHQ & renegotiate your rents." ER116. The Ninth Circuit acknowledged this evidence, but concluded that it did not "overcome the evidence of the provision's permissible purpose." App.15.

In identifying this "permissible purpose," the Ninth Circuit first acknowledged that the ordinance's text "does not provide a rationale for the franchisee classification." Nevertheless, the court "infer[red]" from "the ordinance's context and structure" that the permissible "purpose behind classifying franchisees as large employers is their relative ability to accommodate increased costs." App.11. Thus, the court held that while the city intended to place a special burden on franchisees because of their interstate ties, the city was not "motivated by an intent to harm franchises." App.15.

As noted, that analysis is doubly problematic. First, laws that intentionally put heavier burdens on those engaged in interstate commerce are unconstitutional whether the lawmakers think that the laws will force in-state businesses to break ties to interstate commerce or think that those ties will enable them to foot the bill. And even well-intentioned protectionist measures are unconstitutional. *See Bacchus*, 468 U.S. at 273. Second, to the extent that the Ninth Circuit thought that a five-employee sandwich shop with ties to interstate commerce could better shoulder a $15 wage than a purely-local sandwich shop with five employees, that is fundamentally incompatible with the lynchpin for its effect ruling—namely, that the law burdens only local businesses and not the "wheels of interstate commerce" itself. If franchise businesses have a better ability to pay this differential wage, it is only because they will get the help from corporate headquarters that the Mayor and others told them to seek. In short, the Ninth Circuit's purpose analysis is not only in conflict with this Court's precedents but is at war with the Ninth Circuit's theory for the absence of a discriminatory effect.

II. The Circuits Have Expressly Divided On Whether Discrimination Against Interstate Franchise Networks Is Discrimination Against Interstate Commerce.

The Ninth Circuit was not the first appellate court to confront a law that expressly discriminated against franchise or formula establishments, and the Ninth Circuit's decision here creates an express and acknowledged split with the Eleventh Circuit. The Eleventh Circuit had no problem recognizing that laws intentionally discriminating against businesses associated with interstate franchise networks discriminate against interstate commerce in both purpose and effect. In *Cachia v. Islamorada*, 542 F.3d 839 (11th Cir. 2008) and *Island Silver & Spice, Inc. v. Islamorada*, 542 F.3d 844 (11th Cir. 2008), the Eleventh Circuit considered a Florida city's discrimination against formula retailers above certain sizes and formula restaurants. As with the Seattle law, those ordinances were facially discriminatory, but rather than discriminate against interstate commerce *in haec verba* they discriminated against "formula" restaurants and retailers.[2]

[2] The Ninth Circuit suggested that the First Circuit's decision in *Wine & Spirits Retailers, Inc. v. Rhode Island*, 481 F.3d 1 (1st Cir. 2007), was also aligned against the Eleventh Circuit. App.17 n.7. While that decision may be distinguishable based on its record or alcohol regulation context, if the Ninth Circuit is correct, it would only deepen the split.

In both cases, the Eleventh Circuit held that local efforts to discriminate against "formula" retailers and restaurants violated the Commerce Clause. *Cachia*, 542 F.3d at 842-44; *Island Silver*, 542 F.3d at 846-48. The court recognized that while "the ordinance also prohibits formula restaurants that originate from within the state of Florida," *Cachia*, 542 F.3d at 842, it "disproportionately targets restaurants operating in interstate commerce" and thus "has the practical effect of discriminating against interstate commerce," *id*. at 843; *see also Island Silver*, 542 F.3d at 846-47 (same).

The Ninth Circuit acknowledged the Eleventh Circuit's contrary precedent and recognized that the decisions were difficult to reconcile. App.17 n.7. The Ninth Circuit's half-hearted effort to distinguish the Eleventh Circuit's formula restaurant and retailer decisions is wholly unavailing. The Ninth Circuit emphasized that the ordinances in *Cachia* and *Island Silver* effectively prohibited formula businesses from locating in the City of Islamorada, while Seattle's discriminatory wage did not have the same prohibitory effect. "Unlike *Cachia*, *Island Silver*, and decisions that have stricken measures that limit competition, Seattle's minimum wage ordinance does not limit competition by prohibiting chain retailers and restaurants." App.17-18 n.7 (citations omitted). But the Commerce Clause forbids discrimination against interstate commerce, and nothing in this Court's precedents suggest that state and local governments can impose differential burdens on businesses with ties to interstate commerce as long as the burdens are not prohibitory. Tariffs are the quintessential Commerce Clause violation whether or not they are prohibitory or simply increase the price of out-of-state goods. In similar fashion, the constitutionality of Seattle's discriminatory wage does not turn on whether the franchisees will pay it or go out of business. Some local franchises may well suffer the latter fate, ER70, ER148, but the ordinance is unconstitutional as to all. In all events, the Eleventh Circuit's rulings did not depend on whether the local laws in question *prohibited* businesses with interstate ties. To the contrary, the court relied on precedents invalidating laws that raise the costs of out-of-state businesses and concluded that laws that prohibited businesses with out-of-state ties from operating fail *a fortiori*. *See Cachia*, 542 F.3d at 842.

The Eleventh Circuit thus recognized that discrimination against formula or franchise businesses is discrimination against interstate commerce, whether the discrimination takes the form of a complete ban or the imposition of a differential cost structure. And because Seattle's ordinance unquestionably imposes disparate costs—to the tune of $160 per week per employee—on certain small businesses because of their "out-of-state relationships," App.21, the ordinance would fail under Eleventh Circuit precedent and the Supreme Court precedent the Eleventh Circuit faithfully applied.

III. This Case Is An Ideal Vehicle To Address These Exceptionally Important Issues.

This case presents a uniquely well-suited vehicle to resolve this square split over whether local governments can discriminate against in-state businesses based on their interstate ties. This case does not involve any difficult questions concerning facially neutral laws or questions of whether cable companies and satellite providers are similarly situated for Commerce Clause purposes. The Seattle ordinance treats two five-employee sandwich shops across the street from each other differently for one reason only. And the difference is stark. The five-employee shop affiliated with an interstate chain will face the same minimum labor cost as Boeing and its purely-local competitor will pay over $8,000 less per employee in 2017.

The Ninth Circuit's novel take on discriminatory purpose is also squarely presented. While this Court would certainly want to consider the clear evidence of Seattle's protectionist intent, the Ninth Circuit's novel and erroneous approach to the purpose prong does not depend on any record disputes. The Ninth Circuit agreed that Seattle intentionally discriminated against businesses based only on their ties to interstate commerce, but held that Seattle's overall reason for discriminating somehow pardoned the city's discriminatory intent. Thus, the Court need not weigh Seattle's purported reasons for discriminating in order to reverse the Ninth Circuit's decision.

Multiple additional factors underscore the need for this Court's review. First, Seattle's effort to not just increase the minimum wage but to do so in a manner that discriminates against employers with out-of-state ties is being closely watched by other jurisdictions. Some jurisdictions have already followed suit. San Francisco, for example, recently placed new, costly restrictions on how businesses the city deems "formula retailers" can schedule and pay their employees. *See* City and County of San Francisco, Formula Retail Employee Rights Ordinance Fact Sheet, http://bit.ly/1lDtrXl. Likewise, the State of New York recently ordered that any fast food restaurant in the state sharing common branding, marketing, or products with at least 30 other restaurants nationwide must increase its minimum wage to $15 by the end of 2021. *See* Order of N.Y. Commissioner of Labor on the Report and Recommendations of the 2015 Fast Food Wage Board (Sept. 10, 2015), http://on.ny.gov/1KHBePq. The current minimum wage for restaurants without those interstate ties is $9. N.Y. Dep't of Labor, Minimum Wage Information, http://on.ny.gov/1xnlOr4. Numerous other jurisdictions are actively considering similar laws that would target businesses based on their interstate ties. *See, e.g.*, S.B. 1024, 189th Gen. Ct. (Mass. 2015) ("An Act to establish a living wage for employees of big box retail stores and fast food chains."); H.B. 6791, 2015 Leg., Reg. Sess. (Conn. 2015) (raising minimum wage for "franchisees"). If this Court allows the Ninth Circuit's decision to stand, Seattle's discriminatory approach will spread even further. The temptations to favor purely-local enterprises and pass the cost of novel social experiments off to corporate headquarters in another state are ever present. That is why the Framers included the Commerce Clause in the Constitution. If those protectionist ends can be permissibly achieved by the simple expedient of express discrimination against "franchise," "formula," or "big box stores," then such discrimination will soon fill the statute books.

Second, the importance of the franchise model to interstate commerce underscores the need for this Court's review. Franchise businesses are critical to facilitating interstate commerce, especially in the service sector. The franchise model not only allows small business owners to draw on established models and experience in starting new businesses, but they facilitate interstate commerce by giving consumers a familiar experience when they cross state lines. For this reason, discrimination against the franchise model is discrimination against interstate commerce. Thus, the question whether states and localities are free to openly discriminate against the franchise model is tremendously consequential. The issue has split the circuits and this Court's intervention is plainly needed.

Finally, this Court's case law makes clear not only how this case should be resolved, but also how vital it is that the Ninth Circuit's error be quickly rectified. In *West Lynn*, the state argued that its discriminatory order did not violate the Commerce Clause "because '*only* in-state consumers feel the effect of any retail price increase ... [and] [t]he dealers themselves ... have a substantial in-state presence.'" *W. Lynn*, 512 U.S. at 203. The Court recognized that the state's argument, "if accepted, would undermine almost every discriminatory tax case." *Id.* That once-rejected argument has now been made law in the Ninth Circuit. And because of the interconnected nature of interstate commerce, this error is already being felt beyond the Ninth

Circuit's boundaries. This Court, therefore, should intervene to avert further economic protectionism that will threaten our entire nationwide market.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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January 25, 2016

APPENDIX

TABLE OF APPENDICES

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15-35209

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

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Washington
No. 2:14-cv-00848-RAJ
Richard A. Jones, District Judge, Presiding

Argued and Submitted:
September 1, 2015—Seattle, Washington
Filed: September 25, 2015

Before: Michael Daly Hawkins, Ronald M. Gould, and Sandra S. Ikuta, Circuit Judges.
Opinion by Judge Hawkins

OPINION

HAWKINS, Circuit Judge:

The International Franchise Association ("IFA") appeals the denial of a preliminary injunction which IFA sought in order to prevent the City of Seattle ("City") from enforcing a provision in its recently enacted minimum wage ordinance. The provision classifies certain franchisees as large employers, subjecting them as a result to a steeper schedule of incremental wage increases over the next five years. While we express no view as to the ultimate merits, we affirm because IFA did not, at this stage in the proceeding, show it is likely to succeed on the merits or that a preliminary injunction is in the public interest.

FACTUAL AND PROCEDURAL BACKGROUND

Shortly after taking office, Seattle Mayor Ed Murray assembled an Income Inequality Advisory Committee ("IIAC") tasked with making recommendations "on how best to increase the minimum wage in Seattle." The IIAC consisted of twenty-four members and included representatives from the business community and labor unions. Following a series of meetings and public engagement forums, the IIAC recommended enacting staged increases in the minimum wage, with smaller businesses subject to a more gradual schedule, recognizing that they "would face particular challenges in implementing a higher minimum wage." Though the IIAC debated whether to classify franchisees as large employers, it did not recommend doing so.

Based on the IIAC recommendation, the Mayor's Office drafted a proposed ordinance that would raise the minimum wage to $15 per hour in stages according to two schedules—one for businesses with 500 or more employees ("Schedule One Employers") and the second for businesses with fewer than 500 employees ("Schedule Two Employers"). The draft ordinance classified franchisees associated with a franchisor and/or network of franchisees employing more than 500 employees nationwide as Schedule One employers, regardless of the number of persons employed by the particular franchisee or the number of persons employed in Seattle.

The City Council unanimously passed the ordinance on June 2, 2014, and the Mayor signed it into law the next day. The ordinance raises the minimum wage in stages according to two schedules for large and small employers, Ord. §§ 4, 5, and classifies franchisees affiliated with large networks as large employers, *id.* § 2(T) (definition of large employer). The ordinance defines a franchise as:

> A written agreement by which: (1) A person is granted the right to engage in the business of offering, selling, or distributing goods or services under a marketing plan prescribed or suggested in substantial part by the grantor or its affiliate; (2) The operation of the business is substantially associated with a trademark, service mark, trade name, advertising, or other commercial symbol; designating, owned by, or licensed by the grantor or its affiliate; and (3) The person pays, agrees to pay, or is

> required to pay, directly or indirectly, a franchise fee.

Ord. § 2(I).

The incremental increases for each schedule are as follows:

Effective Date	Schedule One	Schedule Two	Δ
Apr. 1, 2015	$11	$10	10%
Jan. 1, 2016	$13	$10.50	24%
Jan. 1, 2017	$15	$11	36%
Jan. 1, 2018	$15	$11.50	30%
Jan. 1, 2019	$15	$12	25%
Jan. 1, 2020	$15	$13.50	11%
Jan. 1, 2021	$15	$15	0%

IFA filed suit in district court, seeking a preliminary injunction that would require Seattle to classify certain franchisees as small employers. It did not challenge the City's authority to raise the minimum wage generally or to differentiate between large and small employers, nor does it do so on appeal. IFA alleged that the franchisee classification violated the Commerce Clause, Equal Protection Clause, First Amendment, and the Washington State Constitution, and was preempted by the Lanham Act and ERISA.[1]

After hearing argument, the district court denied IFA's motion for preliminary injunction, finding that

[1] IFA does not raise the ERISA claim on appeal.

it did not show a likelihood of succeeding on the merits of its various claims. *Int'l Franchise Ass'n, Inc. v. City of Seattle*, 2015 WL 1221490, at *5–23 (W.D. Wash. Mar. 17, 2015). The district court also concluded that the remaining preliminary injunction factors disfavor granting a preliminary injunction. *Id.* at *24–25.

Judgment was entered March 17, 2015. IFA filed a timely notice of appeal on March 20, 2015.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction to review the denial of a motion for a preliminary injunction under 28 U.S.C. § 1292(a)(1). Denial of a motion for a preliminary injunction is reviewed for abuse of discretion and the underlying legal principles de novo. *DISH Network Corp. v. F.C.C.*, 653 F.3d 771, 776 (9th Cir. 2011). The court does not review the underlying merits of the case, but rather whether the district court relied on an erroneous legal premise or abused its discretion in denying IFA's motion for preliminary injunctive relief. *See Earth Island Inst. v. Carlton*, 626 F.3d 462, 468 (9th Cir. 2010). In making this determination, the court considers "'whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.'" *DISH Network Corp.*, 653 F.3d at 776 (quoting *Sports Form, Inc. v. United Press Int'l, Inc.*, 686 F.2d 750, 752 (9th Cir. 1982)).

ANALYSIS

To obtain a preliminary injunction, IFA was required to show (1) it is likely to succeed on the merits of its claim, (2) it is likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of hardships tips in its favor, and (4) a preliminary injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

I. Dormant Commerce Clause

"Although the Commerce Clause is by its text an affirmative grant of power to Congress to regulate interstate and foreign commerce, the Clause has long been recognized as a self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce." *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 87 (1984). Modern dormant Commerce Clause jurisprudence primarily "is driven by concern about 'economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.'" *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 337–38 (2008) (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273–74 (1988)).

"A critical requirement for proving a violation of the dormant Commerce Clause is that there must be a *substantial burden* on *interstate commerce*." *Nat'l Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1148 (9th Cir. 2012) (citing *South-Central Timber Dev.*, 467 U.S. at 87). This standard recognizes that dormant Commerce Clause cases often involve "delicate adjustment of the conflicting state and federal claims," *H.P. Hood & Sons, Inc. v. Du Mond,* 336 U.S. 525, 553 (1949) (Black, J., dissenting), and that "not every exercise of local power is invalid merely because it affects in some way the flow of commerce between the States," *Great*

Atl. & Pac. Tea Co. v. Cottrell, 424 U.S. 366, 371 (1976) (recognizing "States retain broad power to legislate protection for their citizens in matters of local concern").

"If a statute discriminates against out-of-state entities on its face, in its purpose, or in its practical effect, it is unconstitutional unless it 'serves a legitimate local purpose, and this purpose could not be served as well by available nondiscriminatory means.'" *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1087 (9th Cir. 2013) (quoting *Maine v. Taylor*, 477 U.S. 131, 138 (1986)). "Absent discrimination, we will uphold the law 'unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits.'" *Id.* at 1087–88 (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).[2] "The party challenging the statute bears the burden of showing discrimination." *Black Star Farms, LLC v. Oliver*, 600 F.3d 1225, 1230 (9th Cir. 2010).

A. Facial Discrimination

The district court did not apply an improper legal standard or clearly err in determining that the ordinance does not facially discriminate against out-of-state entities or interstate commerce. The ordinance does not classify employers based on the location of their headquarters, the location of their workers, or the extent to which they participate in interstate commerce. Rather, it classifies based on the number of employees (a facially-neutral classification) and the business model (a facially-

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[2] IFA does not appeal the district court's application of *Pike*.

neutral classification). Nor does the ordinance classify based on an employer's links to interstate commerce or out-of-state firms, but on neutral characteristics, such as having a marketing plan, operating a business associated with a trademark, and paying a franchisee fee. Ord. § 2(I). A franchisee affiliated with a network that has 500 employees in the State of Washington and a headquarters in Seattle is treated just like a franchisee affiliated with a franchise that has 10 employees in Washington, 490 in Oregon, and a headquarters in Boston. A franchisee that sources its inputs from Washington and serves local Seattle residents is treated just like a franchisee—or a nonfranchisee, for that matter—that sources its inputs from Oregon and serves out-of-state tourists.

IFA contends the ordinance does not impose a facially neutral requirement because it expressly discriminates against franchises. Based on this record, we disagree. A distinction drawn based on a firm's business model—a characteristic IFA contends is highly correlated with interstate commerce—does not constitute facial discrimination against out-of-state entities or interstate commerce. *See Cachia v. Islamorada*, 542 F.3d 839, 843 (11th Cir. 2008) (ban on "formula" restaurants "does not facially discriminate between in-state and out-of-state interests"); *Island Silver & Spice, Inc. v. Islamorada*, 542 F.3d 844, 846 (11th Cir. 2008) (restrictive regulation of "formula" retail establishments "does not facially discriminate against interstate commerce").

At a minimum, the district court did not clearly err in rejecting IFA's correlation. IFA did not establish that Seattle franchisees—the party IFA concedes bears the burden of the ordinance—that pay local taxes and have local representation are out-of-state entities. *See S.C. State Highway Dep't v. Barnwell Bros., Inc.*, 303 U.S. 177, 184 n.2 (1938) (political restraints are absent when legislating against out-of-state interests). Nor did it establish that franchises have such unique links to interstate commerce relative to non-franchises that the ordinance facially discriminates against interstate commerce.

