Honorable Richard A. Jones

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

INTERNATIONAL FRANCHISE ASSOCIATION, INC., *et al.*, *Plaintiffs*, v. CITY OF SEATTLE, *et al.*, *Defendants*.	No. C14-848RAJ **PLAINTIFFS' MOTION FOR A LIMITED PRELIMINARY INJUNCTION** **(ORAL ARGUMENT REQUESTED)** **(NOTE ON MOTION CALENDAR: SEPTEMBER 5, 2014 OR DATE TO BE SET BY THE COURT)**

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Pursuant to LCR 7 and this Court's Order (Dkt. # 17), Plaintiffs hereby move for a limited preliminary injunction as to those provisions of Seattle City Ordinance No. 124490, *see* Ex. 1, that discriminate against small franchise businesses.[1]

I. INTRODUCTION

Seattle's new minimum wage ordinance is the first in the Nation to raise the minimum wage to $15 per hour (and beyond). Debates about the wisdom of that historic wage increase itself implicate questions of policy, but the unprecedented and discriminatory manner in which Seattle decided to implement that wage hike implicates serious constitutional concerns. Seattle is not only the first city to raise the minimum wage to $15 per hour, but also the first to treat small employers differently from large employers *and* treat small franchise businesses differently from all other small businesses for these purposes. This discriminatory treatment of a business model typified by involvement in interstate commerce, the use of federally-protected trademarks and particular forms of protected speech and association is not just novel, but unconstitutional. And the ordinance exacerbates those problems with further discrimination among businesses in ways forbidden by ERISA. Somewhere in its deliberations about whether to raise the minimum wage and whether to do so uniformly among businesses, Seattle took a wrong turn and made a decision to single out small franchise businesses for uniquely unfavorable treatment and to favor local businesses. That discriminatory decision crossed the constitutional line.

Under the ordinance, the $15 per hour minimum wage is phased in for large employers (those with more than 500 employees) over a mere three years. For small employers (those with 500 or fewer employees), Seattle recognized the need for a longer transition period and provided

[1] All exhibits cited herein appear as exhibits to the Groesbeck Declaration.

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a seven-year phase-in period. But after drawing that line, Seattle then reversed field and singled out small franchise businesses for discriminatory treatment with a special—and especially damaging—rule: any franchise business, no matter how small, is deemed a "large employer" if all of the separately owned businesses operating under the franchisor's brand or trademark across the country collectively employ more than 500 employees. In other words, if a small Seattle franchise business has just one employee, but the interstate franchise network (which is defined in terms of its common use of federally-protected trademarks and constitutionally-protected speech) with which that business is associated collectively employs more than 500 employees, that small franchise business is treated the same as a Seattle business that itself employs over 500 employees.

The ordinance's unprecedented discrimination against small franchise businesses suffers from several fatal flaws. By treating two otherwise identical employers differently based solely on the fact that one is affiliated with an interstate franchise, Seattle violates the Commerce Clause. Indeed, Seattle's discrimination against small franchisees is so contrary to the ordinance's own recognition of the need to treat small and large businesses differently that it violates the Equal Protection Clause of the Fourteenth Amendment. Seattle, in identifying which small businesses will be singled out for uniquely unfavorable treatment, defines the disfavored class in terms of their use of federally-protected trademarks and constitutionally-protected speech. That punishment for exercising federal property rights and protected speech cannot be squared with the Supremacy Clause or the First Amendment. And the details of Seattle's discriminatory regime create still more problems. Not content to discriminate against small franchise businesses, Seattle also favored certain large businesses that offered federal health plans favored by Seattle. That not only doubles down on the discrimination against small franchise businesses—only truly large businesses offer the plans that qualify for more favorable treatment—but this meddling in federal

health care offerings is also preempted by ERISA. Finally, Seattle's discrimination runs afoul of the Washington Constitution.

In sum, while there is a healthy policy debate about raising the minimum wage, the decision to impose a uniform minimum wage is one for policymakers. But Seattle's decision to discriminate against small businesses based on their affiliation with interstate commerce, use of federally-protected trademarks and constitutionally-protected speech is a different matter entirely. That decision was not a permissible policy choice for policymakers, but an unconstitutional wrong turn.

Because of these glaring problems, Plaintiffs are exceedingly likely to prevail on the merits, and—at an absolute minimum—have raised serious questions about the legality of the ordinance's unjustifiable and significantly adverse treatment of small franchise businesses. As a result, immediate injunctive relief is imperative, especially given the limited scope of the relief requested. Plaintiffs are not asking this Court to preliminarily enjoin the entire ordinance. Instead, Plaintiffs merely seek to enjoin those provisions of the ordinance that discriminate against small franchise businesses. Under Plaintiffs' proposed preliminary injunction, small franchise businesses would pay the same minimum wage as other small businesses; the minimum wage for small franchise businesses would go up on April 1, 2015, just the same as for other small businesses. In the absence of such an injunction, small franchise businesses will suffer imminent and irreparable injury. The violation of constitutional rights is, by definition, irreparable injury. Beyond that, the owners of small franchise businesses, including the Individual Plaintiffs in this case, will be placed at a severe competitive disadvantage which will result in a loss of customers and consumer goodwill, and may even force some of them to cease operation altogether. And the balance of hardships and public interest clearly support granting the limited injunctive relief requested.

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II. BACKGROUND

A. The Franchise Business Model and the Plaintiffs

The franchise 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 licensing fee or royalties for using the franchisor's brand (which is developed through constitutionally-protected commercial speech) and intellectual property (including federally-protected trademarks). While franchisors share a common brand with their franchisees, franchisors are not the owners of their franchisees' independent businesses. Franchisors and franchisees are separate business entities. *See* Reynolds Decl. ¶ 28.

Small franchise businesses are like other small businesses. Each franchisee is an independently owned and operated business. Franchisees manage 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, and how much they can pay their workers—like any other small business owner. Franchisees independently invest in and pay the operating costs of their businesses, including rent, wages, taxes, and debt. No other party shares these obligations. *See* Reynolds Decl. ¶¶ 25-26.

The International Franchise Association, Inc. ("IFA") is an organization of franchisors and franchisees. The IFA has both franchisor and franchisee members in Seattle. *See* Reynolds Decl. ¶¶ 22-24. The Individual Plaintiffs own and operate small franchise businesses that are classified as "large employers" by the ordinance. *See* Stempler, Lyons, and Oh Declarations.

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 had 24 members. It was co-chaired by David

Rolf, the president of local 775 of the Service Employees International Union ("SEIU").

According to the recitals in the ordinance, the IIAC recommended a $15 per hour minimum wage with a slower phase-in for small employers compared to large employers. *See* Ordinance § 1(9) ("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"). The IIAC as a body did not recommend that small franchise businesses be deemed large employers. The IIAC as a body did not draft the Mayor's bill, which defined small franchise businesses as large employers and subjected them to the accelerated phase-in of the $15 per hour minimum wage. The IIAC as a body never recommended discrimination against small franchise businesses. However, certain members of the IIAC knew why the Mayor's bill introduced this discrimination.

Nick Hanauer was a member of the IIAC. On May 3, 2014, he emailed Tim Burgess, the President of the City Council, explaining that the Mayor's bill treated small franchise businesses as large employers 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 were 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. [Ex. 2.]

Robert Feldstein and Brian Surratt serve on the Mayor's staff. On May 5, 2014, they discussed Mr. Hanauer's email. Mr. Feldstein emailed Mr. Surratt: "If we lose franchises in Seattle, I won't be sad – for all the reasons [Hanauer said]. But are their [*sic*] ways for the cost to be born not on those franchise owners? Are they simply going to be a casualty of this transition?"

Ex. 3. The answer to that last question turned out to be yes.

David Meinert was an IIAC member. During the IIAC process, he and Mr. Rolf, the IIAC co-chair and SEIU head, discussed the possibility that the Mayor's bill would treat small franchise business as large employers. Mr. Rolf told Mr. Meinert several times that the purpose behind treating small franchise businesses as large employers under the minimum wage law was "to break the franchise model" and enable unions to organize employees at such businesses. Meinert Decl. ¶ 4. Mr. Meinert later attended a meeting at which Chris Gregorich, the Mayor's Chief of Staff, assured him that the Mayor's minimum wage bill would *not* treat small franchise businesses as large employers. Mr. Gregorich stated that "that would be morally wrong." *Id*. ¶¶ 5-6.

On May 5, 2014, after the Mayor's plan to discriminate against franchise businesses had circulated among IIAC members, Mr. Meinert sent two emails to Mr. Surratt and Mr. Feldstein. Mr. Meinert wrote: "Hey you guys, I'd like to meet. The more I dig into what I 'agreed' to the more I feel we were obviously snowed by Rolf." Ex. 4. "This proposal looks more and more like a bunch of ideas cobbled together by SEIU to organize rather than to raise wages in the best way for everyone. From breaking franchise agreements to outside 'education' of workers funded by the city, to getting rid of tips to lack of training wage." Ex. 4. "I hope you realize how much Rolf has played all of us, including you guys." Ex. 4. Later in May, after the Mayor's bill was released, Mr. Meinert wrote on his Facebook page: "The final ordinance reflects goals of Labor leaders that go far beyond raising the minimum wage. They include breaking the franchise model to open up franchise agreements to allow for collective bargaining …." Ex. 5.

On May 15, 2014, the Mayor formally transmitted his bill to the City Council. *See* Ex. 1 last page. On May 19, the IFA sent a letter to the Mayor and Council expressing its "significant concerns" regarding the proposed legislation. Ex. 6. On May 27, Michael Seid, an IFA board

member, wrote to the Mayor and the City Council. He stated that the bill "discriminates against a large class of small independent business owners merely because they have invested in opening their businesses under a brand name." Ex. 7 at 2. On May 31, Mr. Seid against wrote to the Mayor and the City Council to protest "the discrimination against a class of small business owners simply because of their branded affiliation with franchisors, and for no other reason." Ex. 8 at 1.

On May 30, 2104, representatives of the IFA, McDonald's Corporation, and Yum! Brands, Inc. met with the Mayor in his office to discuss their concerns about his bill, including the provisions deeming small franchise businesses to be large employers. The Mayor stated that the provisions were necessary to secure the approval of the SEIU. *See* Heyl Decl. ¶ 8. As the meeting neared its end, he said "you won't hear me slam quick service restaurants or the franchise model." *Id*. ¶ 9. Less than two weeks later, he publicly described the franchise model as a "problem."

Also on May 30, the *Seattle Times* published an editorial urging the City Council to "strike the definition of franchises" from the bill. 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." The bill, the *Times* said, "effectively discriminates against a business model—franchises—by giving non-franchises a slower phase-in." Ex. 9.

Nick Hanauer, the same IIAC member who had explained the protectionist motive behind the bill, reacted to the *Times* editorial by sending an email to all members of the City Council and Messrs. Rolf, 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." Ex. 10.

Kshama Sawant is a Member of the City Council and the leading force on that body for a

$15 minimum wage. At a public hearing on May 22, 2014, she stated that "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." Ex. 11 at 3. On May 23, she wrote on her official website that "It's clear that the current franchise model is rigged against workers." Ex. 12.

On June 2, 2014, the City Council passed the bill. Recognizing that businesses large and small will need months to prepare for the minimum wage hikes, the Council defeated a proposed amendment that would have raised the minimum wage to $15 per hour for all employers on January 1, 2015. *See* Ex. 13 at 5-6. It also defeated a proposed amendment that would have started to phase in the minimum wage hikes on January 1, 2015, instead of April 1, 2015. *Id*. at 5.

On June 3, 2014, the Mayor signed the bill and it became City Ordinance No. 124490.

C. The Ordinance's Arbitrary Discrimination Against Small Franchisees

The ordinance arbitrarily and irrationally discriminates against small franchise businesses. It phases in a $15 per hour minimum wage on various schedules. The wage hikes begin on April 1, 2015. The ordinance recognizes the special challenges faced by small employers by phasing in the 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 employees in recognition that smaller businesses and not-for-profits would face particular challenges in implementing a higher minimum wage"). But after recognizing the special needs of small employers, the ordinance then by fiat deems small franchisees to be 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." *Id*. § 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 in the United States regardless of where those employees are employed in the United States." *Id.* § 2(U). It also states that "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." *Id.* Thus, it 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, it provides a general standard to govern when the employees of separate non-franchisee businesses will be aggregated. "[S]eparate entities" will be considered a "single employer" if they are an "integrated enterprise." *Id.* § 3(B). But the ordinance expressly excludes franchise businesses from these provisions.

The ordinance states 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.* It 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-franchisee employer." *Id*. Thus the ordinance makes triply sure that even the smallest and most independent franchise businesses will be treated as a large, Schedule 1 employer.

Under the ordinance, the all-important definitions of "franchisor" and "franchisee" turn on whether one offers or uses a licensed "trademark, service mark, trade name, advertising, or other commercial symbol." *Id*. § 2(I). It 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 in substantially associated with a trademark, service mark, trade name, advertising, or other commercial symbol;
> 3. The person pays, agrees to pay, or is required to pay, directly or indirectly, a franchise fee.

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

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

In contrast to Schedule 1, the minimum wage increases for Schedule 2 employers are phased in more slowly on the following schedule: $10 in 2015, $10.50 in 2016, $11 in 2017, $11.50 in 2018, $12 in 2019, $13.50 in 2020, and $15 in 2021. *Id*. § 5(A). In those years, Schedule

2 employees must pay "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 all employers "shall equal the hourly minimum wage applicable to Schedule 1 employers." *Id*. Thus, franchisees are not guaranteed equal treatment until 2025.

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

D. Public Comments of City Officials Regarding Plaintiffs' Legal Challenge

On June 2, 2014, the IFA announced its challenge to the ordinance. *See* Ex. 14. That same day, Councilmember Sawant tweeted from her official Twitter account that franchisees should blame their franchisors, not the City, for the hardship the ordinance causes: "Franchise owners: enough with the blame game! Organize, go to CorpHQ & renegotiate your rents." Ex. 15.

Plaintiffs filed this action on June 11, 2014. In response, the Mayor released a public statement. He justified 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 Sawant tweet, 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." Ex. 16. On June 16, in a televised interview, he repeated his view the franchise model is a "problem": "those franchise owners should focus on the corporations and

their business model, because I think their business model needs to get a change, not our minimum wage proposal. ... We believe the problem is with the corporate model ...." Ex. 17 at 4.

III. STANDARD OF REVIEW

A plaintiff is entitled to a preliminary injunction if (1) "he is likely to succeed on the merits," (2) he "is likely to suffer irreparable harm in the absence of preliminary relief," (3) "the balance of equities tips in his favor," and (4) an "injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Under an alternative formulation, a preliminary injunction should be granted if there are "'serious questions going to the merits' and a balance of hardships that tips sharply towards the plaintiff," there is "a likelihood of irreparable injury," and "the injunction is in the public interest." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011). *Accord M.R. v. Dreyfus*, 697 F.3d 706, 720, 738 (9th Cir. 2012).