B. Discriminatory Purpose

The Ninth Circuit recently stated:

> The party challenging a regulation bears the burden of establishing that a challenged statute has a discriminatory purpose or effect under the Commerce Clause. We will assume that the objectives articulated by the legislature are actual purposes of the statute, unless an examination of the circumstances forces us to conclude that they could not have been a goal of the legislation.

Rocky Mountain Farmers Union, 730 F.3d at 1097–98 (internal citations and quotation marks omitted). In the context of interpreting statutes, the Supreme Court has consistently held that statutory construction "must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175–76 (2009) (citation omitted); *see also United States v. O'Brien*, 391 U.S. 367, 383 (1968) (discerning congressional purpose is a hazardous matter).

IFA does not fault the district court for applying an incorrect test or considering irrelevant factors. Rather, it argues that the district court erred in evaluating the evidence of motive.

While the record contains some evidence that City officials and advocates questioned the merits of the franchise business model, the district court did not clearly err in determining that the City Council was not motivated by an intent to discriminate against out-of-state firms or interstate commerce. The text shows the City had a legitimate, non-discriminatory purpose. The preamble states that the ordinance's general purpose is to improve public health and welfare and reduce economic inequality. *See* Ord. Pr. 5; *id.* § 1(11) ("The public welfare, health, and prosperity of Seattle require wages and benefits sufficient to ensure a decent and healthy life for all Seattle workers and their families").

As for the distinction between large and small businesses, the ordinance explains in a finding that "small businesses and not-for-profit organizations may have difficulty in accommodating the increased costs." *Id.* § 1(9). While the preamble does not provide a rationale for the franchisee classification, the definition of franchisees as large employers, *id.* § 2(T)—read in concert with the "small business" finding—supports an inference that the Council viewed franchisees as more akin to large employers than small businesses and not-for-profits in their ability to accommodate increased costs.

In sum, there is strong textual evidence of the Council's general purpose and weaker textual evidence of its purpose with respect to the franchisee classification. Yet, the ordinance's context and structure indicate the purpose behind classifying franchisees as large employers is their relative ability to accommodate increased costs. Further, discriminatory motives are absent from the text; the ordinance does not demean franchises or describe them as an economic or social ill, nor does it euphemistically call for "diversifying" business ownership or "leveling the playing field." In distinguishing between large and small employers, the ordinance does not use location as a factor, nor does it discuss reliance on local inputs or local customers.

In contrast, statutes struck down for their impermissible purpose have contained language promoting local industry or seeking to level the playing field. *See W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 194 (1994) ("avowed purpose . . . [is] to enable higher cost Massachusetts dairy farmers to compete with lower cost dairy farmers in other States"); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270–71 (1984) (stated reason for exempting "ti root okolehao" from tax was to encourage and promote the establishment of a new industry). IFA cites to no cases in which an ordinance lacking a stated discriminatory purpose was stricken for its impermissible motive.[3]

[3] In addition, the context and manner in which the ordinance was enacted does not give rise to a reason to doubt its stated purposes. For instance, the Mayor did not exclude the business

IFA identifies the following as evidence of improper motive: (1) two emails from IIAC member Nick Hanauer on May 3 and May 31, (2) an email from Robert Feldstein, a member of the Mayor's staff, (3) a statement by Mayor Murray, (4) a tweet by a Councilmember, (5) a statement by Councilmember Licata, and (6) a statement by Councilmember Clark. The district court "considered all of the emails and statements identified by the parties," and reproduced excerpts of many of them in its order.[4]

Of the evidence identified by IFA, Hanauer's emails contain the strongest anti-franchise language. He stated in an email sent May 3:

> [F]ranchises like [S]ubway and McDonalds really are not very good for our local economy. They are economically extractive, civically corrosive and culturally dilutive

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community from the IIAC, the ordinance was not debated in secret, and the record does not show that the City has a history of discriminating against out-of-state businesses. Thus, we assume the ordinance's stated purposes are its true purposes. *See Rocky Mountain Farmers Union*, 730 F.3d at 1097–98.

[4] Courts have considered legislative history to determine whether local action was motivated by a discriminatory purpose. *See, e.g.*, *Kassel v. Consol. Freightways Corp. of Del.*, 450 U.S. 662, 683–84 (1981) (Brennan, J., concurring); *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951); *see also Edwards v. Aguillard*, 482 U.S. 578, 594 (1987) (plain meaning viewed against context and legislative history can control determination of legislative purpose). Yet, "contemporaneous remarks of a sponsor of legislation are certainly not controlling in analyzing legislative history," *Weinberger v. Rossi*, 456 U.S. 25, 35 n.15 (1982) (citations omitted), and statements by a lobbyist are entitled to little weight, *see, e.g.*, *Bell Atl. Tel. Cos. v. F.C.C.*, 131 F.3d 1044, 1048 (D.C. Cir. 1997).

> [sic] . . . . A city dominated by independent, locally owned, unique sandwich and hamburger restaurants will be more economically, civically and culturally rich than one dominated by extractive national chains.

He stated in another email sent May 31:

> [N]ational franchises like McDonalds, or Burger King or KFC, or Subway, simply are not that beneficial to our city. First, these organizations are consistently at the low end of the scale in terms of paying decently and offering benefits. Not all small, locally owned companies take great care of their workers, but none of the national chains do . . . . [O]ur city has no obligation to continue policies that so obviously advantage them and disadvantage the local businesses that benefit our city and it's [sic] citizens more.

While the emails are persuasive evidence of Hanauer's anti-franchise views, they do not show that Hanauer intended to burden out-of-state firms or interfere with the wheels of interstate commerce. More importantly, they also do not show that City officials wished to discriminate against out-of-state entities, bolster in-state firms, or burden interstate commerce.

Thus, IFA failed to demonstrate that Seattle franchisees are out-of-state entities or that franchises are so interstate in character relative to non-franchises that a distinction drawn on this basis interferes with interstate commerce. The district court did not clearly err in rejecting this framework.

See Exxon Corp. v. Governor of Md., 437 U.S. 117, 127 (1978) (dormant Commerce Clause does not protect "particular structure or methods of operation in a retail market" or "particular interstate firms"). Thus, the evidence of anti-franchise views is insufficient to show a discriminatory motive.

Even if we were to accept IFA's premise, the district court did not clearly err in finding that the City did not have an impermissible motive. First, Hanauer's emails are not entitled to substantial weight. Hanauer was not a City Councilmember but one of twenty-four members of the IIAC. Although Mayor Murray created and appointed the members of the IIAC—lending it a quasi-official status—IFA recognizes that the IIAC "did not draft any proposed legislation." And, even if the IIAC is "akin to a legislative committee," as IFA contends, its proposal did not contain the franchise recommendation IFA challenges (citing Ord. § 1(9)). Thus, at most, the emails provide insight into the motive of the body that did not recommend the provision. This is weak evidence of the City's alleged impermissible purpose.

Further, the time line indicates that Hanauer's emails came from the keystrokes of an advocate, not a quasi-official IIAC member, let alone a City official. *See All. of Auto. Mfrs. v. Gwadosky*, 430 F.3d 30, 39 (1st Cir. 2005) (statements by a law's private-sector proponents can shed light on its purpose, but "correspondence of a single lobbyist has little (if any) probative value in demonstrating the objectives of the legislative body as a whole") (citations omitted); *see also W. Lynn Creamery*, 512 U.S. at 215 (Rehnquist, C.J., dissenting) ("Analysis of interest group participation in the political process may serve many useful purposes, but serving as a basis for interpreting the dormant Commerce Clause is not one of them."). The emails were not sent until after Mayor Murray publicly announced the IIAC proposal.[5] By May 3, the debate was no longer transpiring within the IIAC but between the Mayor, Council, and advocates, Hanauer included. The district court did not clearly err in assigning Hanauer's emails little weight.

Second, while IFA provides some evidence that City officials criticized the franchise model, the statements it cited are too indirect and limited to overcome the evidence of the provision's permissible purpose. For instance, a member of the Mayor's staff stated in an email that "[i]f we lose franchises in Seattle, I won't be sad," Mayor Murray stated that "[t]here is a problem in the franchise business model," and Councilmember Clark stated that she was not worried about the ability of franchisees to absorb a higher minimum wage. Yet, an errant remark in an email sent by a staff member is not a cipher that decodes the City Council and Mayor's motives. And, the other two comments reflect a debate about the characteristics and resources of franchises, but are not persuasive evidence that the City was motivated by an intent to harm franchises. The district court did not clearly err in finding that

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[5] *See* Office of Mayor Murray, *Murray: 'We Have a Deal: Seattle Workers Are Getting a Raise'* (May 1, 2014), available at http://murray.seattle.gov/murray-we-have-a-deal-seattle-workers-aregetting- a-raise/#sthash.w1yKnLXX.dpbs.

this evidence fell short of demonstrating an impermissible purpose.

C. Discriminatory Effects

The district court correctly observed that "decisions interpreting the dormant Commerce Clause appear somewhat difficult to reconcile." *Int'l Franchise Ass'n*, at *5 n.10; *see Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986) (recognizing "that there is no clear line" separating legislation with discriminatory effects from legislation with indirect effects). This is particularly the case here, where we assess an ordinance that does not resemble an established type of dormant Commerce Clause case.[6] Rather, the measure arguably imposes costs on a class of businesses said to be highly correlated with out-of-state firms or interstate commerce.

We lack Supreme Court authority assessing whether a regulation affecting franchises ipso facto has the effect of discriminating against interstate commerce. Nor has the Supreme Court addressed whether franchises are instrumentalities of interstate commerce that cannot be subjected to

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[6] Emblematic examples include *South-Central Timber*, 467 U.S. at 104 (processing requirement); *Dean Milk Co.*, 340 U.S. at 354 (same); *Comptroller of Treasury of Md. v. Wynne*, 135 S. Ct. 1787, 1792 (2015) (preferential taxation); *City of Phila. v. New Jersey*, 437 U.S. 617, 622 (1978) (import ban); *Hunt v. Wa. State Apple Adver. Comm'n*, 432 U.S. 333, 352 (1977) (regulatory preference for domestic products); *W. Lynn Creamery*, 512 U.S. at 188–90 (tariff-like price manipulation of imported goods); *Walgreen v. Rullan*, 405 F.3d 50, 52–53, 56–57 (1st Cir. 2005) (excluding out-of-state service providers).

disparate regulatory burdens. While regulations that expressly classify based on business structure or impose disparate burdens on franchises present interesting questions, our review is limited to considering whether the district court applied improper legal principles or clearly erred in reviewing the record.[7]

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[7] We briefly observe that several courts have considered whether measures that affect national chains violate the dormant Commerce Clause. *See Cachia*, 542 F.3d at 843; *Island Silver*, 542 F.3d at 846; *Wine & Spirits Retailers, Inc. v. Rhode Island*, 481 F.3d 1, 15 (1st Cir. 2007); *Wal-Mart Stores v. City of Turlock*, 483 F. Supp. 2d 987, 991 (E.D. Cal. 2006); *Great Atl. & Pac. Tea Co., Inc. v. Town of E. Hampton*, 997 F. Supp. 340, 344–45, 351 (E.D.N.Y. 1998). The decisions are not clearly reconcilable, with two district courts upholding prohibitions on retailers wishing to build large establishments, *Turlock*, 483 F. Supp. 2d at 1012–14; *Hampton*, 997 F. Supp. at 351, and the Eleventh Circuit striking down size-based and franchise-based prohibitions, *Cachia*, 542 F.3d at 843 (prohibition of chain restaurants "disproportionately targets restaurants operating in interstate commerce"); *Island Silver*, 542 F.3d at 846–47 (measure effectively eliminates "all new interstate chain retailers"). In addition, *Cachia* and *Island Silver* are at odds with the First Circuit's rejection of a Commerce Clause challenge to Rhode Island's prohibition against chains and franchises owning and operating liquor stores. *Wine & Spirits Retailers*, 481 F.3d at 15 ("[A] negative impact on [plaintiff's] business model is, in itself, insufficient to show discriminatory effect."). These cases do not affect our conclusion that Seattle's ordinance passes muster under the dormant Commerce Clause. Unlike *Cachia*, *Island Silver*, and decisions that have stricken measures that limit competition, *see, e.g.*, *H.P. Hood & Sons*, 336 U.S. at 545 (statute required agency to deny licenses to a new milk dealer if the market was "already adequately served"); *Granholm v. Heald*, 544 U.S. 460, 473–74 (2005) (statute prohibited out-of-state wineries from directly shipping wine to in-state consumers); *Lewis v. BT Inv. Managers, Inc.*, 447 U.S.

1. Legal Standards

IFA contends that the district court cited and applied two improper legal standards in its discriminatory effects analysis: (1) the evidentiary burden; and (2) the standard to determine whether a statute causes discriminatory effects.

IFA's argument that the district court abused its discretion by requiring a heightened evidentiary standard is unpersuasive. Two recent decisions from our court establish that a plaintiff must satisfy a higher evidentiary burden when, as here, a statute is neither facially discriminatory nor motivated by an impermissible purpose. *See Rocky Mountain Farmers Union*, 730 F.3d at 1100; *Black Star Farms*, 600 F.3d at 1232. Our approach is not an outlier. *See Cherry Hill Vineyard, LLC v. Baldacci*, 505 F.3d 28, 37 (1st Cir. 2007) ("There must be substantial evidence of an

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27, 39 (1980) (statutes prevented out-of-state banks from owning in-state subsidiary banks or businesses offering investment advisory services to banks); *Fla. Transp. Servs., Inc. v. Miami-Dade Cnty.*, 703 F.3d 1230, 1257–59 (11th Cir. 2012) (permitting process required only new entrants to apply and "made entry impossible"); *Walgreen*, 405 F.3d at 52–53, 56–57 (new pharmacies required to obtain certificate of necessity), Seattle's minimum wage ordinance does not limit competition by prohibiting chain retailers and restaurants. Moreover, Seattle may impose additional burdens on businesses that have adopted a franchise business structure without running afoul of the dormant Commerce Clause. *See Exxon*, 437 U.S. at 127 (dormant Commerce Clause does not protect the "particular structure or methods of operation in a retail market"); *Nat'l Ass'n of Optometrists and Opticians LensCrafters, Inc. v. Brown*, 567 F.3d 521, 527 (9th Cir. 2009) (under the dormant Commerce Clause, "states may legitimately distinguish between business structures in a retail market").

actual discriminatory effect"). It was not error to apply these precedents.

IFA raises a somewhat stronger but ultimately unsuccessful point when it contends that the district court erred in requiring evidence that the "law causes local goods to constitute a larger share and goods with an out-of-state source to constitute a smaller share of the market." *Int'l Franchise Ass'n*, at *10. However, the district court did not err in considering this test, among others, because "if the effect of a state regulation is to cause local goods to constitute a larger share, and goods with an out-of-state source to constitute a smaller share, of the total sales in the market," then "the regulation may have a discriminatory effect on interstate commerce." *Exxon Corp.*, 437 U.S. at 126 n.16. Nevertheless, this is not the only test to determine whether a measure has discriminatory effects. While the "mix of goods" test is an apt one to evaluate statutes that impose tariffs on goods, this ordinance is alleged to impair the competitiveness of businesses such as hotels and restaurants. IFA does not contend that the ordinance will restrict the flow of goods.

But the district court did not limit its analysis to the "mix of goods" test. The district court also evaluated whether the ordinance would cause franchisees to suffer a "competitive disadvantage as compared to other similarly situated small businesses," *Int'l Franchise Ass'n*, at *11, "increas[e] costs for a particular type of business model," *id.*, create barriers to entry, *id.* at *13, raise labor costs "in a way that will impact the flow of interstate commerce," *id.*, cause franchisees to close or reduce operations, *id.*, or generally affect interstate commerce, *id.* at *13–14. Thus, the court considered measures well-suited to evaluating the effects of the ordinance. *See New Energy Co. of Ind.*, 486 U.S. at 274; *W. Lynn Creamery*, 512 U.S. at 194–96. While the "mix of goods" test was on its own insufficient, the court did not err, as it evaluated a range of possible effects.

2. Substantial Evidence of Discriminatory Effects

The district court did not clearly err in finding that IFA did not provide substantial evidence showing that the ordinance will have discriminatory effects on out-of-state firms or interstate commerce. IFA's showing that 96.3 percent of Seattle franchisees are affiliated with out-of-state franchisors, and that in-state franchisees will be placed at a competitive disadvantage, does not prove that the ordinance will have a discriminatory effect on out-of-state firms. IFA's offering does not tend to prove that costs will be imposed on out-of-state firms, out-of-state firms will be at a competitive disadvantage, out-of-state businesses will close, or that new out-of-state firms will not enter the market.

Rather, to the extent the ordinance has an effect, its primary or perhaps exclusive effect is to harm in-state firms—franchisees located in Seattle. These in-state firms will face a higher wage requirement relative to franchisees outside of Seattle and non-franchisees.[8] *See Gen. Motors Corp.*, 519 U.S. at 298–

[8] Because the district court determined that the IFA failed to produce evidence showing that the Seattle ordinance had a discriminatory effect even if franchisees and independent small

99 (effects analysis should evaluate similarly-situated entities). Alternatively, the ordinance can be viewed as harming one type of in-state entity (franchisees) while benefitting another type of in-state entity (nonfranchisees). Neither comparison shows that in-state economic interests are benefitted by burdening out-of-state competitors. *See Dep't of Revenue of Ky.*, 553 U.S. at 338.

IFA does not present evidence of the ordinance's effect on out-of-state firms. The record does not discuss diminished franchisor royalties or profitability, or show that future franchise development in Seattle will be impaired. The only thing the affiliation rate shows is that most in-state franchisees have out-of-state relationships and are subject to a disparate minimum wage requirement. The district court did not clearly err in determining that IFA did not, at this stage in the proceeding, provide substantial evidence of discriminatory effects on out-of-state firms.

Nor did the district court err in finding that the ordinance does not have the effect of discriminating against interstate commerce. The rate of out-of-state franchise affiliation tells us very little about the ordinance's effect on interstate commerce. IFA does not demonstrate how a wage requirement imposed on in-state franchisees affects interstate commerce. The ordinance's effects appear to be highly local. Indeed, IFA concedes that franchisees independently pay the "operating costs of their businesses" including

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businesses were similarly situated, we need not reach the question whether the district court erred in concluding that franchisees and non-franchisees are not similarly situated.

"wages" and that "[n]o other party shares in these small business obligations." In other words, in-state franchisees are burdened, not the wheels of interstate commerce. *Cf. Cachia*, 542 F.3d at 840; *Island Silver*, 542 F.3d at 846 (prohibiting national chains has the effect of discriminating against interstate commerce).