IV. ARGUMENT

A. Plaintiffs Are Highly Likely to Prevail on the Merits.

Seattle's ordinance blatantly discriminates against small franchise businesses in violation of numerous reinforcing constitutional prohibitions. While Seattle recognizes the need for small businesses to have a longer transition period than large employers, it denies small employers that longer phase-in period if they are affiliated with franchises. That discriminatory treatment is so arbitrary and contrary to the general thrust of the ordinance that it violates equal protection. But not only does the ordinance discriminate irrationally, it discriminates against certain small employers based on their ties to interstate commerce, their use of federally-protected trademarks, and their constitutionally-protected speech. Indeed, both the purpose and effect of the ordinance is to favor purely local employers over those affiliated with interstate franchise networks, in plain violation of the Commerce Clause. The ordinance further discriminates against small franchise

businesses by favoring certain large employers who choose the federal health plans that Seattle prefers. This not only exacerbates the discrimination—small franchise businesses are actually treated worse than some large non-franchise businesses—but violates the federal ERISA statute. And Washington law also forbids the ordinance's blatant denial of privileges and immunities to some corporations. In short, on multiple grounds, Plaintiffs are overwhelmingly likely to succeed in their challenge to this novel and discriminatory ordinance.

1. The Ordinance Impermissibly Discriminates Against Interstate Commerce.

Under the Commerce Clause, U.S. Const., art. I, § 8, cl. 3, "laws that discriminate against interstate commerce face 'a virtually *per se* rule of invalidity,'" *Granholm v. Heald*, 544 U.S. 460, 476 (2005). That is so whether the law is discriminatory on its face, in purpose, or in effect. *See Chem. Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 344 n.6 (1992). For a law that discriminates against interstate commerce to pass muster, the defendant must carry the "extremely difficult burden" of showing that its 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 (1997).

Seattle's ordinance unquestionably discriminates against interstate commerce. Small businesses operating in Seattle—even businesses with only a handful of employees—are treated more harshly simply because they have opted to affiliate themselves with out-of-state entities and interstate franchise networks. If Seattle had simply imposed a higher wage requirement on companies with out-of-state ties or those engaged in interstate commerce, the Commerce Clause violation would be undeniable. But the ordinance has the same discriminatory effect. Of the 623 franchises operating in Seattle, 600—or 96.3%—have out-of-state franchisors. Reynolds Decl. ¶ 17. 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. Small franchisees are required to pay their employees a higher minimum wage than their similarly situated competitors that lack the same interstate ties: as much as $1 more in 2015, $2.50 more in 2016, and $4 more in 2017.

This differential minimum wage requirement based solely on whether a small business affiliates with an interstate franchise network is tantamount to a tariff on interstate commerce. The law would be the same in substance from the view of the franchisee and the franchise network if, rather than mandating the payment of an additional $4 per employee-hour worked in 2017 in employee wages, it made franchisees pay a $4 tax per employee-hour worked. Requiring a small business to pay 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 Creamery, Inc. v. Healy*, 512 U.S. 186, 193 (1994). Tariffs and laws having "the same effect as a tariff" have "long been recognized as violative of the Commerce Clause." *Id.* at 193-194.

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 (1940). Repackaging a tax on interstate commerce and business affiliations as an increased and accelerated minimum wage requirement cannot salvage it. Nor does the fact that the tax is imposed on entities operating in Seattle based on their affiliations with interstate commerce, rather than directly on the out-of-state entities, alter the analysis. "For over 150 years," courts "have rightly concluded that the imposition of a differential burden on any part of the stream of commerce … is invalid." *W. Lynn Creamery*, 512 U.S. at 202. That is particularly true when the City's response

to adversely affected franchisees is to tell them "go to CorpHQ & renegotiate your rents." Ex. 15. The ordinance's disparate treatment of small businesses based on whether they have ties to an interstate franchise network and out-of-state businesses makes the law's treatment of Seattle franchisees *per se* invalid. The law clearly has a discriminatory effect, and it operates in practice little different from a law that simply forced companies engaged in interstate commerce to pay higher wages than local companies.

The ordinance is discriminatory in purpose as well as effect. "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 Creamery*, 512 U.S. at 205. Here, the discrimination against small franchise businesses was prompted by a forbidden interest in protecting local enterprises. IIAC member Nick Hanauer, in his email to City Council President Burgess, made clear that one of the ordinance's aims was to create a "city dominated by independent, locally owned" retailers, and eliminate "franchises like subway and McDonalds" and other "national chains," which "are not very good for [the] local economy." Ex. 2. The purpose of denying small employer status to small franchise businesses, Mr. Hanauer explained, was to tilt the playing field away from "national franchises" and toward "local businesses [in] our city." Ex. 10. Mr. Feldstein of the Mayor's office likewise saw that the ordinance aims to make "franchises in Seattle" "a casualty of this transition." Ex. 3. The Mayor's own public statement on this lawsuit justified his law's discrimination against franchises in protectionist terms. He cited a franchisee's relationship with "a corporate national entity" as the reason for treating it less favorably than a "local" business. He openly attacked the "franchise business model"—a method of doing business through *interstate* franchise networks—as a "problem." 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." Ex. 16. Councilmember Sawant likewise advised franchise owners to "Organize, go to CorpHQ & renegotiate your rents." Ex. 15.

Seattle has no prospect of justifying its blatantly discriminatory treatment of small business franchises, which is hardly necessary to further the ordinance's stated goals. Indeed, the adverse treatment of a subset of small businesses affirmatively contradicts the ordinance's broader goals and design in ways that strongly suggest an improper motive is afoot. According to the ordinance itself, the wage increase is meant to "promote the general welfare, health, and prosperity of Seattle" and "to respond to the challenge of rising income equality." Ordinance, Whereas Clauses 8, 12. Those are admirable goals, but they do not speak to the need to treat small businesses differently based on whether they choose to develop ties with an interstate franchise network. Indeed, the results that will flow from the ordinance's disparate treatment of franchisees are likely to critically undermine efforts to achieve these goals as the anticompetitive and uneven treatment of franchisees forces those businesses to cut their workforce or shut their doors. Fewer job opportunities or, worse yet, fewer employers, will only exacerbate current income disparity problems and decrease the overall welfare of the intended beneficiaries of the wage increase.

Relatedly, the ordinance itself recognizes that small employers need more time to adjust to the increased minimum wage and thus are extended a longer phase-in period. As the ordinance recognizes, "small businesses ... may have difficulty in accommodating the increased costs." *Id.* § 1(4). But the ordinance then goes on to define certain small businesses—those with ties to interstate franchise networks—as large businesses. In this respect, the ordinance is in no way tailored to achieve its aims of a more measured phase-in of the increased wage for small businesses. Small franchisees with only five or ten employees are in exactly the same position as

their similarly-situated non-franchised competitors when it comes to the "difficult[ies] in accommodating the increased costs" of Seattle's minimum wage. *Id*. Thus, the narrowly-tailored (not to mention obvious) way to ensure that all small businesses are given additional time to absorb the financial blow of the increased wage is to treat all small businesses alike.

2. The Ordinance Violates the Equal Protection Clause.

The "core concern of the Equal Protection Clause" is preventing "arbitrary classifications," *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 598 (2008), which violate the Clause "under even [the] most deferential standard of review." *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 83 (1988). *See Vill. of Willbrook v. Olech*, 528 U.S. 562, 564 (2000) (laws that "intentionally" treat "similarly situated" entities "differently" are invalid if "there is no rational basis for the difference in treatment"). The ordinance's treatment of small franchise businesses cannot withstand even minimal scrutiny. The application of the ordinance will clearly yield irrational and unsupportable results in two ways. First, in failing to treat like businesses alike, it will cause businesses that are identical in all material respects will pay their employees different minimum wages. For example, simply by virtue of their association with an interstate franchise network, the small businesses run by Plaintiffs Stempler and Lyons will be forced to pay a higher wage than their mirror-image competitors across the street. *See* Stempler Decl. ¶ 20; Lyons Decl. ¶ 17. Second, the ordinance treats businesses that bear no resemblance to one another as identical twins. Under the ordinance, the Lyons' business, which employs 22 individuals in Seattle, will be held to the same minimum wage standard as Seattle's largest employer—Boeing—which employs more than 70,000 people. Seattle may be able to force all businesses to raise their wages at the same rate to the same level, or to implement its wage experiment in phases based on actual employer size (as it does in other contexts). But it cannot consistent with equal protection create two categories that are impacted

by the wage increase in fundamentally different ways and then irrationally and arbitrarily define companies that belong in the more permissive category into the more stringent category.

Indeed, the ordinance's treatment of small franchisees is arbitrary and irrational on its face. The ordinance finds and declares that "a benchmark of 500 employees is appropriate in distinguishing between larger and smaller employers in recognition that smaller businesses … would face particular challenges in implementing a higher minimum wage." Ordinance § 1(9). But it then goes on to define small franchisees as "large" employers simply by virtue of their ties to interstate franchise networks. The ordinance's finding regarding the 500-employee benchmark and subsequent treatment of small franchised businesses are irreconcilable. There is simply no basis, let alone a rational one, for treating small franchisees and their similarly situated non-franchised competitors differently when it comes to the minimum wage those businesses must pay.

The ordinance's treatment of "integrated enterprises" only highlights the arbitrariness of its treatment of franchisees. The ordinance establishes a general rubric to "determin[e] whether a non-franchisee employer is a Schedule 1 employer or a Schedule 2 employer" based on the notion that two or more separate employers are sufficiently related that they can be treated as an "integrated enterprise" with their employees aggregated. *Id.* § 3(B). The ordinance requires consideration of the "[d]egree of interrelation between the operations of multiple entities," the "[d]egree to which the entities share common management," whether there is "[c]entralized control of labor relations," and the "[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 ascertaining whether an employer is "large" or "small." *Id.* If applied to small franchise employers, this standard would preclude the treatment of separate

franchisees or individual franchisees and the national franchisor as integrated entities. In the case of franchises there is generally no common management, no centralized control of labor relations, and no common ownership or financial control. Likewise, the general presumption against aggregation would be fully applicable to small franchise employers. To be sure, the more general standards and presumptions for identify integrated entities are expressly inapplicable to franchisees, no matter how small or independent. But that underscores the irrationality. For an ordinance to adopt a general rule for identifying integrated entities and then adopt a bright-line rule that treats a subclass of entities that do not satisfy the general standard as categorically integrated underscores the irrational and arbitrary—indeed, punitive—nature of the ordinance.[2]

That the ordinance's discrimination against small franchise businesses runs directly counter to both the ordinance's general recognition that small businesses need more time and Seattle's own approach in comparable contexts strongly suggests not just the absence of a rational basis, but the presence of an improper motive. Discrimination that is irrational and arbitrary need not be inexplicable. But when the explanation is mere animus or a forbidden motive like local protectionism, that explanation does not save the ordinance.

Here, evidence of animus abounds. In a telling exchange between IIAC member Nick Hanauer and City Council President Tim Burgess, Mr. Hanauer explained that one of the aims of the ordinance was to decrease the number of franchises operating in Seattle. *See* Ex. 2 (the ordinance would force franchises "to change their practices and business models" and result in "fewer franchises"). Mr. Hanauer explained that eradicating franchises from the Seattle business

[2] The ordinance's discrimination against franchisees is irreconcilable with other Seattle laws that treat small franchise businesses like other small businesses, such as the City's sick leave law. *See* Seattle City Ordinance No. 123698 (Sept. 12, 2011). That law classifies employers as small (5-49 employees), medium (50-249) and large (250 or more). *Id.* § 2(T). Franchise status is not a factor.

landscape was desirable because franchises are "economically extractive, civically corrosive and culturally dilutive." *Id.* "The hard truth," Mr. Hanauer said in an email to the City Council, is that "these national franchises ... simply are not that beneficial to our city." Ex. 10.

IIAC member David Meinert's report on the ordinance's true purpose is even more stark: "The final ordinance reflects goals of Labor leaders that go far beyond raising the minimum wage. They include breaking the franchise model to open up franchise agreements to allow for collective bargaining." Ex. 5. *See also* Ex. 4. IIAC co-chair (and local SEIU head) David Rolf told Mr. Meinert several times that the goal was to "break the franchise model." Meinert Decl. ¶ 4. And the Mayor himself indicated in the May 30, 2014 meeting with the IFA that the discrimination against franchises was necessary to secure SEIU's approval. *See* Heyl Decl. ¶ 8.

The antipathy of the Mayor and Ms. Sawant toward franchises is also palpable. "There is a problem in the franchise business model," the Mayor said, which "needs to get a change." Ex. 16, Ex. 17 at 4. "It's clear that the current franchise model is rigged against workers," said Ms. Sawant. Ex. 12. Laws "motivated by animus" or that aim "to harm an unpopular group fail rational basis scrutiny." *Brown v. N.C. DMV*, 166 F.3d 698, 706-707 (4th Cir. 1999). Such laws lack "a legitimate government interest." *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973).

3. The Ordinance Violates the First Amendment.

Plaintiffs' First Amendment challenge is likely to succeed because the ordinance discriminates against small franchises businesses while defining the disfavored class on the basis of protected speech and association. The ordinance plainly discriminates against small businesses defined as franchises, but that term is hardly self-defining. And what subjects a small employer to this unfavorable treatment is its decision to engage in certain kinds of speech and certain kinds of association. The resulting discrimination cannot be reconciled with the First Amendment.

The First Amendment protects both the freedom of speech and the related right of freedom of association. The freedom of speech prevents the government from penalizing speakers for engaging in protected speech, even in a commercial context. *See, e.g., Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 244 (2002). The freedom of association includes the "right to associate with others in pursuit of ... economic ... ends." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984). "Government actions that may unconstitutionally infringe upon this freedom can take a number of forms. Among other things, government may seek to impose penalties or withhold benefits from individuals because of their membership in a disfavored group." *Id.*

The ordinance unconstitutionally burdens fundamental First Amendment rights by penalizing small Seattle businesses for associating with interstate franchise networks and out-of-state franchisors and by penalizing the speech of such franchisees and their franchisors. The ordinance expressly defines the disfavored class—franchises—based on speech and association protected by the First Amendment. To be considered a disfavored franchise, a small business must satisfy a three-prong test, and two of those prongs base disfavored treatment on First Amendment activity. A franchise is a business that operates "under a marketing plan prescribed or suggested in substantial part by a grantor or affiliate" and is "substantially associated with a trademark, service mark, trade name, advertising, or other commercial symbol." Ordinance § 2(I). Marketing, trademarks, and advertising all involve protected speech, and a franchisee's decision to associate itself with a franchisor's trademark or engage in coordinated marketing and advertising is protected by the First Amendment. Seattle is not free to penalize franchisees for engaging in that protected conduct, yet that is precisely what the ordinance does. It penalizes small franchisees with an accelerated phase-in of the minimum wage, and the resulting competitive disadvantage, based on their association with franchisors and their decision to engage in protected speech. The ordinance,

in effect, imposes a civil penalty for choosing to associate with certain businesses and trade names, which, "are a vital form of commercial speech" entitled to robust protection. *Friedman v. Rogers*, 440 U.S. 1, 22 n.3 (1979) (Blackmun, J., concurring in part and dissenting in part).