Even crediting IFA's contention that a disparate impact on national chains discriminates against interstate commerce, the district court did not clearly err in finding that the affiliation rate and franchisee declarations provided by IFA were insufficient. The record does not show that interstate franchise networks will face higher costs or reduce their investment and operations in Seattle, nor does it show that the ordinance will discourage the flow of goods in interstate commerce.

In sum, the evidence that the ordinance will burden interstate commerce is not substantial. It does not show that interstate firms will be excluded from the market, earn less revenue or profit, lose customers, or close or reduce stores. Nor does it show that new franchisees will not enter the market or that franchisors will suffer adverse effects. The district court did not clearly err.[9]

[9] Nor did the district court err in rejecting IFA's contention that the ordinance is "tantamount to a tariff on interstate business activity and thus clearly proscribed by the Commerce Clause." A tariff is a "schedule or system of duties imposed by a government on imported or exported goods," *Tariff*, Black's Law Dictionary (10th ed. 2014), and a tax is a "charge, usu[ally] monetary, imposed by the government on persons, entities, transactions, or property to yield public revenue," *Tax*, Black's Law Dictionary (10th ed. 2014). The cases IFA cited either

II. Equal Protection Clause

"In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993) (citations omitted). The district court properly cited the rational-basis standard. *Int'l Franchise Ass'n*, at *15 (citing *F.C.C.*, 508 U.S. at 315).

The district court did not clearly err in finding a legitimate purpose in the classification and a rational relationship between franchisees and their classification as large employers. The court found that a "reasonably conceivable state of facts" could support the classification based on "the economic benefits flowing to franchisees" and franchisees' ability to "handle the faster phase-in schedule." *Id.* at *16–17. The court based its determination on declarations from experts on franchises, as well as individual franchisees.

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involved duties on imported goods, *W. Lynn Creamery*, 512 U.S. at 188–90, or taxes yielding public revenue, *Wynne*, 135 S. Ct. at 1792; *Best & Co. v. Maxwell*, 311 U.S. 454, 454–57 (1940); *Alpha Portland Cement Co. v. Commonwealth of Mass.*, 268 U.S. 203, 219 (1925). The measures at issue in these cases do not resemble the Seattle ordinance, which does not reduce the competitiveness of out-of-state goods (and hence is not tariff-like) or impose differential taxes that yield public revenue. No case or legal principle identified by IFA converts a geography-neutral regulatory measure into a tariff or tax.

Even if the relationship between the advantages enjoyed by franchisees and their ability to handle the faster phase-in schedule lacks strong support, the City's determination does not require empirical data, and the classification is entitled to a "strong presumption of validity." *F.C.C.*, 508 U.S. at 314. IFA did not negate every possible rationalization for the classification, *see Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973), and the district court did not clearly err in finding that the classification survived rational-basis review.

Nor is the classification the result of "mere animus or forbidden motive." As a threshold matter, this argument fails because the district court did not clearly err in finding a legitimate, rational basis for the City's classification. *Cf. Romer v. Evans*, 517 U.S. 620, 635 (1996) (amendment does not further a proper legislative end). It is legitimate and rational for the City to set a minimum wage based on economic factors, such as the ability of employers to pay those wages.[10]

[10] The animus argument also fails because most of the cited evidence consists of statements of IIAC members. The district court did not err in finding these statements to be of little value in determining the motivations of the City Council and Mayor. Even if the IIAC member statements were probative of the City's intent, the statements reflect a legislative debate about the merits of the franchise model and do not show the City's "bare [] desire to harm a politically unpopular group . . . ." *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973). The evidence does not indicate that the City engaged in the type of invidious discrimination reserved for this area of Equal Protection jurisprudence. *Cf. Romer*, 517 U.S. at 635 (striking down an amendment that "classifie[d] homosexuals not to further a proper legislative end but to make them unequal to everyone

III. First Amendment

IFA argues that the ordinance discriminates on the basis of protected speech because two of the three definitional criteria for franchises are based on speech and association—operating under a marketing plan prescribed by a franchisor and associating with a trademark or other commercial symbol. This construction of the ordinance is unpersuasive. "[R]estrictions on protected expression are distinct from restrictions on economic activity or, more generally, on nonexpressive conduct . . . . [T]he First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2664 (2011); *see also Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 581 (1983). The threshold question is whether conduct with a "significant expressive element" drew the legal remedy or the ordinance has the inevitable effect of "singling out those engaged in expressive activity." *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 706–07 (1986).

Seattle's minimum wage ordinance is plainly an economic regulation that does not target speech or expressive conduct. The conduct at issue—the decision of a franchisor and a franchisee to form a business relationship and their resulting business activities—"exhibits nothing that even the most vivid imagination might deem uniquely expressive." *Wine*

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else."); *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985) (holding that the application of a zoning ordinance was based on "irrational prejudice" against those with disabilities).

& Spirits Retailers, Inc. v. Rhode Island, 418 F.3d 36, 53 (1st Cir. 2005) (discussing business activities of franchisee and franchisor). A business agreement or business dealings between a franchisor and a franchisee is not conduct with a "significant expressive element." *Cf. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569–70 (1995) (compiling instances of communicative conduct). Nor does the statute "singl[e] out those engaged in expressive activity" such as newspapers or advocacy organizations. *Cf. Minneapolis Star*, 460 U.S. at 581 ("special tax that applies only to certain publications").

The ordinance, like a statute barring anti-competitive collusion, *e.g.*, *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949), is not wholly unrelated to a communicative component, but that in itself does not trigger First Amendment scrutiny. *See Arcara*, 478 U.S. at 708 (subjecting every incidental impact on speech to First Amendment scrutiny "would lead to the absurd result that any government action that had some conceivable speech-inhibiting consequences, such as the arrest of a newscaster for a traffic violation, would require analysis under the First Amendment") (O'Connor, J., concurring). Although the franchisees are identified in part as companies associated with a trademark or brand, the ordinance applies to businesses that have adopted a particular business model, not to any message the businesses express. *Cf. Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015) ("Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed."). It is clear that the ordinance was not motivated by a desire to suppress speech, the conduct at issue is not franchisee expression, and the ordinance does not have the effect of targeting expressive activity. The district court did not err in finding IFA did not show, on this record, a likelihood of success on this claim.

IV. Lanham Act Preemption

IFA's preemption argument alleges that because the ordinance defines franchisees in part based on their shared use of a trademark, it frustrates the purposes and objectives of the Lanham Act. The district court correctly ruled that IFA did not show a likelihood of succeeding on this claim, as the ordinance does not conflict with the purposes of the Act.

As the Lanham Act does not expressly preempt state law, *Mariniello v. Shell Oil Co.*, 511 F.2d 853, 857 (3d Cir. 1975), and courts have said that it does not occupy the field, *Attrezzi, LLC v. Maytag Corp.*, 436 F.3d 32, 41 (1st Cir. 2006), the ordinance can only be preempted if it conflicts with the Lanham Act, *see generally Freightliner Corp. v. Myrick*, 514 U.S. 280, 286–87 (1995) (local laws can be preempted expressly, when Congress occupies the field, or when state law conflicts with or frustrates the purpose of statute).

IFA does not indicate which provision of the Lanham Act preempts the ordinance, apart from a general purposive statement in the Act that it is designed to "protect registered marks used in such commerce from interference by State, or territorial legislation . . . ." 15 U.S.C. § 1127. The Act does not discuss the regulation of wages or employment conditions or establish that classifications based on trademark use are impermissible.

The value of the purpose language is limited by the absence of operative language. Oft-cited language in the Senate Report accompanying the statute clarifies Congress's motives:

> The purpose underlying any trade-mark statute is twofold. One is to protect the public so it may be confident that . . . it will get the product which it asks for and wants to get. Secondly, where the owner of a trade-mark has spent energy, time, and money in presenting to the public the product, he is protected in his investment from its misappropriation by pirates and cheats.

S. Rep. No. 79-1333, at 1274.

A number of courts have cited this language in assessing whether measures affecting—but not directly regulating—trademarks are preempted. For instance, the Third Circuit affirmed a rule barring franchisors from terminating a franchise without cause, rejecting the argument that it was preempted by the Lanham Act because "[n]o deception of the public is suggested and no dilution of [an] investment in its trademark is alleged to have occurred." *Mariniello*, 511 F.2d at 858.

Similarly, the Utah Supreme Court determined that a state criminal statute penalizing passing counterfeit goods containing federally registered trademarks does not conflict with the Lanham Act because it does not "permit confusing guarantee of exclusive use to federal trademark holders." *State v. Frampton*, 737 P.2d 183, 191 (Utah 1987) (quoting

Mariniello, 511 F.2d at 858); *see also Am. Petroleum Inst. v. Cooper*, 718 F.3d 347, 359 (4th Cir. 2013) ("[U]nder the Lanham Act, the mark holder has a right to maintain the quality of the goods bearing its mark, and when a state statute does not significantly interfere with that right, there is no preemption."); *Golden Door, Inc. v. Odisho*, 646 F.2d 347, 352 (9th Cir. 1980) (similar, citing *Mariniello*). Applying this standard, the ordinance does not interfere with a franchise's ability to maintain quality, compromise the public's confidence in trademarks, allow misappropriation, or directly interfere with or regulate marks. Thus, the ordinance is not preempted by the statute.[11]

Further, it has not been shown that Congress clearly intended to preempt an ordinance of this nature. *See N.Y. State Conference of Blue Cross &*

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[11] A second body of law—addressing local authority to regulate signs bearing trademarks—cuts against IFA's position as well. Interpreting a provision in the Act prohibiting localities from "requir[ing] alteration of a registered mark," 15 U.S.C. § 1121(b), we determined that "a zoning ordinance may not require a change in a registered mark" but may "prohibit the display of a registered mark." *Blockbuster Videos, Inc. v. City of Tempe*, 141 F.3d 1295, 1300–01 (9th Cir. 1998); *see also Lisa's Party City, Inc. v. Town of Henrietta*, 185 F.3d 12, 16 (2d Cir. 1999) (allowing cities to control "the color, design elements, or character of outdoor signs"). Thus, despite a prohibition on altering trademarks and the purpose of protecting trademark holders, cities may bar mark-holders from displaying trademarks and in some jurisdictions may regulate their color and size. The burden that an ordinance can place on the use of the mark *itself* far outstrips the burden that the Seattle ordinance places on trademark holders and constitutes far greater interference with the use of trademarks.

Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 655 (1995) ("[W]here federal law is said to bar state action in fields of traditional state regulation, we have worked on the 'assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'") (citation omitted) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Here, we assess a field of traditional state regulation, minimum wages to be paid to employees, and the text of the Lanham Act does not indicate an intent to preempt such an ordinance. It was not error for the district court to find IFA unlikely to succeed on this claim.

V. Washington State Constitution

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." Washington courts employ a two-step inquiry to determine whether a law violates the privileges and immunities clause: (1) whether the law in question involves a privilege or immunity; if not, the provision is not implicated; but (2) if so, whether the legislative body had a "reasonable ground" for granting the privilege or immunity. *Ockletree v. Franciscan Health Sys.*, 179 Wash. 2d 769, 776 (2014).

IFA's claim that the ordinance violates the state constitution is unpersuasive at both steps. The district court correctly concluded that the provision is not violated "anytime the legislature treats similarly situated businesses differently." *Int'l Franchise Ass'n*, at *22. Rather, "the terms 'privileges and immunities' pertain alone to those fundamental rights which belong to the citizens of the state by reason of such citizenship." *Grant Cnty. Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wash. 2d 791, 812-13 (2004) (citing *State v. Vance*, 29 Wash. 435, 458 (1902)). Accordingly, legislative classifications only constitute a privilege "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*, 179 Wash. 2d at 778 (quoting *Vance*, 29 Wash. at 458–59). IFA was required to show that the classification derogated a fundamental right of citizens and failed to do so. *Compare Ralph v. City of Wenatchee*, 34 Wash. 2d 638, P. 2d 270, 272 (1949) (striking down regulation that "substantially [] prohibited . . . non-resident photographers"), *with Ass'n of Wa. Spirits & Wine Distribs. v. Wa. State Liquor Control Bd.*, 182 Wash. 2d 342, 362 (2015) (upholding differential fees on spirits industry according to position in distribution chain).

We also affirm because the classification rests 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 (quoting *State ex rel. Bachich v. Huse*, 187 Wash. 75, 84 (1936)). The City determined that franchisees have material advantages over non-franchisees that affect their ability to absorb increases in the minimum wage—a distinction related to the ordinance's subject matter.

VI. Remaining Preliminary Injunction Factors

A. Irreparable Harm

IFA contends that franchisees will suffer competitive injury, lose customers and goodwill, and go out of business. The district court disagreed, finding the "allegations [] conclusory and unsupported by the facts in the record." *Int'l Franchise Ass'n*, at *24.

The district court, however, did err in evaluating IFA's evidence of competitive injury. A rule putting plaintiffs at a competitive disadvantage constitutes irreparable harm. *See Gilder v. PGA Tour, Inc.*, 936 F.2d 417, 423 (9th Cir. 1991); *Apple Computer, Inc. v. Formula Int'l, Inc.*, 725 F.2d 521, 525–26 (9th Cir. 1984). The declarations of franchise owners and the ordinance's text indicate that franchisees will face a higher minimum wage obligation compared to nonfranchisees. Franchisees will experience higher labor costs or lose the flexibility to pay workers the wage rate required of non-franchisees. The allegations are neither conclusory nor without support in the record.

Seattle offers some evidence showing that the ordinance may result in a higher wage rate for all employers and that the injury is merely speculative. Furthermore, Seattle's experts observe that higher labor costs may actually attract new customers and improve productivity. While the evidence is mixed, we find that the court erred in rejecting IFA's evidence of competitive injury.

In contrast, IFA did not show that franchisees face irreparable harm as a result of losing customers or goodwill. The only evidence supporting these allegations is the speculation of franchise owners that higher wages will result in higher prices and reduce demand. The record does not discuss the costs and revenues of these businesses, the performance of non-franchisees, current or future labor costs, the proportion of employees earning more than the minimum, or the elasticity of demand for goods and services provided by franchisees. Thus, it is impossible to evaluate whether franchisees will need to raise prices or whether price changes will result in decreased demand. The chain of events suggested by IFA is speculation that does not rise beyond the mere "possibility" of harm. *Winter*, 555 U.S. at 22.

B. Balance of Hardships and Public Interest

The district court also erred in finding that IFA did not demonstrate that the balance of hardships tips in its favor. The inquiry is not between franchisees and workers, but rather between the parties—franchisees and the City. *See All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1137 (9th Cir. 2011). If the ordinance goes into effect, franchisees will face a higher wage requirement than their competitors. In contrast, the City did not make a persuasive showing that it would experience hardships from the issuance of a preliminary injunction.

In contrast, the district court did not err in concluding that the public interest disfavors an injunction. Granting a preliminary injunction would likely result in many workers receiving reduced wages. *See Bernhardt v. L.A. Cnty.*, 339 F.3d 920, 931 (9th Cir. 2003) (evaluating impact on non-parties). Seattle voters would see part of a law passed as a result of an election enjoined. *See Golden Gate Rest. Ass'n v. City of S.F.*, 512 F.3d 1112, 1116 (9th Cir. 2008). IFA did not provide persuasive evidence showing that the public interest would suffer as a result of allowing the ordinance to take effect. The district court did not clearly err.

VII. Serious Questions Test

A plaintiff is alternatively entitled to a preliminary injunction by raising serious questions going to the merits and showing a balance of hardships that tips sharply in the plaintiff's favor, a likelihood of irreparable injury, and that an injunction serves the public interest. *All. for the Wild Rockies*, 632 F.3d at 1135 (plaintiff must make a showing on all four prongs). Though the district court failed to include all *Winter* factors, *Int'l Franchise Ass'n*, at *25, it ultimately reached the proper conclusion because IFA did not raise serious questions going to the merits on any of its claims, nor did it show that an injunction is in the public interest.

CONCLUSION

We affirm the district court's denial of IFA's motion for a preliminary injunction. The district court applied the correct legal standards and did not clearly err in its factual determinations.

AFFIRMED.

Appendix B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C14-848 RAJ

INTERNATIONAL FRANCHISE ASSOCIATION, INC, ET AL.,

Plaintiffs,

v.

CITY OF SEATTLE, ET AL.,

Defendants.

ORDER

I. INTRODUCTION

On June 3, 2014, the City of Seattle ("the City" or "Seattle"), enacted Ordinance Number 124490 ("the Ordinance"), which establishes a $15 minimum hourly wage. In doing so, Seattle joined dozens of other cities nationwide that have increased the minimum wage beyond both federal and state minimums.[1]

The City's stated reason for increasing the minimum wage was to reduce income inequality.

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[1] *See, e.g., City Minimum Wage Laws, Recent Trends and Economic Evidence on Local Minimum Wages*, Nat'l Emp. L. Project, 1 (Dec. 2014), http://www.nelp.org/page/-/rtmw/City-Minimum-Wage-Laws-Recent-Trends-Economic-Evidence.pdf?nocdn=1 (San Jose, $10.15; Santa Fe, $10.66; Washington, DC, $11.50; Oakland $12.25; Chicago, $13.00; San Francisco $15.00).

Additionally, the increased minimum wage was intended to "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." Ordinance, WHEREAS clauses 1-12, § 1.

The current minimum wage in Seattle is $9.47.[2] Although the Ordinance goes into effect on April 1, 2015, the shift to a $15 minimum wage will not happen overnight. There are two phase-in schedules under the Ordinance: a faster phase-in, applicable to large businesses and a slower phase-in, applicable to small businesses. Large businesses will be required to incrementally raise the minimum wage to $15 in just three years (*i.e.*, reaching $15 by January 1, 2017) whereas small businesses will be allowed seven years (*i.e.*, reaching $15 by January 1, 2021). Ordinance, § 4. Small businesses were given this extra time because they lack the same resources as large businesses and will face particular challenges in implementing the law. Ordinance, § 1, ¶ 9; (Feldstein Decl.) Dkt. # 63, ¶ 10.[3]

Seattle's power to raise the minimum wage to $15 is not at issue in this lawsuit.[4] Indeed, the

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[2] Washington State Department of Labor & Industries, Minimum Wage, *available at* http://www.lni.wa.gov/workplace rights/wages/minimum/ (last visited Mar. 16, 2015).

[3] Robert Feldstein is the Director of the Office of Policy and Innovation in the Mayor's Office.