Due to this severe burden on First Amendment rights, the ordinance, to survive scrutiny, must be narrowly drawn to serve a compelling state interest, or at least burden no more protected activity than necessary. *See Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 2984-85 (2010); *Turner Broadcasting Sys., Inc. v. Turner*, 512 U.S. 622, 658 (1994). The ordinance fails that test. Its treatment of small franchise businesses fails rational basis scrutiny; *a fortiori* it fails the more exacting First Amendment review. Moreover, Seattle lacks a compelling interest in burdening franchisee-franchisor association. Whatever interest it might have could be served by a regulation that does not expressly and substantially disadvantage franchisees as compared to their non-franchised competitors. Indeed, a substantially less restrictive alternative is present in the ordinance itself, which provides a generally applicable standard for determining when two separate companies can fairly have their employees aggregated for purposes of deciding whether the employer is large or small. There is no reason for a *per se* rule that punishes a company for engaging in coordinated marketing or associating with a common trademark.

To the extent some lesser form of scrutiny applies because the associations at issue are largely "commercial" in nature, Seattle would still need to show that its "targeted" adverse treatment of protected franchise relationships "directly advances a substantial governmental interest" and that the Ordinance "is drawn to achieve that interest." *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2667-68 (2011). Seattle cannot meet the test for restricting commercial First Amendment activity, as less restrictive alternatives are apparent on the face of the statute. If two separate entities have truly common ownership, there is an argument for aggregating employees.

See Ordinance § 3(B). But coordinated advertising and marketing are not even a rough proxy for thinking that the employees of two separately owned and controlled franchisees should have their employees aggregated. Using that protected activity as an inexact proxy for considerations that can be evaluated without infringing First Amendment values flunks any level of scrutiny.

4. The Ordinance Is Preempted by the Lanham Act.

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 (2013) (quotation marks omitted). "Congress's intent to preempt may be explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Omnipoint Commc'ns, Inc. v. City of Huntington Beach*, 738 F.3d 192, 194 (9th Cir. 2013). The ordinance expressly discriminates against franchisees and franchisors who exercise their federally protected rights to obtain and utilize trademarks. A local ordinance disfavoring a class of employers defined in significant part by their use of a shared trademark frustrates the objectives of the Lanham Act and is preempted by the Act.

The Lanham Act "includes an unusual, and extraordinarily helpful, detailed statement of the statute's purposes." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1389 (2014) (quotation marks omitted). The Lanham Act "protect[s] registered marks used in ... commerce from interference by State, or territorial legislation." 15 U.S.C. § 1127. When a law conflicts with the "intent of Congress in enacting the Lanham Act," "then the state law" is "invalid" "under the Supremacy Clause." *Golden Door, Inc. v. Odisho*, 646 F.2d 347, 352 (9th Cir. 1980) (quotation marks omitted). *See Mister Donut of Am., Inc. v. Mr. Donut, Inc.*, 418 F.2d 838, 844 (9th Cir. 1969) ("The Lanham Act has pre-empted the field of trademark law and controls.").

The ordinance clearly "interfere[s]" with federally registered trademarks and frustrates the

purposes of the Lanham Act and is thus preempted. 15 U.S.C. § 1127. Under the ordinance, one of the critical attributes of a small business counted as a franchise is that "[t]he operation of its business is substantially associated with a trademark, service mark, [or] trade name … designating, owned by, or licensed by the grantor or its affiliate." Ordinance § 2(I). And there is no doubt that a small business deemed to be a franchise because it substantially associates with a trademark suffers dramatically negative consequences. The ordinance operates no differently from a $4 an hour tax on small businesses that associate with a federally protected trademark. Such a penalty on exercising a federally protected right directly interferes with a federally protected mark. The inability of localities to discriminate against or tax federally protected rights has been clear since the earliest days of the Republic. *See, e.g., McCulloch v. Maryland*, 17 U.S. 316 (1819).

It is no answer that the ordinance does not disadvantage every company that utilizes a trademark, but only a subset of companies that associate together to exploit a common trademark. The Lanham Act expressly makes trademarks subject to license and assignment. *See* 15 U.S.C. § 1060. Indeed, one of the underlying reasons for a trademark is to ensure that all products offered pursuant to a particular mark are of our uniform quality. *See Carris v. Marriott Int'l, Inc.*, 466 F.3d 558, 562 (7th Cir. 2006). The "right to control the quality" of the goods associated with a trademark is "[o]ne of the most valuable and important protections afforded by the Lanham Act." *Intel Corp. v. Terabyte Int'l, Inc.*, 6 F.3d 614, 618 (9th Cir. 1993) (quotation marks omitted). Thus, a law that discriminates against those who agree to offer products and services of uniformly high quality under a common mark strikes at the heart of the Lanham Act's purposes.

5. The Ordinance Is Preempted by ERISA.

Seattle was not content merely to discriminate against small franchise employers. The ordinance goes further and provides especially favorable treatment to certain (truly) large

employers who offered their employees a form of federal health care plan apparently favored by Seattle as a policy matter. This provision has two fatal flaws. First, this provision exacerbates the unlawful discrimination against small franchise employers. It is bad enough that the ordinance denies them the benefits extended to all other small employers, but it then adds insult to injury by granting certain large employers a more relaxed implementation schedule. Although this option is technically open to small business franchisees, as a practical matter truly small businesses will not be in a position to take advantage of the special treatment for employers who offer a federal gold or silver plan. Employers with fewer than 50 employees have no obligation to offer a plan at all. *See* 26 U.S.C. § 4980H(c)(2). Thus, not only will small franchise employers be treated the same as vastly larger employers, they will actually be treated worse than large employers that offer a federal gold or silver plan. Second, this provision suffers from a deeper flaw. Seattle has no business imposing its preferences concerning the choices among various federal health care plans. ERISA has an especially broad preemption clause, and the ordinance falls squarely within it.

"ERISA includes expansive pre-emption provisions, *see* ERISA § 514, 29 U.S.C. § 1144, which are intended to ensure that employee benefit plan regulation would be 'exclusively a federal concern.'" *Aetna Health Inc. v. Davila*, 542 U.S. 200, 208 (2004). ERISA preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA. 29 U.S.C. § 1144(a). "Congress used the words 'relate to' in § 514(a) in their broad sense." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 98 (1983). "A law 'relates to' an employee benefit plan ... if it has a connection with or reference to such a plan." *Id*. at 96-97.

The ordinance clearly refers to ERISA plans and hence is preempted. Indeed, the ordinance expressly applies a special minimum wage schedule to "Schedule 1 employers that pay toward an employee's medical benefits plan." Ordinance § 4(B). It defines a "Medical benefits plan" as "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." *Id.* § 2(O). Under these provisions, Schedule 1 employers that pay toward a silver or higher plan get an extra year—until 2018—to pay the $15 per hour minimum wage compared to Schedule 1 employers that pay toward a bronze plan (or do not pay toward any plan). The ordinance "specifically refers to welfare benefits plans regulated by ERISA and on that basis alone is preempted." *District of Columbia v. Greater Wash. Bd. of Trade*, 506 U.S. 125, 130 (1992). "[A]ny state law imposing requirements by reference to [ERISA] covered programs must yield to ERISA." *Id.* at 130-131.

6. The Ordinance Violates Article I, Section 12 of the Washington Constitution.

Article I, Section 12 of the Washington Constitution provides: "No law shall be passed granting to any ... corporation ... privileges or immunities which upon the same terms shall not equally belong to all ... corporations." This provision was enacted to "eliminat[e] governmental favoritism toward certain business interests." *Ockletree v. Franciscan Health Sys.*, 179 Wn.2d 769, 782 (2014). It "is violated if a statute treats two businesses that are" similarly situated "differently." *Am. Legion Post #149 v. Wash. State Dep't of Health*, 164 Wn.2d 570, 607 (2008).

The ordinance violates Article I, Section 12. It clearly "involves a privilege or immunity." *Ockletree*, 179 Wn.2d at 776. Washington courts have long recognized a fundamental right to "'carry on business.'" *Grant Cnty. Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 813 (2004). And "an exemption from a regulatory law that has the effect of benefiting certain businesses at the expense of others" is a "'privilege.'" *Am. Legion*, 164 Wn.2d at 607. The ordinance requires all employers to pay a $15 per hour minimum wage by 2025, but allows some smaller employers to reach that milestone at a slower pace. That slower phase-in is a privilege

which applies to "a designated class"—all Schedule 2 employers. *Ockletree*, 179 Wn.2d at 783. The ordinance denies small franchise businesses this privilege by defining them as large employers even as it extends this privilege to those businesses' competitors. And there is no "reasonable" basis "for distinguishing between those who" benefit from the privilege "and those who do not." *Id.* There is no "real and substantial difference[] bearing a natural, reasonable, and just relation to the subject matter of the act" that can justify depriving small franchise business of the privilege afforded to their similarly situated competitors simply by virtue of their affiliation with an interstate franchise network. *Id*. (quotation marks omitted).

B. Plaintiffs Will Suffer Irreparable Harm Without a Preliminary Injunction.

"It is well established that the deprivation of constitutional rights unquestionably constitutes irreparable injury." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quotation marks omitted). *See Planned Parenthood Ariz., Inc. v. Humble*, 753 F.3d 905, 911 (9th Cir. 2014). A showing of "serious questions going to the merits" satisfies the irreparable harm factor. If a law "raises serious constitutional concerns" "it follows" that "'irreparable harm is *likely*.'" *Rodriguez v. Robbins*, 715 F.3d 1127, 1144-45 (9th Cir. 2013) (quoting *Wild Rockies*, 632 F.3d at 1131).

Plaintiffs and other small franchisees will suffer four other irreparable harms absent relief: (1) competitive injury, (2) loss of customers, (3) loss of goodwill, and (4) the risk of going out of business. First, the ordinance will put all small franchise businesses at a competitive disadvantage relative to their non-franchise competitors. *See* Stempler Decl. ¶ 21; Lyons Decl. ¶ 18; Oh Decl. ¶ 12; Reynolds Decl. ¶ 29. The ordinance will increase labor costs for small franchises much more sharply than for similar non-franchise businesses. *See Gilder v. PGA Tour, Inc.*, 936 F.2d 417, 423 (9th Cir. 1991) (enjoining rule that put plaintiffs at a "competitive disadvantage"); *Knudsen Corp. v. Nev. State Dairy Comm'n*, 676 F.2d 374, 378 (9th Cir. 1982) (injury to "ability to

compete" is irreparable harm) (Kennedy, J.); *Pac. Radiation Oncology, LLC v. Queen's Med. Ctr.*, 555 F. App'x 730, 732 (9th Cir. 2014) (so is losing "competitive ground in the industry"); *Microsoft Corp. v. Mai*, No. C09-0474RAJ, 2009 WL 1393750, ¶ 14 (W.D. Wash. May 15, 2009).

Second, the ordinance will cause small franchise businesses in Seattle to lose customers. *See* Stempler Decl. ¶ 23; Lyons Decl. ¶ 19; Reynolds Decl. ¶ 29. The ordinance will increase the labor costs of small franchise businesses (more than their non-franchise competitors) and force them to raise prices (again, more than their non-franchised competition), which will cause them to lose customers. *Id*. The minimum wage hike will pressure businesses to trim margins to maintain customers, and in such a difficult market, the imposition of differential burdens on similarly situated businesses will make it very difficult for small franchisees to maintain customers. The risk of losing customers is an irreparable harm. *See Stuhlbarg Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 841 (9th Cir. 2001) ("threatened loss of prospective customers or goodwill certainly supports" irreparable harm finding); *Cellco P'ship v. Hope*, 469 F. App'x 575, 577 (9th Cir. 2012) (same); *Microsoft v. Motorola*, 871 F. Supp. 2d 1089, 1102-03 (W.D. Wash. 2012). The loss of even *one* customer constitutes irreparable harm "in the form of unquantifiable future damages." *UBS Fin. Servs. v. Hergert*, No. C13-1825RAJ, 2013 WL 5588315, at *2 (W.D. Wash. Oct. 10, 2013). The ordinance will cause small franchisees to lose customers in untold numbers.

Third, the ordinance will cause Plaintiffs and other small franchise businesses to suffer a loss of goodwill, itself an irreparable harm. *See Stuhlbarg*, 240 F.3d at 841. The ordinance

> sends the message that small franchise businesses are not welcomed or valued in Seattle as are other small businesses. And in public comments in which he tried to defend the ordinance's blatant discrimination against franchisees, the Mayor of Seattle called the franchise business model a "problem." He thereby communicated to the people of Seattle that small businesses like mine are bad and deserve to be treated worse than non-franchise businesses. The ordinance and the Mayor's public discourse about it send a clear message that he doesn't care that the ordinance discriminates

> against small franchise businesses or that it may cause businesses like mine to fail—and that the people of Seattle should not care either. [Lyons Decl. ¶ 21].

In addition, the Individual Plaintiffs and many other Seattle businesses are on a boycott list that accuses them of "supporting the lawsuit to block the minimum wage." Oh Decl. ¶ 17.

Fourth, as Mrs. Lyons states, "[t]he ordinance definitely threatens to put our BrightStar Care franchise out of business because, as explained, it will significantly raise our labor costs without doing the same for our direct non-franchise competitors. If our business fails, Mark and I could very well lose the home we live in, which we put up as security for the $235,000 loan we took out with the SBA." Lyons Decl. ¶ 20. "The threat of being driven out of business is sufficient to establish irreparable harm." *Am. Passage Media Corp. v. Cass Commc'ns, Inc.*, 750 F.2d 1470, 1474 (9th Cir. 1985). So is the risk of losing one's home. Other small franchise businesses in Seattle will also face these risks.

C. The Balance of Equities Tips Definitively in Favor of Plaintiffs.

This factor considers "the balance of hardships between the parties." *Wild Rockies*, 532 F.3d at 1137. In contrast to Plaintiffs' many injuries, Defendants will suffer no harm from a limited preliminary injunction. The City "cannot suffer harm from an injunction that merely ends an unlawful practice." *Rodriguez*, 715 F.3d at 1145. It "cannot reasonably assert that it is harmed in any legally cognizable sense by being enjoined from constitutional violations." *Zepeda v. U.S. INS*, 753 F.2d 719, 727 (9th Cir. 1983). Where litigants seek only "to preserve, rather than alter, the *status quo* while they litigate the merits of th[eir] action" that fact "strengthens their position." *Rodde v. Bonta*, 357 F.3d 988, 999 n.14 (9th Cir. 2004). Here, the proposed injunction is even more modest. Plaintiffs do not seek to enjoin the entire law. They ask this Court to enjoin the provisions that discriminate against small franchisees. The new minimum wage hikes would take

effect for all employers, starting on April 1, 2015, with small franchisees following Schedule 2.