[4] It is well settled that raising the minimum wage is within the City's police power. *See, e.g.*, *RUI One Corp. v. City of Berkeley*, 371 F.3d 1137, 1150 (9th Cir. 2004) (acknowledging

plaintiffs accept that *eventually* all Seattle employers will be required to pay their employees at least $15. The issue the court has been asked to address relates solely to how fast this increase will happen for employees of a specific type of business model: franchises (*e.g.*, your local Subways, McDonalds, and Holiday Inns, among many others).

The crux of this lawsuit is the Ordinance's categorization of franchisees as large businesses. Because these businesses are considered large, they will be subject to the faster three-year phase-in schedule. The plaintiffs object to this categorization. Although franchisees are connected to large franchisors, they are technically separate entities under the law. Additionally, individual franchisee outlets often employ only a handful of workers. According to plaintiffs, this makes them more similar to small businesses and equally likely to suffer challenges in implementing the new law. (Compl.) Dkt. # 1, ¶¶ 3, 4; (Pls.' Mot.) Dkt. # 37, p. 18.

Plaintiffs are the International Franchise Association ("IFA"), which is an organization of franchisors, franchisees, and suppliers, and five individual franchisee owners and/or managers. Together, they are seeking a preliminary injunction compelling the City to treat franchisees as "small" businesses rather than "large" businesses. They do not seek to invalidate the entire Ordinance; rather, they ask only that franchisees be subject to the

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that "[t]he power to regulate wages and employment conditions lies clearly within a state's or municipality's police power").

slower (seven year) phase-in schedule applicable to small businesses.

Defendants are the City of Seattle and Fred Podesta, the Director of the Department of Finance and Administrative Service ("the Department"). The Department and its Director are responsible for implementing and enforcing the Ordinance. Defendants will be referred to collectively as "the City" or "Seattle."

For the reasons stated below, the court DENIES plaintiffs' motion for a preliminary injunction.[5]

II. BACKGROUND

A. History of the Ordinance

Shortly after taking office, the Mayor of Seattle assembled an Income Inequality Advisory Committee (the "Advisory Committee"), which consisted of twenty-four members, including representatives of business interests and labor unions. Ordinance, § 1, ¶ 6. The Mayor formed the Advisory Committee to "address the pressing issue of income inequality in Seattle" and to seek input regarding a potential increase in the minimum wage. Ordinance, § 1, ¶¶ 6, 7; (Feldstein Decl.) Dkt. # 63, ¶ 8. The Advisory Committee reviewed scholarly studies on the impact of minimum wage laws in other cities and hosted numerous public engagement forums, including industry-specific forums. Ordinance, § 1, ¶ 8. In May 2014, the Advisory Committee transmitted its formal recommendation to the Mayor. The recommendation advocated for a phased increase in the minimum

[5] The court heard oral argument in this matter on March 10, 2015. Neither party requested an evidentiary hearing.

wage and acknowledged that small businesses should be subject to a slower phase-in schedule. Ordinance, § 1, ¶ 9; (Feldstein Decl.) Dkt. # 63, ¶¶ 10, 11. The recommendation said nothing specific about the categorization of franchisees.

B. The Franchise Business Model

The term "franchise business model" refers to a long-term business relationship in which one company (the franchisor) grants other companies (the franchisees) the right to sell products under its brand, using its business model and intellectual property, generally in exchange for ongoing royalty payments and other fees. (Gordon Decl.) Dkt. # 70-2, ¶ 6.[6] Although franchisees are part of the larger organization of the franchisor, they are legally separate entities. (Shane Dep.) Dkt. # 81-4, p. 9.[7] This business model provides the franchisor with the benefits of vertical control over retail units without the investment in assets required by full integration. Mick Carney and Eric Gedajlovic, *Vertical Integration in Franchise Systems: Agency Theory and Resource Explanations*, 12 Strategic Mgmt. J. 607 (1991). The employees of a franchisee are not employees of the franchisor. (Shane Dep.) Dkt. # 81-4, p. 10. Franchisees manage the day-to-day aspects of their business, including

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[6] John A. Gordon is a franchise business consultant and has provided the court with an expert declaration in support of the amicus brief of OPEIU Local 8 et al.

[7] Scott A. Shane is an economics professor and has provided the court with an expert declaration in support of the City's opposition to this motion.

making decisions regarding which workers to hire, how many to hire, the benefits they will offer, and how much to pay their employees. *Id.*, p. 19.

Despite this legal separateness, however, franchisees are not free to do as they please. Most franchise agreements heavily regulate the conduct of the franchisee and include statements about how the franchisee is expected to run the franchise, whether or not the franchisee has an exclusive territory, and when and where the franchisee may open another business. (Shane Decl.) Dkt. # 62, ¶ 22. Franchise agreements also contain clauses that outline acceptable outlet "appearance, hours of operation, location, and product quality" and typically allow franchisors to conduct "inspections, audits, mystery shopper programs, and so on" of the franchisees. (Shane Decl.) Dkt. # 62, ¶¶ 22-31.

Franchisees accede to the franchisor's restrictions because being part of a larger network provides significant benefits. Participation in a franchise system often affords brand recognition and customer loyalty, as well as access to, advertising, trade secrets, software, lower material costs, site selection assistance, financing, and extensive operational support and training. (Shane Decl.) Dkt. # 62, ¶ 10. Participation in this system also often affords franchisees more profit than they would earn as individual business owners. (Shane Decl.) Dkt. # 62, ¶ 9. In addition to these factors, franchisors also have the ability to use their greater financial resources to support the franchise by aiding franchisees during time of business stress, including identifying and responding to changed business conditions. (Gordon Decl.) Dkt. # 70-2, ¶ 9.

C. Mechanics of the Ordinance

1. The Two Phase-In Tracks: "Large" and "Small" Businesses

The Ordinance goes into effect on April 1, 2015. The law provides for two core tracks leading to the $15 minimum wage. The first track applies to Schedule One or "large" businesses (defined as those with 500 or more employees nationwide).[8] These businesses will have three years to implement the new law. Large businesses also have the opportunity to take advantage of an alternative Schedule One track if they choose to offer certain health benefits to their employees. If they offer a qualifying health plan, they will be given four years to implement the new law.

The second track applies to Schedule Two or "small" businesses (defined as those with 500 or fewer employees nationwide).[9] These smaller businesses will have seven years to implement the

[8] "'Schedule 1 Employer' means all employers that employ more than 500 employees in the United States, regardless of where those employees are employed in the United States, and all franchisees associated with a franchisor or a network of franchises with franchisees that employ more than 500 employees in aggregate in the United States." Ordinance § 2.

[9] "'Schedule 2 Employer' means all employers that employ 500 or fewer employees regardless of where those employees are employed in the United States. Schedule 2 employers do not include franchisees associated with a franchisor or network of franchises with franchisees that employ more than 500 employees in aggregate in the United States." Ordinance, § 2.

new law. The exact incremental increases for each track are set forth below:

Schedule One — large employers (> 500 employees)

- April 1, 2015—$11
- January 1, 2016—$13
- January 1, 2017—$15

Schedule One — large employers offering health benefits

- April 1, 2015—$11
- January 1, 2016—$12.50
- January 1, 2017—$13.50
- January 1, 2018—$15

Schedule Two — small employers (≤ 500 employees)

- April 1, 2015—$10
- January 1, 2016—$10.50
- January 1, 2017—$11
- January 1, 2018—$11.50
- January 1, 2019—$12
- January 1, 2020—$13.50
- January 1, 2021—$15

Ordinance § 4.

By 2021, all employers will be subject to a minimum wage of at least $15 per hour.

2. Franchisees and Integrated Enterprises

Under the law, a wholly independent business with more than 500 employees falls into the "large" category and a wholly independent business with 500 or fewer employees falls into the "small" category. Certain types of businesses, however, are not considered independent: franchisees and integrated enterprises.

A franchisee is considered a "large" business if its franchisor and/or its network of franchisees employ more than 500 employees in aggregate in the United States. Ordinance, § 3. This means that the owner of a Subway outlet with only 10 employees will be considered a "large" employer because of his relationship with the Subway franchisor and other Subway franchisees.

Additionally, entities that appear separate but in fact form an "integrated enterprise" are also considered "large" businesses under the Ordinance. Separate entities are considered an "integrated enterprise" if there is a significant degree of: (1) interrelation between the operations of the entities, (2) common management, (3) centralized control over labor relations, and (4) common ownership or financial control over the entities. There is a presumption, however, that separate entities are actually separate employers if: (1) the entities operate substantially in separate physical locations from one another, and (2) each entity has partially different ultimate ownership. Ordinance, § 3. This test applies only to *non*-franchise businesses.

III. LEGAL STANDARD

Plaintiffs seek a preliminary injunction compelling the City to treat franchisees as small businesses under the new law. "A preliminary injunction is an extraordinary and drastic remedy; it is never awarded as of right...." *Munaf v. Geren*, 553 U.S. 674, 689 (2008) (citation and internal quotation marks omitted). To obtain a preliminary injunction, the moving party must establish that: (1) it is likely to succeed on the merits; (2) it is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in its favor; and (4) an injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

Alternatively, "serious questions going to the merits" and a balance of hardships that tips sharply towards the plaintiffs can support issuance of a preliminary injunction, so long as plaintiffs also show that there is a likelihood of irreparable injury and that the injunction is in the public interest. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011).

IV. ANALYSIS

Plaintiffs allege a number of claims against the City, including: (1) violation of the Commerce Clause, (2) violation of the Equal Protection Clause, (3) violation of the First Amendment, (4) Lanham Act preemption, (5) ERISA preemption, and (6) violation of the Privileges and Immunities Clause of the Washington State Constitution. The court will address the merits of each claim below.

A. The Dormant Commerce Clause

The Constitution was framed upon the theory that "the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Baldwin v. G.A.F. Seeling, Inc.*, 294 U.S. 511, 523 (1935).

Thus, the Court "has consistently held that the Constitution's express grant to Congress of the power to 'regulate Commerce … among the several States,' Art. I, § 8, cl.3, contains, 'a further, negative command, known as the dormant Commerce Clause ….' " *Am. Trucking Ass'n, Inc. v. Michigan Public Service Comm'n*, 545 U.S. 429, 433 (2005) (quoting *Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 174 (1995)).

The dormant Commerce Clause bars state and local governments from erecting taxes, tariffs, or regulations that favor local businesses at the expense of interstate commerce. *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 35 (1980). One of its core purposes is to prevent states from engaging in economic protectionism—*i.e.*, shielding local markets from interstate competition. *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 337-38 (2008) (citing *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269 (1988)).

The dormant Commerce Clause's two-tiered analytical framework is well settled: (1) the anti-discrimination test—which involves heightened scrutiny and (2) the *Pike* balancing test—a lower bar. The anti-discrimination test involves a two-step inquiry. The first step is to ask whether the statute discriminates facially, has a discriminatory purpose, or has a discriminatory effect against interstate commerce. *Nat'l Ass'n of Optometrists & Opticians LensCrafters, Inc. v. Brown*, 567 F.3d 521, 525 (9th Cir. 2009). If it does, at the second step, the burden shifts to the state to justify that discrimination by showing the discrimination is necessary to achieve a legitimate local purpose and that there is no reasonable non-discriminatory means for accomplishing the same objective. *See, e.g.*, *Maine v. Taylor*, 477 U.S. 131, 138 (1986).

A determination that the law is non-discriminatory under the first tier, however, does not end the analysis. The court must move on to the second tier and apply the *Pike* balancing test when the non-discriminatory law nevertheless has some burden on interstate commerce. *Nat'l Ass'n of Optometrists*, 567 F.3d at 528. Under *Pike*, the law will only be invalidated if plaintiffs can show that the burden on interstate commerce is clearly excessive in relation to the putative local benefits.[10] *Pike v. Bruce Church*, Inc., 397 U.S. 137, 142 (1970).

1. Tier One: The Anti-Discrimination Test

   a. Does the Ordinance discriminate on its face?

[10] The court notes that the decisions interpreting the dormant Commerce Clause appear somewhat difficult to reconcile. *See*, *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 210 (1994) (Scalia, J., concurring) ("[O]nce one gets beyond facial discrimination our negative-Commerce-Clause jurisprudence becomes (and long has been) a quagmire.") (internal quotation marks omitted); *see also* Brannon P. Denning, *Reconstructing the Dormant Commerce Clause Doctrine*, 50 Wm. & Mary L. Rev. 417, 423 (2008) (noting that "a number of the Court's [ ] cases are, in fact, impossible to reconcile…."). Nevertheless, the Court has attempted to apply the framework to serve the purpose of the dormant Commerce Clause—*i.e.*, to prevent barriers to the flow of interstate commerce—while keeping in mind the "residuum of power" in a municipality to make laws governing matters of local concern. *S. Pac. Co. v. State of Ariz.*, 325 U.S. 761, 767 (1945).

To determine which wage schedule applies, the Ordinance counts all employees of a particular employer nationwide without regard to geographic location. Indeed, the Ordinance's faster phase-in schedule applies to franchises with headquarters here in Washington. Accordingly, the language of the Ordinance does not facially discriminate against out-of-state entities.

b. Does the Ordinance have a discriminatory purpose?

Discriminatory purpose exists when a state or local statute is "motivated by an intent to discriminate against interstate commerce." *Family Winemakers of Cal. v. Jenkins*, 592 F.3d 1, 13 (1st Cir. 2010). The words of the legislative body itself, written contemporaneously with the passage of the law in question, are the most persuasive source of legislative purpose. *See, e.g.*, *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 463 n. 7 (1981) ("[T]his Court will assume that the objectives articulated by the legislature are actual purposes of the statute, unless examination of the circumstances forces us to conclude that they 'could not have been a goal of the legislation.'"). The legislature's stated purpose, however, is not dispositive. Several additional factors have been recognized as probative of discriminatory intent: (1) evidence of a consistent pattern of actions by the decision-making body disparately impacting members of a particular class of persons; (2) historical background of the decision, which may take into account any history of discrimination by the decision-making body or the jurisdiction it represents; (3) the specific sequence of events leading up to the particular decision being challenged, including any significant departures from normal procedures; and (4) contemporary statements by decision-makers on the record or in minutes of their meetings. *See, e.g., Vill. Of Arlington Heights v. Metro. Hous. Dev. Corp.,* 429 U.S. 252, 267-68 (1977); *Waste Mgmt. Holdings, Inc. v. Gilmore,* 252 F.3d 316, 336 (4th Cir. 2001).

Here, the stated legislative purposes for increasing the minimum wage included reducing income inequality and promoting the general welfare, health, and prosperity of Seattle by allowing low-wage workers to better support themselves and to participate in the City's civic and economic activities. Ordinance, WHEREAS clauses 1-12, § 1. The rationale for differentiating between large and small businesses was the recognition that "some employers, in particular small businesses and not-for-profit organizations, may have difficulty in accommodating the increased costs." Ordinance, § 1, ¶ 9.

Plaintiffs do not contend that the City has engaged in a consistent pattern of actions disparately impacting out-of-state franchises, nor do they contend that the City has a history of discriminating against out-of-state franchises. Rather, to show discriminatory purpose, they point only to comments from one member of the Advisory Committee and isolated statements made by three lawmakers.[11]

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[11] In the entirety of the legislative history, plaintiffs object to a total of five emails and five public statements. (Exs. to Groesbeck Decl. iso Pls.' Mot.) Dkt. ## 38-2, 38-3, 38-10, 38-11, 38-12, 38-15, 38-16, 38-17, 81-1, and 81-2. The court reviewed and considered all of the emails and statements identified by

Plaintiffs focus mainly on the comments of Nick Hanauer, a private citizen on the Mayor's Advisory Committee. Mr. Hanauer made statements in email correspondence to other members of the committee and to the City Council, such as:

> [F]ranchises like subway and McDonalds really are not very good for our local economy…A city dominated by independent, locally owned, unique sandwich and hamburger restaurants will be more economically, civically and culturally rich than one dominated by extractive national chains.

Dkt. # 38-2, p. 2.

He also stated:

> …[F]ranchises dominate their niches, not because they are intrinsically better, but mostly because they benefit massively from the scale of their parent operations. Cheaper ingredients. Cheaper equipment. Better lease terms. Better training. Better and more advertising. Well known brand. etc, etc, etc.…I have nothing against these companies. They have a right to operate. But our city has no obligation to continue policies that so obviously advantage them and disadvantage the local businesses that benefit our city and it's [*sic*] citizens more.

Dkt. # 38-10, p. 2.

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the parties, despite not including a verbatim recitation of each in its opinion.

In response to one of Mr. Hanauer's emails, Robert Feldstein, a member of the Mayor's staff, wrote in an email:

> I like the thinking but would love some additional thinking to help think through how to answer concerns about the effect on the individual immigrant business owner who decided to open a Subway rather than a bahn mi shop. I will admit upfront that I probably know least about [the] franchise model so there might be big gaps that I don't understand. That's part of why I'm asking for help in thinking this through....If we lose franchises in Seattle, I won't be sad—for the reasons you say. But are their ways for the cost to be born not on those franchise owners? Are they simply going to be a casualty of this transition? Are they less sympathetic or less at financial risk than I am imagining....

Dkt. # 38-3, p. 2.[12]

Additionally, two City Council members made comments regarding the resources flowing to franchisees from their "large" and/or "corporate" franchisors. Councilmember Kshama Sawant stated at a public hearing that:

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[12] It is unclear whether Mr. Feldstein actually sent this response to Mr. Hanauer. Defendants claim it was merely a draft, but Mr. Feldstein's declaration does not confirm this allegation. (Defs.' Opp.) Dkt. # 61, n. 4; (Feldstein Decl.) Dkt. # 63. The court, nevertheless, considered the email as if it was sent.

> It's important, before we get lost in to this false idea that franchisees are somehow struggling businesses, we should look at the evidence here, which compiles McDonald's, Burger King, and Wendy's owners in Seattle…Just six companies own every franchised big burger chain in Seattle, and those six companies own a total of 236 locations all across the country. These are not small businesses. And a McDonald's franchise requirement is $750,000 of personal wealth, not borrowed money, and [a] $45,000 franchisee fee, 40% of the total cost to open a new restaurant must be paid in cash. Now yes, it's true that the McDonalds headquarters, corporate headquarters, takes away the lion's share of the profits, but in order to be a franchisee, you have to be very, very wealthy. Just a small business person of color from Rainier Beach is not going to be able to afford to open a franchise outlet.

Dkt. # 38-11, p. 4; *see also* Dkt. # 38-12, p. 2 (writing on her official website, she also stated, "It's clear that the current franchise model is rigged against workers."); Dkt. # 38-15, p. 2 (tweeting from her official twitter account, she also stated, "Franchise owners: enough with the blame game! Organize, go to CorpHQ & renegotiate your rents.").