D. Granting Preliminary Injunctive Relief Is in the Public Interest.

"The public interest inquiry primarily addresses impact on non-parties rather than parties." *Bernhardt v. L.A. Cnty.*, 339 F.3d 920, 931 (9th Cir. 2003) (quotation marks omitted). Here, it "is clear that it would not be equitable or in the public's interest to allow the state to violate the requirements of federal law." *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1029 (9th Cir. 2013) (quotation marks and ellipses omitted). "[I]t is always in the public interest to prevent the violation of a party's constitutional rights." *Melendres*, 695 F.3d at 1002 (quotation marks omitted). The irreparable harms Plaintiffs face—deprivation of constitutional rights, competitive disadvantage, loss of customers and goodwill, the risk of going out of business—will also be inflicted upon hundreds of other small franchise businesses. *See* Reynolds Decl. ¶ 29. Given that the ordinance itself recognizes that having "500 employees is appropriate as distinguishing between larger and smaller employers," Ordinance § 1(9), the public interest clearly favors a preliminary injunction.

E. At a Minimum, the "Serious Questions" Test Warrants Preliminary Relief.

The standard factors—likely merits success, irreparable harm, balance of equities, and the public interest—all favor the issuance of a limited injunction. But at a minimum, Plaintiffs have raised "serious questions going to the merits" and shown a "balance of hardships that tips sharply towards" them, "a likelihood of irreparable injury" and that "the injunction is in the public interest." *Wild Rockies*, 632 F.3d at 1135. The *Wild Rockies* test thus calls for preliminary relief.

V. CONCLUSION

The Court should grant Plaintiffs' motion for a limited preliminary injunction and enjoin those provisions of the ordinance that discriminate against small franchise businesses.

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Respectfully submitted,

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Dated: August 5, 2014

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of August, 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following:

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Honorable Richard A. Jones

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

INTERNATIONAL FRANCHISE ASSOCIATION, INC., *et al.*, *Plaintiffs*, v. CITY OF SEATTLE, *et al.*, *Defendants*.	No. C14-848RAJ **DECLARATION OF CHARLES J. STEMPLER**

I, Charles J. Stempler, declare as follows:

1. I am over 18 years of age, am competent to testify about the matters set forth herein, and submit the testimony below based upon personal knowledge and information.

2. I am a Plaintiff in the above-captioned action.

3. I am a resident of the City of Seattle. My family and I have lived in Seattle for 20 years.

4. I am a small business owner. I own Alphaprint, Inc., which does business as AlphaGraphics, a printing and marketing services business.

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5. AlphaGraphics operates pursuant to a franchise agreement.

6. I operate six AlphaGraphics business centers, five in Washington State and one in California. Of AlphaGraphics' five Washington locations, two are located in Seattle.

7. I purchased an existing AlphaGraphics store in May 2001. To finance the purchase, I invested $100,000 of my personal savings and took out Small Business Administration ("SBA") loans.

8. To be eligible for those SBA loans, my business had to be a small business, which it is. The SBA classifies commercial printing companies as small businesses if they have 500 or fewer employees.

9. In connection with the purchase of the AlphaGraphics store in May 2001, I executed a Franchise Agreement with the franchisor, AlphaGraphics, Inc. ("franchisor").

10. The franchisor's world headquarters are located in Salt Lake City, Utah.

11. Alphaprint, Inc. is incorporated under the laws of the State of Washington.

12. Alphaprint, Inc. is not owned in any part by the Franchisor.

13. My five AlphaGraphics stores in Washington employ a total of 85 employees, all of whom are paid more than the current state minimum wage.

14. My two AlphaGraphics locations in Seattle employ 69 workers, of whom 58 are paid by the hour. My 58 hourly employees in Seattle are now paid between $11.50 per hour and $28.00 per hour. Thirteen of those 58 hourly employees are now paid less than $15.00 per hour.

15. I provide health care, dental care, vision care, life insurance, long term disability

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insurance, and 401K benefits for all his employees. The franchisor does not contribute to these benefits.

16. Although my AlphaGraphics franchise locations employ far less than 500 employees, the AlphaGraphics franchise network with which it is associated collectively employs more than 500 employees throughout the United States. Seattle City Ordinance No. 124490 ("the ordinance") therefore treats AlphaGraphics as a large, "Schedule 1" Employer.

17. AlphaGraphics has 13 employees in Seattle who are now paid less than $15.00 per hour. Under the ordinance, the minimum wage for all of AlphaGraphics' employees will be $11.00 as of April 1, 2015, $12.50 as of January 1, 2016, $13.50 as of January 1, 2017, and $15.00 as of January 1, 2018.

18. The minimum wage hikes mandated by the ordinance for employees in the City of Seattle will cause AlphaGraphics to raise the hourly wages of employees outside of Seattle in order to maintain an equitable pay structure between the AlphaGraphics locations.

19. The minimum wage hikes mandated by the ordinance will cause AlphaGraphics to raise the hourly wages of employees who are paid more than the minimum wage in order to maintain an equitable pay structure within each AlphaGraphics location.

20. AlphaGraphics has approximately 15 similarly situated competitors in Seattle that are not franchise businesses. These non-franchise competitors are similarly situated to AlphaGraphics in terms their number of employees, revenue, and customers.

21. The ordinance will cause AlphaGraphics to be at a competitive disadvantage relative to its non-franchise competitors because, between April 1, 2015, and January 1, 2021,

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a higher minimum wage will apply to AlphaGraphics than to its non-franchise competitors, and therefore AlphaGraphics will face higher wage costs relative to those competitors. The ordinance gives my non-franchise competitors a city-mandated advantage.

22. In the market in which AlphaGraphics competes, most costs of doing business—such as rent and the cost of paper—are the about the same for everyone. The cost of labor is the most significant fungible factor. The ordinance will raise my labor costs sharply, but my non-franchise competitors will not face the same increase in labor costs.

23. The ordinance will cause AlphaGraphics to lose customers. A significant portion of my workforce is paid less than the minimum wages that the ordinance requires. The ordinance therefore will increase my labor costs. Increased labor costs will require me to raise prices. Raising prices will cause me to lose customers to AlphaGraphics' many non-franchise competitors, who will not have the same increased labor costs. My customers are very price sensitive. If my prices are higher than my competitors' prices, many prospective customers will decide to do business with my competitors instead of me.

24. In the printing and marketing business that AlphaGraphics is in, you have a constant need to attract new customers. Every day, 50% of my customers are up for grabs. The ordinance will increase my labor costs faster than it will increase the labor costs of my non-franchise competitors. I will have to raise prices, while my non-franchise competitors will have a competitive advantage. The ordinance will impair my ability to attract new customers and as a result I will lose new customers.

25. When I acquired my first store in 2001, I received four weeks of training from

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the franchisor in the basics of the printing business. The training took place in Tucson, Arizona. I paid all the costs of my training—room, board, tuition, and travel costs.

26. The franchisor, AlphaGraphics, Inc., does no national advertising.

27. Because the franchisor does no national advertising, the "AlphaGraphics" brand name does not resonate except in a few cities in which there are a number of AlphaGraphics stores in a concentrated area. The City of Seattle is not one of those cities.