Similarly, Councilmember Mike O'Brien stated the following in response to a constituent's email objecting to the categorization of franchisees as "large" businesses:

> I know a lot of franchise owners are struggling to survive under current minimum wage rules and I have met with a number of them and am sympathetic to their situation. That said, their workers are also struggling to survive at the current minimum wages too. The ones not struggling are the corporate parents of all these, and we don't have a direct path to the parent corporations to make them treat both the employees and the franchise owners fairly. My hope is that the path we have chosen will force parent companies to treat franchise owners fairly and allow employees at these businesses to make closer to a living wage. I don't believe that the large parent companies of these franchises will allow their businesses in Seattle to fail and give up the market to the competition and I expect over time adjustments will need to be made to accommodate the new minimum wage.…Because workers at fast food franchises make up a large portion of people in Seattle currently earning minimum wage, this felt like an appropriate trade off.

Dkt. # 81-2, p. 2.

Finally, after the Ordinance was enacted, the Mayor issued the following statement in a press release:

> Franchises have resources that a small business in the Rainier Valley or a small sandwich shop on Capitol Hill do not have. Franchise restaurants have menus that are

> developed by a corporate national entity, a food supply and products that are provided by a corporate national entity, training provided by a corporate national entity, and advertising provided by a corporate national entity. They are not the same as a local sandwich shop that opens up or a new local restaurant that opens up in the city. Our process for reaching $15 an hour in Seattle recognizes that difference.

Dkt. # 38-16, p. 2.

The court finds that these statements are insufficient to show that the law was enacted for a discriminatory purpose.

First, the court gives little weight to the comments of an Advisory Committee member. Mr. Hanauer had no part in drafting the Ordinance and, unlike a lawmaker, he had no responsibility to consider and weigh opposing viewpoints. Because he was not the ultimate decision-maker, Mr. Hanauer was free to zealously lobby for and advance his own line of thinking on this issue.[13]

The same is true for other private citizens who, in fact, disagreed with Mr. Hanauer and voiced pro-franchise views. For example, David Meinert,

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[13] The court has reviewed an email sent by Councilmember Tim Burgess to Mr. Hanauer thanking him for his "leadership on this important issue." Dkt. # 81-1. This email, when read in context, appears to be a simple acknowledgement of Mr. Hanauer's efforts to advance one line of thinking on the minimum wage ordinance. There is no evidence that Councilmember Burgess or any other Councilmember adopted any of Mr. Hanauer's opinions as their own.

another Advisory Committee member, stated in an email to the Mayor's staff: "From breaking franchise agreements to outside 'education' of workers funded by the city, to getting rid of tips to lack of training wage. I have to speak out against these things." Dkt. # 38-4, p. 2. MSA Worldwide, a franchise advisory firm, also wrote a detailed letter to the Mayor arguing that "[b]y its actions, the City of Seattle is statutorily denying franchisees the right to exist in Seattle...." Dkt. # 38-8, p. 2. Additionally, The Seattle Times wrote an editorial criticizing the categorization of franchisees as "large" businesses. *See*, *Editorial: Redefine franchises under Seattle's minimum-wage proposal*, The Seattle Times, May 30, 2014 ("[The Ordinance] effectively discriminates against a business model—franchises – by giving non-franchisees a slower phase-in."). If the court were to extend its inquiry into every statement made by every Advisory Committee member or other private person on an issue as politically charged as this one, it would surely discover a plethora of advocacy by both sides—e.g., statements at public hearings, editorials, and letters to lawmakers—some of which might well be discriminatory.

Second, the statements made by lawmakers do not expressly suggest an intent to discriminate against out-of-state interests. While they refer to the franchisor as the "corporate headquarters," the "corporate national entity" and the "parent corporation," the statements, when considered in context, are reasonably read to distinguish between entities with more resources and those with fewer resources. Indeed, each of the statements refers to the resources of franchisees and their ability to adjust to the increased minimum wage on an accelerated basis. Councilmember Sawant stated, “[W]e [should not] get lost into this false idea that franchisees are somehow struggling businesses…. These are not small businesses….” Councilmember O’Brien stated, “The ones not struggling are the corporate parents of all these, and…I expect over time adjustments will need to be made to accommodate the new minimum wage.” Finally, the Mayor stated, “Franchises have resources that a small business in the Rainier Valley or a small sandwich shop on Capitol Hill do not have… They are not the same as a local sandwich shop that opens up or a new local restaurant that opens up in the city.” Whether accurate or not, the statements made by these lawmakers are consistent with the Ordinance’s stated purpose of differentiating between large and small businesses—businesses with more resources can more easily (and more quickly) adjust to the increasing minimum wage, while small businesses, with fewer resources, may have difficulty in accommodating the costs.

Third, the court notes that the Ordinance passed by unanimous vote and plaintiffs have identified no objectionable comments made by any other City Council members. Thus, even if the aforementioned statements could somehow be construed to indicate some impermissible motivation, isolated and stray comments by two Council members are insufficient to override the entire City Council’s formal statements of purpose in the Ordinance itself. *Compare Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 161 (5th Cir. 2007) (finding stray protectionist remarks of certain legislators were insufficient to condemn statute under the dormant Commerce Clause where overall legislative record revealed legitimate, nondiscriminatory purposes), *with Waste Mgmt. Holdings, Inc.*, 252 F.3d at 336-40 (finding discriminatory purpose when comments of lawmakers expressly referred to imposing burdens and restrictions on actors "outside" the state and sequence of events leading up to enactment of statute clearly established impermissible motive), *and Family Winemakers*, 592 F.3d at 7, 15-17 (finding discriminatory purpose when protectionist statements by lawmakers caused the state legislature to amend a statute to include a unique exception that would favor a particular in-state winery).

Fourth, and finally, the record does not reveal any significant departures from normal procedures in enacting the Ordinance. It is no secret that the minimum wage increase was hotly debated and that interest groups from both sides weighed in on the issue. These included both labor interests and franchise interests and both represented Seattle voters. (Exs. to Groesbeck Decl. iso Pls.' Mot.) Dkt. ## 38-1 to 38-17; (Exs. to Grosebeck Decl. iso of Pls.' Reply) Dkt. ## 81-1 to 81-3. Thus, the alleged statements by some union leaders, for example, indicating a desire to "break the franchise model" do not surprise the court. (Meinert Decl.) Dkt. # 37-2, ¶ 4. Even if true, such fervent remarks and lobbying efforts by interest groups cannot be imputed to the City Council. *See*, *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 215 (1994) (Rehnquist, C.J., dissenting) ("Analysis of interest group participation in the political process may serve many useful purposes, but serving as a basis for interpreting the dormant Commerce Clause is not one of them.”). The City Council likely heard many opposing viewpoints leading up to the enactment of the Ordinance. In response, the lawmakers asked questions (for example, Mr. Feldstein requested additional information, stating “I will admit upfront that I probably know least about [the] franchise model so there might be big gaps that I don’t understand… Are [franchisees] less sympathetic or less at financial risk than I am imagining?”) and inquired into the financial risks facing franchisees and their potential resources. The findings by the Mayor and other lawmakers regarding the benefits flowing to these entities from their franchisors support the conclusion that franchisees were categorized as “large” employers based upon a determination that they could handle the faster phase-in schedule, not by any protectionist motive.[14]

Accordingly, the court does not find that the categorization of franchisees as large businesses was

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[14] Additionally, even if the court were to find that the law was motivated by some discriminatory purpose, that finding alone would be unlikely to violate the Commerce Clause. *Alliance of Auto. Mfrs. v. Gwadosky,* 430 F.3d 30, 36 (1st Cir. 2005) (noting “[t]here is some reason to question whether a showing of discriminatory purpose alone will invariably suffice to support a finding of constitutional invalidity under the dormant Commerce Clause”); *see also* Kathleen M. Sullivan & Gerald Gunther, Constitutional Law 275 (15th ed. 2004) (recognizing the analytical difficulty that arises because “a law motivated wholly by protectionist intent might fail to produce significant discriminatory effects”).

motivated by a desire to discriminate against interstate commerce.

c. Does the Ordinance have a discriminatory effect?

To prove discriminatory effect, plaintiffs have the burden of producing substantial evidence showing that the law discriminates in practice. *Black Star Farms LLC v. Oliver*, 600 F.3d 1225, 1232 (9th Cir. 2010); *Family Winemakers*, 592 F.3d at 11. Discrimination means "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994). Of course, the "differential treatment" must be as between entities that are similarly situated. *See Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 298-99 (1997); *Nat'l Ass'n of Optometrists & Opticians LensCrafters, Inc. v. Brown*, 567 F.3d 521, 527 (9th Cir. 2009).

Although the dormant Commerce Clause protects against burdens on interstate commerce, it also respects federalism by protecting local autonomy. *Nat'l Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1148 (9th Cir. 2012) (citing *Dep't of Revenue v. Davis*, 553 U.S. 328, 338 (2008)). The Supreme Court has recognized that "under our constitutional scheme the States retain broad power to legislate protection for their citizens in matters of local concern" and has held that "not every exercise of local power is invalid merely because it affects in some way the flow of commerce between the States." *Id.* (quoting *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366, 371 (1976)); *see also Nat'l Ass'n of*

Optometrists & Opticians v. Harris, 682 F.3d 1144, 1148 (9th Cir. 2012) ("A critical requirement for proving a violation of the Commerce Clause is that there must be a *substantial burden* on *interstate commerce*.") (emphasis in original).

Thus, it is plaintiffs' burden to show that the law causes local goods to constitute a larger share and goods with an out-of-state source to constitute a smaller share of the market. *See Black Star Farms*, 600 F.3d at 1232-33; *see also Cherry Hill Vineyard, LLC v. Baldacci*, 505 F.3d 28, 36 (1st Cir. 2007) (plaintiff claiming discriminatory effect must submit "probative evidence of adverse impact" and where a statutory provision "is evenhanded on its face and wholesome in its purpose," a "substantial" evidentiary showing is required to prove discriminatory effect); *Nat'l Paint & Coatings Ass'n v. City of Chicago*, 45 F.3d 1124, 1132 (7th Cir. 1995) (discriminatory effect was not established where "plaintiffs did not offer any evidence"). Potential or possible discrimination is not sufficient, and the court is not permitted to speculate or to infer discriminatory effect without substantial proof. *Black Star Farms*, 600 F.3d at 1232, 1235. As the Ninth Circuit has stated, "[P]rove it, or lose it." *Id.* at 1232.

Here, plaintiffs claim that the Ordinance disproportionately impacts out-of-state franchisors. 623 franchises operate in Seattle; 600 (or 96.3%) of those have out-of-state franchisors. (Reynolds Decl.) Dkt. # 37-4, ¶ 17.[15] Additionally, all of the 23 in-state

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[15] John R. Reynolds is the President of the IFA Educational Foundation and has provided the court with a declaration in support of plaintiffs' motion.

franchisors are associated with franchisees outside of the state of Washington. *Id.* Thus, plaintiffs argue, the Ordinance overwhelmingly burdens out-of-state entities. Plaintiffs also claim that the Ordinance will put franchisees at a competitive disadvantage as compared to other similarly situated small businesses by increasing their labor costs.

As an initial matter, comparing franchisees and independent small businesses is somewhat difficult; they are not "similarly situated" in all relevant respects. It is true that they compete in the same markets and it is also true that a franchisee who owns only one outlet may share some similarities with an independent small business. That said, franchisees and independent small businesses have different business structures. *See Nat'l Ass'n of Optometrists & Opticians Lenscrafters, Inc. v. Brown*, 567 F.3d 521, 527 (9th Cir. 2009) ("Because states may legitimately distinguish between business structures in a retail market, a business entity's structure is a material characteristic for determining if entities are similarly situated."). The franchisee has, through his contract with the franchisor, made a business decision—*i.e.*, to pay royalties and fees in exchange for use of a brand name, training, advertising, established customer base, and other benefits—presumably because he deemed this arrangement profitable. The City, however, has had no part in creating or defining this structure and has no duty to promote it or protect it. Increasing costs for a particular type of business model, even one that involves interstate commerce, does not violate the dormant Commerce Clause without a further showing of impact on the flow of goods among the states. The Commerce Clause simply does not protect "the particular structure or methods of operation in a retail market." *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 127 (1978). Nor does it "give an interstate business the right to conduct its business in what it considers the most efficient manner," for "the Constitution protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations." *Valley Bank of Nev. v. Plus Sys., Inc.*, 914 F.2d 1186, 1993 (9th Cir. 1990) (citing *Exxon*, 437 U.S. at 127-28).

Second, even if the court were to find that franchisees are similarly situated to independent small businesses, plaintiffs have not produced substantial evidence showing discriminatory effect. *Black Star Farms*, 600 F.3d at 1232. Pointing to a 96.3% connection to out-of-state entities is insufficient. *See, e.g.*, *Exxon*, 437 U.S. at 125-29 (finding that even when the burden of legislation falls 100% on out-of-state entities, that fact alone "does not lead, either logically or as a practical matter, to a conclusion that the State is discriminating against interstate commerce in the retail market"); *Valley Bank*, 914 F.2d at 1193 ("[E]ven a disproportionate effect on out-of-state residents…does not necessarily violate the commerce clause."). Instead, plaintiffs must show that the faster phase-in schedule will cause local goods to constitute a larger share and goods with an out-of-state source to constitute a smaller share of the market. *Black Star Farms*, 600 F.3d at 1233. While plaintiffs argue that this will necessarily occur, they have not presented evidence of an actual, rather than potential, impact on interstate commerce. Identifying a correlation between franchisees and out-of-state business entities, even a very strong correlation, does not establish the further fact that a burden on franchisees in Seattle will cause a reduction in the flow of commerce across state lines.

Plaintiffs' cases are not to the contrary. For example, in *Cachia v. Islamorada*, 542 F.3d 839 (11th Cir. 2008), the court considered an ordinance which stated that "[f]ormula restaurants shall not be permitted in any zoning district of [Islamorada]." 542 F.3d at 841. The court found that the ordinance had a discriminatory effect because it served as "an *explicit barrier* to the presence of national chain restaurants, thus *preventing the entry* of such businesses into competition with independent local restaurants." *Id.* at 842 (emphasis added). Thus, the *Cachia* ordinance expressly banned formula restaurants and erected a figurative wall around the local market.

In *Island Silver & Spice, Inc. v. Islamorada*, 542 F.3d 844 (11th Cir. 2008), another case relied upon by the plaintiffs, the court considered an ordinance that limited formula retail establishments (*e.g.*, Target or Walmart) to 2,000 square feet of retail space and 50 feet of frontage. 542 F.3d at 846. The parties had stipulated that this restriction "effectively prevents the establishment of new retail stores," and "a facility limited to no more than 2,000 square feet or 50' of frontage cannot accommodate the minimum requirements of nationally and regionally branded formula retail stores." *Id.* The court acknowledged that even when the burden of a regulation falls onto a subset of out-of-state retailers, that fact "does not, by itself, establish a claim of discrimination against interstate commerce." *Id.* (quoting *Exxon*, 437 U.S. at 126). The court found, however, that the ordinance's *effective elimination* of all new interstate retailers had the "practical effect of…discriminating against" interstate commerce. *Id.* at 847 (emphasis added). Thus, the playing field was rigged so sharply against interstate retailers, it effectively eliminated them from the city—a clear move toward economic isolation.

Similarly, in *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977), the Supreme Court found that a North Carolina produce labeling statute had "a leveling effect which insidiously operate[d] to the advantage of local apple producers." 432 U.S. at 351. North Carolina had enacted a statute which required all closed containers of apples shipped into the state to bear "no grade other than the applicable U.S. grade or standard." *Id.* at 335. This meant that any individual state's grading system could not be used on apple containers shipped into North Carolina. *Id.* At the time, Washington State was the nation's largest producer of apples, its crops accounting for approximately 30% of apples grown domestically and nearly 50% of all apples shipped in closed containers in interstate commerce. *Id.* at 336. Washington had its own grading system, which reflected a stringent inspection program that required compliance with quality standards that were the equivalent of or superior to the standards adopted by the United States Department of Agriculture. *Id.* Washington's system had become the industry standard and Washington apple containers were, of course, labeled with Washington grades. *Id.* at 351. North Carolina, by contrast, had never established a grading or inspection system. Thus, the North Carolina law, which prohibited the use of state grades, had no impact on North Carolina apple growers. The burden fell entirely on out-of-state entities. *Id.* But that fact alone was not enough to lead the Court to conclude that the law discriminated against interstate commerce. *Id.*; s*ee also Exxon*, 437 U.S. at 125-29.

In *Hunt*, the plaintiff presented *evidence* that out-of-state apple growers had incurred substantial costs in complying with the law and had in fact lost accounts as a direct result of the statute. *Hunt*, 432 U.S. at 347. Indeed, the statute had raised the costs of doing business in North Carolina to the point where Washington apple growers were faced with abandoning the North Carolina market. *Id.* at 340. North Carolina apple growers, by contrast, suffered absolutely no negative impacts under the law. Thus, based upon this evidence, the Court found that North Carolina had "insidiously" rigged the playing field in a way that would cause local goods to constitute a larger share of the market. *Id.* at 351; *see also Black Star Farms*, 600 F.3d 1232 (distinguishing *Hunt*).

Here, unlike *Cachia*, plaintiffs have not shown that the Ordinance creates any barrier to the entry of franchisees into the Seattle market; unlike *Island Silver & Spice*, they have not shown that the Ordinance will effectively eliminate franchisees from the Seattle market; and unlike *Hunt*, they have not shown that the playing field has been rigged in a such way that local goods are certain, or virtually certain, to constitute a larger share of the market. The evidence of market impact in this case simply does not rise to the level of that presented in cases where a law has been found to violate the dormant Commerce Clause.

Although plaintiffs contend that by increasing franchisees' labor costs, the City is "rigging the playing field," akin to *Hunt* or the *Islamorada* cases, to prevail on their dormant Commerce Clause challenge, plaintiffs must present evidence that the City has done so in a way that will impact the flow of interstate commerce. *See, e.g.*, *Hunt*, 432 U.S. at 349 ("Not every exercise of state authority imposing some burden on the free flow of commerce is invalid."); *Milk Control Bd. v. Eisenberg Farm Prod.*, 306 U.S. 346, 351-52 (1939) ("Every state police statute necessarily will affect interstate commerce in some degree, but such a statute does not run counter to the grant of Congressional power merely because it incidentally or indirectly involves or burdens interstate commerce…."); *cf. Family Winemakers*, 592 F.3d at 11 ("Here, the totality of the evidence introduced by the plaintiffs demonstrates that the… [statute's] effect is to significantly alter the terms of competition between in-state and out-of-state wineries to the detriment of the out-of-state wineries that produce 98 percent of the country's wine.").

Again, the evidence of discriminatory effect must be substantial. *See Black Star Farms*, 600 F.3d at 1233 (distinguishing *Family Winemakers* on this very point and finding that the "plaintiffs in that case, unlike the plaintiffs here, had *evidence* to prove their contentions") (emphases added). Here, there is simply no credible evidence in the record that indicates franchisees will close up shop or reduce operations, or that new franchisees will not open up in Seattle. Although one plaintiff's declaration indicates that the faster phase-in *may* cause her to go out of business, she is only speculating. (Lyons Decl.) Dkt. # 37-5, ¶ 20.[16]

Her declaration is merely anecdotal and does not include any data analysis or empirical evidence that would lead the court to believe that imposing a faster phase-in schedule on franchisees is going to impact interstate commerce. The same is true regarding the survey results presented by *amici curiae*, in which a minority of small business owners *predicted* that they were "likely" to limit expansion in response to the wage increase. (Br. of Am. Hotel & Lodging Ass'n et al.) Dkt. #43-1, p. 8. The survey is based upon little more than conjecture and, in any case, fails to differentiate the responses of independent small business owners from those of franchisees.[17] Further, other *amici* have submitted contrary evidence, showing that although business owners in San Jose made similar predictions in response to that City's minimum wage increase, "[f]ast-food hiring accelerated once the higher wage was in place."[18] (Br.

[16] Katherine M. Lyons is an individual plaintiff in this matter and the owner of a BrightStar Care franchise.

[17] *New Survey of Seattle Businesses: $15 Wage Hike Will Raise Prices, Reduce Job Opportunities, and Shut Doors*, Emp. Policies Inst. (June 24, 2014), *available at* http://www.epionline.org/release/new-survey-of-seattle-businesses-15-wage-hike-will-raise-prices-reduce-job-opportunities-and-shut-doors/.

[18] S*ee, e.g.*, Eric Morath, *What Happened to Fast-Food Workers When San Jose Raised the Minimum Wage? Hold the Layoffs*, Wall Street Journal, April 9, 2014; Timothy Egan, *For $7.93 an*

of. Nat'l Emp. Law Project) Dkt. # 76, p. 15. Indeed, as stated recently by the CEO of Togo's Eateries, a sandwich franchisor that is planning an expansion into Seattle, "[the increase in the minimum wage] is what it is. Every city passes its own laws. We have a way to adjust the pricing and labor models to help us still be competitive but also make a profit." Rachel Lerman, *Fast-food eatery Togo's will expand to Seattle (not afraid of $15 wage)*, Puget Sound Bus. J. (June 11, 2014). Mr. Gordon, one of the franchise experts, confirmed this possibility, stating, "[F]ranchisors also have the ability to use their greater financial resources to support the franchise by aiding franchisees during time of business stress. Because of these advantages, franchisees and franchisors are better able than independent small businesses to identify and respond to changed business conditions, including regularly scheduled minimum wage increases." (Gordon Decl.) Dkt. # 70-2, ¶9.

Put simply, there is no evidence demonstrating whether the Ordinance will have an impact on interstate commerce one way or the other, and the court declines to infer that it will necessarily have a negative one. At most, plaintiffs have shown *possible* or *potential* discriminatory effect, and as the Ninth Circuit has already found, that showing is insufficient. *See Black Star Farms*, 600 F.3d at 1232,

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hour, It's Worth a Trip Across a State Line, N.Y Times, Jan. 11, 2007 (finding that when Washington State raised its minimum wage, businesses near the Idaho state line "prospered far beyond their expectations" and suffered no decrease in profitability).

1235 ("Courts examining a 'practical effect' challenge must be reluctant to invalidate a state statutory scheme…simply because it *might* turn out down the road to be at odds with our constitutional prohibition against state laws that discriminate against interstate commerce.").

2. Tier Two: The *Pike* Balancing Test

Because the court finds no discriminatory purpose or effect, it must move on to the *Pike* balancing test. Under that test, despite being non-discriminatory, a statute or regulation may be invalid if it, nevertheless, has an indirect effect on interstate commerce:

> When...a statute has only indirect effects on interstate commerce and regulates evenhandedly, we have examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits.

Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970). Under *Pike*, if a legitimate local purpose is found, then the question becomes one of degree. The extent of the burden that will be tolerated depends on the nature of the local interest involved. *Id.*

Even in weighing competing interests, however, "the Supreme Court has frequently admonished that courts should not second-guess the empirical judgments of lawmakers concerning the utility of legislation." *S.D. Myers, Inc . v. City of San Francisco*, 253 F.3d 461, 471 (9th Cir. 2001) (quoting *Pac. Nw. Venison Prods. v. Smitch*, 20 F.3d 1008, 1017 (9th Cir. 1994)). Instead, for a facially neutral statute to violate the Commerce Clause, the burdens of the statute must so outweigh the putative benefits as to make the statute unreasonable or irrational. *Id.* (quoting *Ala. Airlines, Inc. v. City of Long Beach*, 951 F.2d 977 (9th Cir. 1991)). A challenge to the legislative judgment must establish that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decision-maker. *Spoklie v. Montana*, 411 F.3d 1051, 1059 (9th Cir. 2005) (quoting *Minnesota v. Clover Leaf Creamery, Co.*, 449 U.S. 456 (1981)).

Here, even if the court assumes that the Ordinance will have some incidental burden on interstate commerce, for the reasons articulated above, plaintiffs have not shown that burden will "clearly exceed" the proffered local benefit, such that the benefit is unreasonable or irrational. The Ordinance is, at least putatively, designed to assist low wage workers, to decrease the gender wage gap, and to ensure that workers can better support and care for their families and fully participate in Seattle's civic, cultural and economic life—objectives that are well within the scope of legitimate municipal policymaking. While the court may philosophize about ways that the Ordinance could have been more narrowly tailored to achieve these goals, it is not the court's place to second guess the reasoned judgments of the lawmakers who studied and analyzed this issue as part of an involved legislative process. Ordinance § 1, ¶¶ 5-9. Accordingly, the court finds that the Ordinance survives the *Pike* balancing test as well.

B. Equal Protection

Plaintiffs also contend that the Ordinance arbitrarily and irrationally discriminates against franchisees because it treats franchisees employing only 5-10 workers as "large" employers and subjects them to the faster phase-in schedule. This results, they argue, in a disadvantage to franchisees because they compete with small independent businesses that will not be subject to the same labor costs during the phase-in of the minimum wage. (Pls.' Mot.) Dkt. # 37, pp. 22-25.

Whether embodied in the Fourteenth Amendment or inferred from the Fifth, equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. *F.C.C. v. Beach Commcn's, Inc.*, 508 U.S. 307, 313 (1993). "In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against an equal protection challenge if there is *any reasonably conceivable state of facts* that could provide a rational basis for the classification." *Id.* (citations omitted) (emphasis added). This standard of review is a paradigm of judicial restraint. *Id.* "The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted." *Vance v. Bradley,* 440 U.S. 93, 97 (1979). Thus, those attacking the rationality of the legislative classification have the burden "to negative every conceivable basis which might support it." *Id.* at 315 (citing *Lehnhausen v. Lake Shore Auto Parts Co.,* 410 U.S. 356, 364 (1973)).

Moreover, because courts never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature. *United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980). In other words, a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data. *Vance*, 440 U.S. at 111. "Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function." *Lehnhausen*, 410 U.S. at 365 (quoting *Carmichael v. S. Coal & Coke Co.*, 301 U.S. 495, 510 (1937)).

Here, there is certainly a "reasonably conceivable state of facts" that provides a rational basis for the classification of franchisees as large businesses. Two experts, Scott Shane and John Gordon, have provided declarations outlining the economic benefits flowing to franchisees as a result of the franchise relationship. *See* (Shane Decl.) Dkt. # 62; (Gordon Decl.)
Dkt. # 70-2. Those benefits include, among other things, national advertising, extremely valuable and well-known trademarks, the market power of a large corporation when purchasing supplies and raw materials, and access to valuable and trustworthy information based on the experiences of other

franchisees. Dkt. # 62, ¶¶ 10-17; Dkt. # 70-2, ¶¶ 10-31.

Indeed, the individual plaintiffs in this matter do not deny that their franchise relationships provide them with such benefits. For example, plaintiff Ronald Oh, a partial owner of a Holiday Inn Express franchise, testified that through his franchise network he receives the use of a large on-line reservation system which provides at least twenty-percent of his hotel's guests; he receives the benefit of a loyalty reward system that has 74 million members worldwide; he is able to consult with others in his franchise network and receive assistance on a host of issues. (Oh Dep.) Dkt. # 87-1, pp. 10-12, 13-14, 15, 16, 21-24. Mr. Oh's franchise agreement identifies other benefits, including use of Holiday Inn's trademarks, training, and certain marketing benefits. (Oh Franchise Agreement) Dkt. # 87-2, pp. 9-11.

Similarly, plaintiff Katherine Lyons, partial owner of a BrightStar Care franchise, acknowledged that her franchisor provided assistance in obtaining an SBA loan; the time-saving ability to receive assistance with various matters from a single source; a network of other franchisees who provide trustworthy business advice and whom she can trust; and a franchise-wide marketing fund. (Lyons Dep.) Dkt. # 87-3, pp. 4, 9, 13-15, 16-17. Ms. Lyons' franchise agreement identifies the use of business software, training, trademarks, and assistance with both opening and operating the business as benefits provided by her franchisor. (Lyons Franchise Agreement) Dkt. # 87-4, pp. 18-19, 21-23, 28-30, 38-39.

A third plaintiff, Charles Stempler, confirmed at his deposition that there are benefits to becoming an AlphaGraphics franchisee, including continuous training and support, lease assistance, buying power via global contracts with major suppliers, management consultation, and ongoing regionalized field and sales support among other things. (Stempler Dep.) Dkt. # 87-5, p. 4; (Stempler Franchise Doc.) Dkt. # 87-6, p. 3. Mr. Stempler's AlphaGraphics franchise agreement also identifies a number of benefits that AlphGraphics has contractually agreed to provide its franchisees including assistance with site selection; advice on financing; detailed plans for a print shop; three to four weeks of training; up to forty-eight hours per year of free consultation; operating manuals; and use of trademarks. (Stempler Franchise Agreement) Dkt. #87-7, pp. 16, 17, 19-20, 23-26.

Whether these alleged "benefits" actually put franchisees in a better position to handle the faster phase-in schedule is irrelevant under rational basis review. As explained above, the court must respect the legislative branch's "rightful independence and its ability to function," and absent some reason to "infer antipathy," the court cannot overstep and replace its judgment for the judgment of lawmakers. *Lehnhausen*, 410 U.S. at 365. As long as there was a "reasonably conceivable state of facts" that supported the City's decision, the court must leave that decision alone. *See United States R.R. Ret.*, 449 U.S. at 179 ("Where there are plausible reasons for Congress' action, our inquiry is at an end.") (internal quotations omitted). If the voters are unhappy, they can, of course, resort to the democratic process.

Here, the facts presented by the two experts, along with the facts drawn from the plaintiffs' individual depositions and franchise agreements confirm that a rational basis exists for the City's decision to classify franchisees as "large" businesses. Based upon the benefits outlined above, the City could have "reasonably conceived" that franchisees are in a better position than independent small businesses and therefore better able to accommodate the faster phase-in schedule for the minimum wage. Again, the realistic impact of these "benefits" is not part of the court's inquiry, as the legislature need only show "rational speculation." *See Vance*, 440 U.S. at 111 ("[A] legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data.").

Notably, no one disputes the City's decision to draw a line defining "large" businesses as any employer with 500 or more employees. But who is to say an employer with 501 employees has more resources than one with 499? And who is to say businesses with 501 employees can actually accommodate a faster phase-in schedule? The court is in no position to answer these questions, nor is the court obliged to do so. The City Council, based upon its research, review of historical data, legislative hearings, and communications with the public, saw fit to draw the "large" business line at 500 employees. *See Beach Commc'ns, Inc.*, 508 U.S. at 315 ("These restraints on judicial review have added force where the legislature must necessarily engage in a process of line-drawing."). And absent a reason to infer antipathy, the court cannot second-guess the wisdom, fairness, or logic of that choice.

The Ordinance's separate treatment of "integrated enterprises" does not change the court's conclusion. The "state of facts" was sufficient to allow the City to "rationally speculate" that: large businesses (those with more than 500 employees) could handle the faster phase-in schedule because presumably they have more resources; that "integrated enterprises" (separate entities that share a certain degree of common control and in aggregate have more than 500 employees) could handle the faster phase-in because of their additional resources; and franchisees (separate entities that are subject to some level of control by a larger entity and receive certain benefits from that larger entity) could handle the faster phase-in because of that business model. Again, because there is a rational basis for the line-drawing, judicial intervention is unwarranted.

Finally, despite plaintiffs' arguments to the contrary, there is no reason to infer antipathy here. The large majority of statements identified by plaintiffs as showing animus were made by Advisory Committee members and private citizens, not lawmakers. The court has already explained why it gives little weight to such statements, especially when they relate to issues as politically charged as this one. Additionally, the statements by lawmakers distinguished between entities with more resources and those with less resources. When read in context, no protectionist motive was apparent from any of the statements.

Thus, the court finds plaintiffs have neither shown a likelihood of success nor raised serious questions going to the merits of their equal protection claim.

C. First Amendment

Plaintiffs next contend that the faster phase-in schedule violates their freedoms of speech and association. They contend that the Ordinance penalizes franchisees for their association with franchisors and "their decision to engage in protected speech." (Pls.' Mot.) Dkt. # 37, p. 26. They allege that the First Amendment protects their right to engage in "coordinated marketing and advertising" and that the Ordinance will curtail this "commercial speech in at least three important respects." (Compl.) Dkt. # 1, ¶ 169. First, by increasing the labor costs of franchisees, the Ordinance will reduce the ability of franchisees to dedicate funding to the promotion of their business and brands. *Id.* Second, the increased labor costs the Ordinance mandates may cause some franchisees to shut their doors, reducing the amount of relevant commercial speech they engage in to zero. *Id.* And third, the Ordinance will likely cause potential franchisees to forego purchasing a franchise because of the associated higher operation costs. *Id.*

Plaintiffs' argument is unconvincing. The Ordinance does not penalize speech or association. Rather, it uses certain factors common to franchises to identify them as one type of business subject to the faster phase-in schedule. The definition used by the City here is no different than many other federal and state laws which regulate franchises. *See, e.g.*, 16 C.F.R. § 436.1(h) ("Franchise means any continuing commercial relationship or arrangement…in which the terms of the offer or contract specify…that the franchisee will obtain the right to operate a business that is identified or associated with the franchisor's trademark…"); R.C.W. § 19.100.010(6) ("Franchise means… the operation of the business is substantially associated with a trademark…"); Cal. Bus. & Prof. Code § 20001 ("Franchise means…the operation of the franchisee's business…is substantially associated with the franchisor's trademark…"); N.J.S.A. § 56:10-3 ("Franchise means a written arrangement…in which a person grants to another person a license to use a…trade mark…"). If the court were to accept plaintiffs' argument, it would mean that any regulation that impacts a franchisee's operation costs implicates the First Amendment because it would necessarily reduce funds that would otherwise be available for "coordinated marketing and advertising" and other forms of commercial speech. Plaintiffs, however, cite no case to support this expansive theory of First Amendment rights.

Indeed, as recognized by the First Circuit, "the mere fact that the joint activities that define the business relationship between the franchisor and its franchisees have some communicative component cannot, in and of itself, establish an entitlement to the prophylaxis of the First Amendment." *See Wine & Spirits Retailers, Inc. v. Rhode Island*, 418 F.3d 36, 51, 53 (1st Cir. 2005); *see also Roberts v. U.S. Jaycees*, 468 U.S. 609, 634, 638 (1984) (O'Connor, J., concurring) ("[T]here is only minimal constitutional protection of the freedom of commercial association," and that in all events, "no First Amendment interest stands in the way of a State's rational regulation of economic transactions by or within a commercial association.”).

Accordingly, plaintiffs have not shown a likelihood of success or raised serious questions going to the merits of this claim.

D. Lanham Act Preemption

Next, plaintiffs contend that the Ordinance is preempted by the Lanham Act. Though novel and creative, this argument is untenable. Under the Supremacy Clause, U.S. Const., art. VI, cl. 2, when a local law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,” it is preempted. *Hillman v. Maretta*, 133 S. Ct. 1943, 1950 (2010). Thus, where conflict is alleged between federal and state law, “the specific purpose of the federal act must be ascertained in order to assess any potential erosion of the federal plan by operation of the state law.” *Golden Door, Inc. v. Odisho*, 646 F.2d 347, 352 (9th Cir. 1980) (citing *Mariniello v. Shell Oil Co.*, 511 F.2d 853 (3d Cir. 1975)). Deciphering the purposes of the Lanham Act requires no guesswork, as the Act itself includes an “unusual and extraordinarily helpful” statement of its purposes. *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1389 (2014). The purposes of the Lanham Act are to:

> “[R]egulate commerce within the control of Congress by making actionable the deceptive and misleading use of marks in such commerce; *to protect registered marks used in such commerce from interference by State, or territorial legislation*; to protect persons engaged in such commerce against unfair

> competition; to prevent fraud and deception in such commerce by the use of reproductions, copies, counterfeits or colorable imitations of registered marks; and to provide rights and remedies stipulated by treaties and conventions respecting trademarks, trade names, and unfair competition entered into between the United States and foreign nations."

15 U.S.C. § 1127 (emphasis added).

Nothing in the Ordinance conflicts with these purposes. As explained above, the Ordinance relies on trademark use as one indicator that a business is a franchise. This definition is used merely to categorize franchisees and to identify them as subject to the faster phase-in schedule. Plaintiffs cite no case that holds that such a categorization "interferes" with the use of trademarks in violation of the Lanham Act.

Indeed, there is a presumption against preemption in areas where the states have traditionally exercised their police powers. *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995). Here, the regulation of wages is firmly within the local police power. *See, e.g.*, *RUI One Corp.*, 371 F.3d at 1150 (acknowledging that "[t]he power to regulate wages and employment conditions lies clearly within a state's or municipality's police power."). To overcome this presumption, plaintiffs must show that preemption was Congress' "clear and manifest purpose." *Travelers Ins., Co.*, 514 U.S. at 655. Plaintiffs have made no such showing.

Accordingly, plaintiffs have not shown a likelihood of success or raised serious questions going to the merits of this claim.

E. ERISA Preemption

Plaintiffs next contend that certain health plan-related provisions of the Ordinance are preempted by the Employment Retirement Income Security Act ("ERISA"). These provisions allow large employers (those with more than 500 employees), who offer their employees health plans classified as "silver" or "gold" under the federal Affordable Care Act, the opportunity to take advantage of an alternative, more favorable, wage schedule. Rather than complying with the three year phase-in, these employers will be given *four* years to reach the $15 per hour minimum wage. Plaintiffs claim that these provisions are preempted because they "relate to" employee benefit plans that are governed by ERISA. (Pls.' Mot.) Dkt. # 37, pp. 24-26.

This argument, as a practical matter, is not relevant to the pending motion. The health plan-related provisions simply have no impact on the franchise-related provisions plaintiffs seek to enjoin. Here, plaintiffs are asking the court to enjoin the provision that requires them to comply with the three year phase-in schedule (Schedule 1) and to compel the City to allow franchisees to take advantage of the seven year phase-in schedule (Schedule 2). Thus, the validity of this alternative four-year schedule is irrelevant. Even if the court finds that the health plan-related provisions are preempted by ERISA, that finding will do nothing to advance the relief requested by the franchisees in this motion.

Nevertheless, for the sake of completeness, the court will address plaintiffs' argument. To begin with, it is important to reiterate that there is a presumption against preemption when the statute under review relates to a matter of local concern, such as the regulation of wages. *See*, *WSB Elec., Inc. v. Curry*, 88 F.3d 788, 791 (9th Cir. 1996) ("It is well settled that wages are a subject of traditional state concern, and are not included in ERISA's definition of employee benefit plan. Thus, regulation of wages per se is not within ERISA's coverage.") (internal quotation marks omitted). Nevertheless, it is possible, under certain circumstances, for ERISA to preempt local wage regulations. ERISA preempts and supersedes any and all state laws that "relate to" any employee benefit plan. *See* 29 U.S.C. § 1144(a). Recognizing that the term "relate to" potentially had no limits, the Supreme Court narrowed its scope in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Company*, 514 U.S. 645 (1995) and *California Division of Labor Standards Enforcement v. Dillingham Construction Company*, 517 U.S. 316 (1997). Under the more narrow construction, the "relate to" criterion is analyzed by determining if the state law: (1) has a "connection with" or (2) a "reference to" employee benefits plans.

1. Does the Ordinance Have a "Connection With" an ERISA Plan?

To determine whether a state or local law has a "connection with" ERISA, courts consider (1) the objectives of ERISA and (2) the nature of the impact that the challenged law has on ERISA plans.

Dillingham, 519 U.S. at 325; *Golden Gate Rest. Ass'n v. City & County of San Francisco*, 546 F.3d 639, 655-56 (9th Cir. 2008).

The objectives of ERISA focus on maintaining a uniform regulatory regime over employee benefit plans. Thus, one purpose of ERISA's preemption clause is to "ensure that the administrative practices of a benefit plan will be governed by only a single set of regulations." *Golden Gate*, 546 F.3d at 655. Accordingly, in considering the nature and impact local laws have on ERISA plans, courts will often find that they have an impermissible "connection with" ERISA if they require employers to have health plans, dictate the specific benefits that must be provided through those plans and/or impose certain reporting requirements which differ from those of ERISA. *Id.*

Here, the Ordinance does not require any employer to provide any ERISA plan; it does not dictate the contents or any administrative requirements for such a plan; it does not have any direct impact on any ERISA plan; and it does not impose reporting, disclosure, funding, or vesting requirements on any ERISA plan.

Accordingly, it does not have an impermissible "connection with" ERISA.

2. Does the Ordinance Have a "Reference To" an ERISA Plan?

A statute has an impermissible "reference to" ERISA plans if it acts immediately and exclusively upon the plans or if the plans are essential to the law's operation. *Dillingham*, 519

U.S. at 324-25; *S. Ca. IBEW-NECA Trust Funds v. Standard Indus. Elec. Co.*, 247 F.3d 920, 525 (9th Cir. 2001). Thus, the challenged statute must do more than mention ERISA to be preempted; it must have some effect upon ERISA plans. *WSB Elec., Inc. v.*, 88 F.3d at 793.

Here, the Ordinance does not have any effect upon ERISA plans. It does not require any employer to provide benefits through ERISA plans nor does it dictate the contents of any such plan. The Ordinance merely allows large employers to take advantage of an alternative four year phase-in schedule if they happen to provide certain benefits to their employees. Thus, while ERISA plans may be optional under the Ordinance, they are certainly not required or "essential" to the law's operation. *See, e.g.*, *WSB Elec., Inc*, 88 F.3d at 793 (noting that the statute at issue did not premise any employer obligation on the existence of benefit plans, but instead merely took account of such plans if they happened to exist).

Accordingly, the Ordinance does not have an impermissible "reference to" ERISA.

F. Privileges and Immunities Under Washington State Constitution

Finally, plaintiffs contend that the Ordinance violates the privileges and immunities clause of the Washington Constitution because it infringes on their fundamental right to "carry on business" in Seattle.

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.

Washington courts have often construed article I, section 12 consistent with the federal Equal Protection Clause. *Ockletree v. Franciscan Health Sys.*, 179 Wash. 2d 769, 776 (2014). However, if the matter at issue is one of particular local concern—such as the power to regulate wages—an independent analysis is warranted. *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wash. 2d 791, 811 (2004)). This analysis involves a two-step inquiry. *Ass'n of Wash. Spirits & Wine Distribs. v. Wash. State Liquor Control Bd.*, 340 P.3d 849, 857 (Wash. 2015) (en banc). The first step is to determine whether the law in question involves a privilege or immunity; if not, then article I, section 12 is not implicated. *Id.* If there is a privilege or immunity, the second step is to determine whether the legislature had a "reasonable ground" for granting the privilege or immunity. *Id.*

1. Does the Ordinance Involve a Privilege or Immunity?

Plaintiffs contend that the slower phase-in schedule is a "privilege" that is granted on unequal terms. (Pls.' Mot.) Dkt. # 37, pp. 31-32. Although plaintiffs are correct that the slower phase-in schedule favors small independent businesses over other types of businesses in Seattle, plaintiffs fail to show that this benefit is a "privilege" that implicates the Washington Constitution.

The privileges and immunities clause is not violated anytime the legislature treats similarly situated businesses differently.[19] *Am. Legion Post No. 149 v. Dep't of Health*, 164 Wash. 2d 570, 607 (2008). "[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*, 179 Wash. 2d at 778. As the court found in *Ockletree*, *Ockletree*, 179 Wash. 2d at 778. As the court found in *Ockletree*,

> Accepting Ockletree's definition means recognizing a privilege anytime a statute grants a right to some but not others…As a result, we could be called upon to second-guess the distinctions drawn by the legislature for policy reasons nearly every time it enacts a statute. For example, the property tax exemptions for citizens "[s]ixty-one years of age or older" and "veterans with one hundred percent service-connected disabilities" could be challenged as unconstitutional grants of special privileges to certain classes of citizens but not others. Similarly, exemptions from emission control inspections for "[f]arm vehicles," "[s]treet rod vehicles," "[h]ybrid motor vehicles," and "[c]lasses of motor vehicles exempted by the director of the department of ecology,"

[19] The court has already outlined the differences between independent small businesses and franchisees.

> among others, would all be subject to challenge under article I, section 12. RCW 46.16A.060(2)(e), (f), (h), (i). We therefore reject Ockletree's invitation to broaden the meaning of the word "privilege" for purposes of article I, section 12 and reiterate that a privilege in this context is limited to those *fundamental* rights of citizenship.

Id. at 779 (emphasis added).

Plaintiffs insist, however, that a fundamental right is at issue here. They claim that allowing independent small businesses to phase-in the minimum wage at a slower pace than franchisees infringes upon the franchisees' fundamental right to "carry on business." (Pls.' Mot.) Dkt. # 37, p. 31. The court disagrees.

Plaintiffs' reliance on *Ralph v. City of Wenatchee*, 34 Wash. 2d 638 (1949) is misplaced. There, the City of Wenatchee enacted an ordinance that clearly and purposefully discriminated against itinerant photographers. *Id.* at 638-39, 643. The ordinance imposed substantial licensing fees on the photographers and prohibited them from soliciting business in public places, private homes, and private businesses (i.e., almost everywhere in the city). *Id.* at 639-40, 643. The court found that the effect of these regulations was to "*substantially* prohibit activity of non-resident photographers in the city of Wenatchee." *Id.* at 642 (emphasis added). Rather than reasonably regulate the activities of itinerant photographers, the city enacted significant burdens and prohibitions on "what is in itself a completely lawful business." *Id.* at 644.

Here, nothing in the Ordinance prevents anyone from exercising their right to "carry on business." *See, e.g.*, *Am. Legion*, 164 Wash. 2d at 608 (holding that business regulations that do not "prevent any entity from engaging in business" do not involve a fundamental right). The Ordinance requires all businesses to pay the higher minimum wage. That "large" businesses must pay $1.00 more in labor costs in 2015, $2.50 more in 2016, and $4 more in 2017 does not substantially burden or prohibit those entities from carrying on business in Seattle. Accordingly, the Ordinance does not implicate a "privilege" under the Washington Constitution.

2. Did the Legislature Have a "Reasonable Ground" for Granting the Privilege or Immunity?

Even if the court were to find that the Ordinance implicates a "privilege or immunity," plaintiffs' article I, section 12 challenge still fails because reasonable grounds exist for the distinction between franchisees and small independent businesses. To meet the reasonable ground requirement, 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 Ordinance readily satisfies this standard for the reasons previously stated. Franchisees enjoy certain benefits as a result of the franchise relationship and those benefits have recognizable economic value to the franchisees. These benefits support the reasonableness of the Ordinance's distinction between franchises and independent small businesses.

Accordingly, plaintiffs have neither shown a likelihood of success nor raised serious questions regarding the merits of this claim.

G. Irreparable Harm, Balance of the Equities and Public Interest

Although plaintiffs have not shown a likelihood of success on the merits of any of their claims, the court will nevertheless address the remaining preliminary injunction factors.

1. Irreparable Harm

A preliminary injunction is an extraordinary remedy and to obtain such relief, plaintiffs must demonstrate more than a mere "possibility" of harm. *Winter*, 555 U.S. at 22. Indeed, the need to show "substantial and immediate irreparable injury" is especially strong when plaintiffs seek to enjoin the activity of a state or local government. *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037, 1042 (9th Cir. 1999) ("The Supreme Court has repeatedly cautioned that, absent a threat of immediate and irreparable harm, the federal courts should not enjoin a state to conduct its business in a particular way.").

Here, plaintiffs have not met their burden of demonstrating the requisite irreparable harm. Although plaintiffs assert that they will suffer competitive injury, loss of customers, loss of goodwill, and the risk of going out of business, Dkt. # 37, p. 32, the court finds that these allegations are conclusory and unsupported by the facts in the record. It is true that "evidence of threatened loss of prospective customers or goodwill" supports a finding of irreparable harm, *Stuhlbarg Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 841 (9th Cir. 2001), but that *evidence* is lacking here. Although the court is sympathetic to the concerns of franchisees, the individual plaintiffs' declarations in this matter consist only of speculation. There is no actual evidence of the alleged negative impacts that plaintiffs fear will occur as a result of the faster phase-in schedule. *See Oakland Tribune Inc. v. Chronicle Pub. Co., Inc.*, 762 F.2d 1374, 1377 (9th Cir. 1985) (discounting conclusory statements concerning 762 F.2d 1374, 1377 (9th Cir. 1985) (discounting conclusory statements concerning irreparable harm made by interested party); *see also Am. Passage Media Corp. v. Cass Commc'ns, Inc.*, 750 F.2d 1470, 1474 (9th Cir. 1985) (reversing a preliminary injunction and finding that plaintiff's forecast of large losses was insufficient to show it was "threatened with extinction").

2. Balance of the Equities and Public Interest

The balance of the equities and public interest factors also weigh against the entry of a preliminary injunction. Plaintiffs' harm is speculative and does not outweigh the concrete harm that will be suffered by employees who are entitled to a Schedule 1 increase in their wages under the Ordinance. When weighing the *imminent* costs to franchisees (*i.e.*, a $1 per hour differential in pay to their employees and other speculative consequential harms) against the concrete harm to those employees in the form of lost income, it is impossible for the court to find that the equities tip sharply in plaintiffs' favor.

Additionally, contrary to plaintiffs' contentions, granting injunctive relief would not maintain the status quo. Here, the status quo is the Ordinance, which the citizens of Seattle expect to go into effect on April 1, 2015. The public has an interest in ensuring that laws passed by its legislative body are implemented. *See, e.g.*, *Golden Gate Rest. Ass'n v. City of San Francisco*, 512 F.3d 1112, 1116 (9th Cir. 2008) (observing that enjoining the implementation of an ordinance would disturb rather than maintain the status quo); *Planned Parenthood of Blue Ridge v. Camblos*, 116 F.3d 707, 721 (4th Cir. 1997) ("[T]he status quo is that which the People have wrought, not that which unaccountable federal judges impose upon them.")

H. The "Serious Questions" Test

Finally, the court finds that plaintiffs have failed to satisfy the alternative "serious questions" standard. *See, e.g.*, *Alliance for the Wild Rockies*, 632 F.3d at 1135 ("'[S]erious questions going to the merits' and a balance of the hardships that tips sharply towards the plaintiff can support the issuance of a preliminary injunction…."); S*ierra On-Line, Inc. v. Phoenix Software, Inc.*,739 F.2d 1415, 1421 (9th Cir. 1984) (noting that a "serious question" is one on which the movant has "a fair chance of success on the merits"). Even if the court were to assume that plaintiffs raised "serious questions" regarding their dormant Commerce Clause claim, as set forth above, they have not shown that the balance of the equities tips sharply in their favor. Accordingly, the court cannot grant a preliminary injunction under the alternative standard.

V. CONCLUSION

For all the foregoing reasons, the court denies plaintiffs' motion for preliminary injunction. Dkt. # 37.

Dated this 17th day of March, 2015.

s/Richard A. Jones

The Honorable Richard A. Jones
United States District Judge

Appendix ***C***

U.S Const. art. I, §8, cl. 3

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

Appendix D

CITY OF SEATTLE ORDINANCE 124490

AN ORDINANCE relating to employment in Seattle; adding a new Chapter 14.19 to the Seattle Municipal Code; establishing minimum wage and minimum compensation rates for employees performing work in Seattle; and prescribing remedies and enforcement procedures.

WHEREAS, United States President Barack Obama has called addressing income inequality the [sic] "the defining issue of our time;"

WHEREAS, the noted economist Thomas Piketty wrote in his landmark book Capital in the 21st Century, the need to act on income inequality is profound as "[r]eal wages for most US workers have increased little if at all since the early 1970s, but wages for the top one percent of earners have risen 165 percent, and wages for the top 0.1 percent have risen 362 percent;"

WHEREAS, the tens of thousands of low wage workers in Seattle who struggle to meet their most basic needs, the increasing unaffordability of this city for so many of our citizens, and the hollowing-out of the middle class strike at the core of who we are as a community dedicated to democratic principles and economic advancement and opportunity;

WHEREAS, Seattle has one of the worst gender wage gaps in the country, where a majority of low wage workers tend to be women, and a higher minimum wage is a powerful tool to reduce the income disparity between women and men;

WHEREAS, many Seattle workers cannot fully participate in our community's dynamic civic life or pursue the myriad educational, cultural, and recreational opportunities that constitute a flourishing life because many struggle to meet their households' most basic needs;

WHEREAS, Seattle is home to many innovative and progressive employers who contribute significantly to the economic prosperity of the region;

WHEREAS, Seattle has a long and proud tradition of advocating for worker rights and promoting social and economic justice;

WHEREAS, minimum wage laws 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;

WHEREAS, the Mayor signed Executive Order 2014-01 directing all City of Seattle Department Directors to prioritize and work in coordination with the City's Personnel Department and Budget Office to develop a comprehensive implementation plan that ensures a minimum hourly wage of $15.00 for employees of the City of Seattle, and directing the Personnel Department and Budget Office to seek concurrence and coordinate with the City Council and the Mayor's Income Inequality Advisory Committee;

WHEREAS, the Mayor and City Council has convened a Labor Standards Advisory Committee and the City expects the committee will provide feedback later in 2014 on recommended approaches for enhancing the City's enforcement of various labor laws including, but not limited to, minimum wage laws;

WHEREAS, the City is committed to evaluating options for securing progressive sources of funding to ensure that non-profit human services providers with City-funded contracts can provide both a living wage to their workforce and continue to provide critical services for those in the greatest need;

WHEREAS, Seattle's employer and worker advocacy community have come together to respond to the challenge of rising income inequality and ensure broadly shared prosperity in our community;

NOW, THEREFORE,

BE IT ORDAINED BY THE CITY OF SEATTLE AS FOLLOWS:

Section 1. The City Council ("Council") makes the following findings of fact and declarations:

1. Over 100,000 Seattle workers earn wages insufficient to support themselves and their families;
2. In Seattle, the weight of income inequality falls disproportionately on people of color and on women. More than 34 percent of all women and over 40 percent of African Americans and Asian and Pacific Islander Americans rank among low wage workers in Seattle. For Latinos, that number is nearly 50 percent, and it is 70 percent for Native Americans;
3. Over 24 percent of Seattle residents earn hourly wages of $15.00 per hour or less and

approximately 13.6 percent of the Seattle community lives below the poverty level;

4. Some employers, in particular small businesses and not-for-profit organizations, may have difficulty in accommodating the increased costs;
5. Numerous studies suggest minimum wages benefit employers and the economy as a whole by improving employee performance, reducing employee turnover, lowering absenteeism, and thereby improving productivity and the quality of the services provided by employees;
6. The Mayor formed an "Income Inequality Advisory Committee," a group comprised of representatives from Seattle's employer, labor, and non-profit communities to address the pressing issue of income inequality in Seattle;
7. The Income Inequality Advisory Committee was charged with delivering recommendations on how best to increase the minimum wage in Seattle in a way that ensures that our economy is vibrant enough and fair enough to embrace all who live and work here;
8. The Income Inequality Advisory Committee reviewed the impact of minimum wage increases in other cities, relevant studies and other appropriate data, and hosted numerous public engagement forums, including industry-specific forums and the

"Income Inequality Symposium" at Seattle University;

9. The Income Inequality Advisory Committee determined the following: Seattle's minimum wage should be raised to $15.00 per hour; the minimum wage should be phased in over time, the first year of implementation of a phased increase of the minimum wage should begin in 2015; once the minimum wage reaches $15.00 per hour it should rise in concert with the consumer price index; exemptions from the $15.00 per hour minimum wage are limited to only those allowed under the Washington State Minimum Wage Act; a benchmark of 500 employees is appropriate as distinguishing between larger and smaller employers in recognition that smaller businesses and not-for-profits would face particular challenges in implementing a higher minimum wage;

10. The Income Inequality Advisory Committee also recognized a set of principles for a strong enforcement and culturally competent worker and business education program that integrates existing annual business license processes; creates significant penalties for intentional and repeat violations; establishes worker and employer outreach and education programs through contracts with 501(c)3 community-based organizations and business associations; develops an incentive structure for businesses with solid labor practices;

emphasizes culturally competent communication with employees and employers; connects workers with the appropriate local, state, and federal agencies; and establishes a business, labor, and community oversight committee to monitor implementation of the City of Seattle's new labor standards education and enforcement function. These principles will be forwarded to the City of Seattle's Labor Standards Advisory Committee; and

11. The public welfare, health, and prosperity of Seattle require wages and benefits sufficient to ensure a decent and healthy life for all Seattle workers and their families.

Section 2. A new Section 14.19.010 is added to the Seattle Municipal Code as follows:

14.19.010 Definitions

For the purposes of this Chapter:

A. "Actuarial value" means the percentage of total average costs for covered benefits that a health benefits package will cover;

B. "Bonuses" means non-discretionary payments in addition to hourly, salary, commission, or piece-rate payments paid under an agreement between the employer and employee;

C. "Commissions" means a sum of money paid to an employee upon completion of a task, usually selling a certain amount of goods or services;

D. "Department" means the Department of Finance and Administrative Services;

E. "Director" means the Director of the Department of Finance and Administrative Services, or his or her designee;

F. "Employ" means to permit to work;

G. "Employee" means "employee," as defined under Section 12A.28.200. Employee does not include individuals performing services under a work study agreement;

H. "Employer" means any individual, partnership, association, corporation, business trust, or any person or group of persons acting directly or indirectly in the interest of an employer in relation to an employee;

I. "Franchise" means a written agreement by which:

   1. A person is granted the right to engage in the business of offering, selling, or distributing goods or services under a marketing plan prescribed or suggested in substantial part by the grantor or its affiliate;

   2. The operation of the business is substantially associated with a trademark, service mark., trade name, advertising, or other commercial symbol; designating, owned by, or licensed by the grantor or its affiliate; and

3. The person pays, agrees to pay, or is required to pay, directly or indirectly, a franchise fee;

J. "Franchisee" means a person to whom a franchise is offered or granted;

K. "Franchisor" means a person who grants a franchise to another person;

L. "Hearing Examiner" means the official appointed by the Council and designated as the Hearing Examiner, or that person's designee (Deputy Hearing Examiner, Hearing Examiner Pro Tem, etc.);

M. "Hourly minimum compensation" means the minimum compensation due to an employee for each hour worked during a pay period;

N. "Hourly minimum wage" means the minimum wage due to an employee for each hour worked during a pay period;

O. "Medical benefits plan" means a silver or higher level essential health benefits package, as defined in 42 U.S.C. § 18022, or an equivalent plan that is designed to provide benefits that are actuarially equivalent to 70 percent of the full actuarial value of the benefits provided under the plan, whichever is greater;

P. "Minimum compensation" means the minimum wage in addition to tips actually received by the employee and reported to the Internal Revenue Service, and money paid by the employer towards an individual employee's medical benefits plan;

Q. "Minimum wage" means all wages, commissions, piece-rate, and bonuses actually received by the employee and reported to the Internal Revenue Service;

R. "Piece-rate" means a price paid per unit of work;

S. "Rate of inflation" means the Consumer Price Index annual percent change for urban wage earners and clerical workers, termed CPI-W, or a successor index, for the twelve months prior to each September 1st as calculated by the United States Department of Labor;

T. "Schedule 1 Employer" means all employers that employ more than 500 employees in the United States, regardless of where those employees are employed in the United States, and all franchisees associated with a franchisor or a network of franchises with franchisees that employ more than 500 employees in aggregate in the United States;

U. "Schedule 2 Employer" means all employers that employ 500 or fewer employees regardless of where those employees are employed in the United States. Schedule 2 employers do not include franchisees associated with a franchisor or a network of franchises with franchisees that employ more than 500 employees in aggregate in the United States;

V. "Tips" means a verifiable sum to be presented by a customer as a gift or gratuity in recognition of some service performed for the customer by the employee receiving the tip;

W. "Wage" means compensation due to an employee by reason of employment, payable in legal tender of the United States or checks on banks convertible into cash on demand at full face value, subject to such deductions, charges, or allowances as may be permitted by rules of the Director. Commissions, piece-rate, and bonuses are included in wages. Tips and employer payments toward a medical benefits plan do not constitute wages for purposes of this Chapter.

Section 3. A new Section 14.19.020 is added to the Seattle Municipal Code as follows:

14.19.020 Employment in Seattle and Employer Schedule Determination

A. Employees are covered by this Chapter for each hour worked within the geographic boundaries of Seattle, provided that an employee who performs work in Seattle on an occasional basis is covered by this Chapter in a two-week period only if the employee performs more than two hours of work for an employer within Seattle during that two-week period. Time spent in Seattle solely for the purpose of travelling through Seattle from a point of origin outside Seattle to a destination outside Seattle, with no employment-related or commercial stops in Seattle except for refueling or the employee's personal meals or errands, is not covered by this Chapter. An employee who is not covered by this Chapter is still included in any determination of the size of the employer.

B. For the purposes of determining whether a non-franchisee employer is a Schedule 1 employer or a Schedule 2 employer, separate entities that form an integrated enterprise shall be considered a single employer under this Chapter. Separate entities will be considered an integrated enterprise and a single employer under this Chapter where a separate entity controls the operation of another entity. The factors to consider in making this assessment include, but are not limited to:

1. Degree of interrelation between the operations of multiple entities;
2. Degree to which the entities share common management;
3. Centralized control of labor relations; and
4. Degree of common ownership or financial control over the entities.

There shall be a presumption that separate legal entities, which may share some degree of interrelated operations and common management with one another, shall be considered separate employers for purposes of this section as long as (1) the separate legal entities operate substantially in separate physical locations from one another, and (2) each separate legal entity has partially different ultimate ownership. The determination of employer schedule for the current calendar year will be calculated based upon the average number of employees employed per calendar week during the preceding calendar year for any and all weeks during which at least one employee worked for compensation. For employers that did not have any employees during the previous calendar year, the employer schedule will be calculated based upon the average number of employees employed per calendar week during the first 90 calendar days of the current year in which the employer engaged in business.

C. The Director shall have the authority to issue a special certificate authorizing an employer to pay a wage less than the City of Seattle minimum wage, as defined in this Chapter, but above the Washington State minimum wage, as defined in RCW 49.46.020. Such special certificates shall only be available for the categories of workers defined in RCW 49.46.060 and shall be subject to such limitations as to time, number, proportion, and length of service as the Director shall prescribe. Prior to issuance, an applicant for a special certificate must secure a letter of recommendation from the Washington State Department of Labor and Industries stating that the applicant has a demonstrated necessity pursuant to W AC 296-128.

D. The Director shall by rule establish the minimum wage for employees under the age of eighteen years, provided that any percentage of the hourly rate established by rule shall not be lower than the percentage applicable under state statutes and regulations.

Section 4. A new Section 14.19.030 is added to the Seattle Municipal Code as follows:

14.19.30 Hourly Minimum Wage Schedule 1 Employers

A. Effective April 1, 2015, Schedule 1 employers shall pay each employee an hourly minimum wage of at least $11.00. Pursuant to the following schedule, effective January 1 of each year thereafter, Schedule 1 employers shall pay any employee an hourly minimum wage as follows:

Year	Hourly Minimum Wage
2016	$13.00
2017	$15.00

Effective January 1, 2018, the hourly minimum wage paid by a Schedule 1 employer to any employee shall be increased annually on a percentage basis to reflect the rate of inflation and calculated to the nearest cent on January 1 of each year thereafter.

B. Schedule 1 employers can meet the applicable hourly minimum wage requirement through a payment of the minimum wage, provided that the Schedule 1 employer is in compliance with all applicable law. Where an employee is paid on a commission or piece-rate basis, wholly or partially, the amount earned on such basis in each work-week period may be credited as a part of the total wage for that period, and the total wages paid for such period shall be computed on the hours worked in that period resulting in no less than the applicable minimum wage rate. Where an employee is paid a bonus, the amount of the bonus in each work-week period may be credited as a part of the total wage for that period, and the total wages paid for such period shall be computed on the hours worked in that period resulting in no less than the applicable minimum wage rate. Pursuant to the following schedule, effective January 1, 2016, Schedule 1 employers that pay toward an individual employee's medical benefits plan shall pay the employee an hourly minimum wage as follows:

Year	Hourly Minimum Wage
2016	$12.50
2017	$13.50
2018	$15.00

Effective January 1, 2019, payment by the employer of health benefits for employees shall no longer affect the hourly minimum wage paid by a Schedule 1 employer.

Section 5. A new Section 14.19.040 is added to the Seattle Municipal Code as follows:

14.19.040 Hourly Minimum Wage- Schedule 2 Employers

A. Effective April 1, 2015, Schedule 2 employers shall pay each employee an hourly minimum wage of at least $10.00. Schedule 2 employers can meet the applicable hourly minimum wage requirement through a payment of the minimum wage, provided that the Schedule 2 employer is in compliance with all applicable law. Effective January 1 of 2016 and each year thereafter, Schedule 2 employers shall pay each employee an hourly minimum wage that is the lower of (a) the applicable hourly minimum wage for Schedule 1 Employers or (b) the hourly minimum wage shown in the following schedule:

Year	Hourly Minimum Wage
2016	$10.50
2017	$11.00
2018	$11.50
2019	$12.00
2020	$13.50
2021	$15.00
2022	$15.75
2023	$16.50
2024	$17.25

Effective on January 1 of 2025, and January 1 of every year thereafter, the hourly minimum wage paid by a Schedule 2 employer to any employee shall equal the hourly minimum wage applicable to Schedule 1 employers.

B. Schedule 2 employers can meet the applicable hourly minimum wage requirements through a payment of the minimum wage, provided that the Schedule 2 employer is in compliance with all applicable law.

Section 6. A new Section 14.19.050 is added to the Seattle Municipal Code as follows:

14.19.050 Hourly Minimum Compensation-Schedule 2 Employers

A. Effective April 1, 2015, Schedule 2 employers shall pay each employee an hourly minimum compensation of at least $11.00. Effective January 1 of each year thereafter, Schedule 2 employers shall pay each employee an hourly minimum compensation that is the lower of (a) the applicable hourly minimum wage for Schedule 1 Employers or (b) the hourly minimum compensation shown in the following schedule:

Year	Hourly Minimum Compensation
2016	$12.00
2017	$13.00
2018	$14.00
2019	$15.00
2020	$15.75

Effective January 1, 2021, the hourly minimum compensation paid by a Schedule 2 employer to any employee shall equal the hourly minimum wage applicable to Schedule 1 employers.

B. Schedule 2 employers can meet the applicable hourly minimum compensation requirement through wages (including applicable commissions, piece-rate, and bonuses), tips and money paid by an employer towards an individual employee's medical benefits plan, provided that the Schedule 2 employer also meets the applicable hourly minimum wage requirements.

C. Effective January 1, 2025, minimum compensation will no longer be applicable as defined in this Chapter.

Section 7. A new Section 14.19.060 is added to the Seattle Municipal Code as follows:

14.19.060 Enforcement

A. Powers and Duties

1. The Department shall investigate alleged violations of this Chapter as defined herein, and shall have such powers and duties in the performance of these functions as are defined in this Chapter and otherwise necessary and proper in the performance of the same and provided for by law.
2. The Director is authorized and directed to promulgate rules consistent with this Chapter.

B. Exercise of Rights Protected; Retaliation Prohibited

1. It shall be a violation for an employer or any other person to interfere with, restrain, or deny the exercise of, or the attempt to exercise, any right protected under this Chapter.
2. It shall be a violation for an employer to discharge, threaten, harass, demote, penalize, or in any other manner discriminate or retaliate against any employee because the employee has exercised in good faith the rights protected under this Chapter. Such rights include but are not limited to the right to file an oral or written complaint with the Department about any employer's alleged

violation of this Chapter; the right to inform his or her employer, union or similar organization, and/or legal counsel about an employer's alleged violation of this Chapter; the right to cooperate with the Department in its investigations of alleged violations of this Chapter; the right to oppose any policy, practice, or act that is unlawful under this Chapter; and the right to inform other employees of his or her potential rights under this Chapter.

3. It shall be considered a violation for an employer to communicate to a person filing a wage claim, directly or indirectly, explicitly or implicitly, the willingness to inform a government employee that the person is not lawfully in the United States, report or threaten to report suspected citizenship or immigration status of an employee or a family member of the employee to a federal, state, or local agency because the employee has exercised a right under this Chapter.

C. Notice, Posting, and Records

1. Employers shall give notice to employees in English, Spanish and any other language commonly spoken by employees at the particular workplace that they are entitled to the minimum wage and minimum compensation; that retaliation against employees who exercise their rights under this Chapter is prohibited;

and that each employee has the right to file a charge or bring a civil action if the minimum wage or minimum compensation as defined in this Chapter is not paid or the employee is retaliated against for engaging in an activity protected under this Chapter.

2. Employers may comply with this section by posting in a conspicuous place at any workplace or job site where any covered employee works a notice published each year by the Department informing employees of the current minimum wage and minimum compensation rates applicable in that particular workplace or jobsite and of their rights under this Chapter in English, Spanish and any other languages commonly spoken by employees at the particular workplace or job site.

3. Employers shall retain payroll records pertaining to covered employees for a period of three years documenting minimum wages and minimum compensation paid to each employee.

D. Charges and Investigation

1. The Department may investigate any violations of this Chapter. A charge alleging a violation of this Chapter should include a statement of the dates, places, and persons or entities responsible for such violation. A charge alleging a violation of this Chapter may

also be filed by the Director on behalf of an aggrieved individual when the Director has reason to believe that a violation has occurred.

2. Charges filed under this Chapter must be filed within 3 years after the occurrence of the alleged violation. The applicable statute of limitations for civil actions is tolled during the Department's investigation and any administrative enforcement proceeding under this Chapter based upon the same facts.
3. The Director shall cause to be served or mailed by certified mail, return receipt requested, a copy of the charge on the respondent within 20 days after the filing of the charge and shall promptly make an investigation thereof.
4. The investigation shall be directed to ascertain the facts concerning the alleged violation of this Chapter, and shall be conducted in an objective and impartial manner.
5. During the investigation the Director shall consider any statement of position or evidence with respect to the allegations of the charge which the charging party or the respondent wishes to submit. The Director shall have authority to sign and issue subpoenas requiring the attendance and testimony of witnesses, and the production of evidence including but not limited to

books, records, correspondence or documents in the possession or under the control of the employer subpoenaed.

E. Findings of Fact and Notice of Violation.

1. The results of the investigation shall be reduced to written findings of fact, and a written determination shall be made by the Director that a violation of this Chapter has occurred. The findings of fact shall be furnished promptly to the respondent and charging or aggrieved party in the form of a notice of violation.
2. Within sixty days of a notice of violation, the Director shall confer with the parties and determine an appropriate remedy, which shall include full payment of unpaid wages due to the charging or aggrieved party under the terms of this Chapter. Such remedy shall be reduced to writing in an order of the Director.

F. Remedies

1. An employer who willfully violates the notice and posting requirements of this section shall be subject to a civil penalty in an amount not to exceed $125 for the first violation and $250 for subsequent violations.
2. It is unlawful for any employer to willfully resist, prevent, impede or interfere with the Director in the performance of his or her duties under this Chapter. Conduct made unlawful by

this section constitutes a violation and any employer who commits such a violation may be punished by a civil penalty of not less than $1,000 and not more than $5,000.

3. For a first time violation of this Chapter, the Director shall issue a warning and may assess a civil penalty of up to $500 for improper payment of minimum wage and minimum compensation as defined in this Chapter. For subsequent violations, the Director shall assess a civil penalty for improper payment of minimum wage and minimum compensation as defined in this Chapter. A civil penalty for a second time violation of this Chapter shall be not greater than $1,000 per employee or an amount equal to ten percent of the total amount of unpaid wages, whichever is greater. A civil penalty for a third violation of this Chapter shall not be greater than $5,000 per employee or an amount equal to ten percent of the total amount of unpaid wages, whichever is greater. The maximum civil penalty for a violation of this chapter shall be $20,000 per employee.

4. Within sixty days of a notice of violation of this Chapter, the Director shall confer with the parties and determine an appropriate remedy, which shall include full payment of unpaid wages and accrued interest due to the charging or

aggrieved party under the terms of this Chapter. Such remedy shall be reduced to writing in an order of the Director.

G. Appeal Period and Failure to Respond

1. An employer may appeal the Director's order by requesting a contested hearing in writing within 15 days of service. If an employer fails to appeal the Director's order within 15 days of service, the Director's order shall be final and enforceable. When the last day of the appeal period so computed is a Saturday, Sunday, or federal or City holiday, the period shall run until 5:00 p.m. on the next business day.

H. Appeal Procedure and Failure to Appear

1. Contested hearings shall be conducted pursuant to the procedures for hearing contested cases contained in Section 3.02.090 and the rules adopted by the Hearing Examiner for hearing contested cases. The Director shall have the burden of proof by a preponderance of the evidence before the Hearing Examiner. Failure to appear for a requested hearing will result in an order being entered finding that the employer cited committed the violation stated in the Director's order. For good cause shown and upon terms the Hearing Examiner deems just, the Hearing Examiner may set aside an order entered upon a failure to appear.

2. In all contested cases, the Hearing Examiner shall enter an order affirming, modifying or reversing the Director's order.

Section 8. A new Section 14.19.070 is added to the Seattle Municipal Code as follows:

14.19.070 Severability

The provisions of this Chapter are declared to be separate and severable. If any clause, sentence, paragraph, subdivision, section, subsection or portion of this Chapter, or the application thereof to any employer, employee, or circumstance, is held to be invalid, it shall not affect the validity of the remainder of this Chapter, or the validity of its application to other persons or circumstances.

Section 9. A new Section 14.19.080 is added to the Seattle Municipal Code as follows:

14.19.080 Other Legal Requirements

This Chapter provides minimum wage and minimum compensation requirements and shall not be construed to preempt, limit, or otherwise affect the applicability of any other law, regulation, requirement, policy, or standard that provides for greater wages or compensation; and nothing in this Chapter shall be interpreted or applied so as to create any power or duty in conflict with federal or state law. Nor shall this Chapter be construed to preclude any person aggrieved from seeking judicial review of any final administrative decision or order made under this Chapter affecting such person.

Section 10. This ordinance shall take effect and be in force 30 days after its approval by the Mayor, but if not approved and returned by the Mayor within ten days after presentation, it shall take effect as provided by Seattle Municipal Code Section 1.04.020.