28. The ability to use the "AlphaGraphics" brand name has not provided my business with any advantage over my non-franchised competitors.

29. I pay marketing fees to the franchisor. This marketing fee supports the franchisor's website, which links to my business' website (which I alone pay for) and the websites of other franchisees.

30. The marketing fee also pays for the right to receive advice from the franchisor with respect to the development of salespeople.

31. I also pay royalty fees to the franchisor. Those royalty fees pay for the right to use the AlphaGraphics brand, the ability to receive some ongoing training, and access to certain industry studies.

32. The franchisor recommends to its franchisees certain printing equipment providers. The franchisor negotiates certain prices with these equipment provides, but any franchisee could negotiate the same prices. I have not made use of any franchisor negotiated prices.

33. When a franchisee purchases equipment, the franchisor does not help the

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franchisee qualify for credit or provide any guarantees with respect to the purchase.

34. The market for printing paper is local. The franchisor attempts to negotiate prices in some markets—Seattle is not one of them—but the price terms are not advantageous.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed this 31 day of July, 2014, at Seattle, Washington.

Charles J. Stempler

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Honorable Richard A. Jones

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

INTERNATIONAL FRANCHISE ASSOCIATION, INC., *et al.*, *Plaintiffs*, v. CITY OF SEATTLE, *et al.*, *Defendants*.	No. C14-848RAJ **DECLARATION OF DAVID MEINERT**

I, David Meinert, declare as follows:

1. I am over 18 years of age, am competent to testify about the matters set forth herein, and submit the testimony below based upon personal knowledge and information.

2. I was a member of Mayor Murray's Income Inequality Advisory Committee ("IIAC").

3. David Rolf was one of the co-chairs of the IIAC.

4. During the IIAC process, there were discussions about whether the Mayor's minimum wage bill should treat small franchise businesses as large employers. I had several

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meetings with David Rolf in which he told me that the purpose behind treating small franchise businesses as large employers under the minimum wage law was "to break the franchise model" and enable labor unions to organize the employees of such businesses.

5. Toward the end of the IIAC process, I attended a meeting with Craig Schafer, an IIAC member, Chris Gregorich, the Mayor's Chief of Staff, and Brian Surratt, a member of the Mayor's staff who worked with the IIAC. The meeting was held in a side room of Ivar's restaurant, which is owned by IIAC member Bob Donegan.

6. At the meeting, I objected to the idea of treating small franchise businesses as large employers under the minimum wage law. Mr. Gregorich assured us that the Mayor's bill would not do that because, he said, "that would be morally wrong."

Executed this 4 day of August, 2014, at Seattle, Washington.

David Meinert

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Honorable Richard A. Jones

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

INTERNATIONAL FRANCHISE ASSOCIATION, INC., *et al.*, *Plaintiffs*, v. CITY OF SEATTLE, *et al.*, *Defendants.*	No. C14-848RAJ **DECLARATION OF DEAN HEYL**

I, Dean Heyl, declare as follows:

1. I am over 18 years of age, am competent to testify about the matters set forth herein, and submit the testimony below based upon personal knowledge and information.

2. I received my law degree from the University of South Dakota in 1995. I am a member of the South Dakota bar, the District of Columbia bar, and the bar of the Supreme Court of the United States.

3. I am employed by the International Franchise Association ("IFA") as Vice President, State Government Relations, Public Policy and Tax Counsel.

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4. On May 30, 2104, I attended a meeting with the Honorable Edward Murray, the Mayor of the City of Seattle, in his office.

5. Among those who also attended the meeting were Harlan Levy of McDonald's Corporation, Matthew Lathrop of Yum! Brands, Inc., and Kathy Lyons, who owns a BrightStar Care franchise in Seattle.

6. Mr. Levy had requested the meeting to discuss the Mayor's minimum wage bill, including the provisions of the bill deeming small franchise businesses to be large businesses.

7. At the meeting, representatives of franchising expressed to the Mayor that the bill unfairly discriminated against small franchise businesses by failing to treat them like other small businesses.

8. The Mayor stated that the provisions of the bill treating small franchise business as if they were large businesses were included because they were required to secure the approval of the Service Employees International Union ("SEIU").

9. Near the end of the meeting, the Mayor said words to the effect that "you won't hear me slam quick service restaurants or the franchise model."

10. Less than two weeks later, on June 11, 2014, the Mayor issued a public statement regarding IFA's legal challenge to the minimum wage ordinance. The Mayor's statement said in part that "[t]here is a problem in the franchise business model ...."

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

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Executed this 31st day of July, 2014, at Dallas, Texas.

Dean a. Heyl

Dean Heyl

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Honorable Richard A. Jones

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

INTERNATIONAL FRANCHISE ASSOCIATION, INC., *et al.*, *Plaintiffs*, v. CITY OF SEATTLE, *et al.*, *Defendants*.	No. C14-848RAJ **DECLARATION OF JOHN R. REYNOLDS**

I, John R. Reynolds, declare as follows:

1. I am over 18 years of age, am competent to testify about the matters set forth herein, and submit the testimony below based upon personal knowledge and information.

2. I am the President of the IFA Educational Foundation, a non-profit organization which conducts research and educational programs to expand the awareness of the role of franchising in the free enterprise system. I am also the vice president of business development for the International Franchise Association ("IFA").

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3. I have served in various capacities at the IFA for the past 27 years, as executive editor and associate publisher of *Franchising World* magazine, as director of communications, as vice president of marketing, and as executive vice president.

4. In the mid-1990's, I served as staff liaison to the newly formed IFA Franchisee Advisory Council, which spearheaded the inclusion of franchisees as members of IFA. In my current position, I work closely with IFA's Research Committee, the Foundation Board of Trustees, the Institute of Certified Franchise Executives Board of Governors, the Diversity Institute Board, and the IFA Franchisee Forum.

5. I am a Certified Franchise Executive (C.F.E.), a designation awarded to those who complete a course of study in franchise management and meet continuing education requirements.

The International Franchise Association

6. The International Franchise Association, Inc., is a membership organization of franchisors, franchisees, and suppliers.

7. Founded in 1960, the IFA is the world's oldest and largest organization representing the use of the franchise business model. The IFA's membership includes more than 1,350 franchisor companies and more than 12,000 franchisees nationwide.

8. The IFA is incorporated under the laws of the State of Illinois.

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Franchisors and Franchisees in the United States,
the State of Washington, and the City of Seattle

9. The source of the data in this section is FRANdata, a company that researches, collects, and analyzes data on franchisors and franchisees. The data in paragraphs 10 through 17 are based on Franchise Disclosure Documents filed within the last three years (2012-2014).

10. There are 2,536 franchisors headquartered in the United States.

11. There are 50 franchisors headquartered in the State of Washington.

12. There are 10 franchisors headquartered in the City of Seattle.

13. The percentage of U.S. franchisors headquartered in Washington is 1.97%.

14. The percentage of U.S. franchisors headquartered in Seattle is 0.39%.

15. Franchising is an interstate business. The percentage of franchisors that have licensed franchisees to do business under the franchisor's trade name or trademark in more than one state (or outside of the state in which the franchisor is headquartered) is 87.99%.

16. A large number of franchisors located outside of the State of Washington have franchisees located within Washington or Seattle. There are 661 franchisors headquartered outside of Washington that have licensed franchisees within Washington to do business under the franchisor's trade name or trademark. There are 211 franchisors headquartered outside of Washington that have licensed franchisees within Seattle to do business under the franchisor's trade name or trademark.

17. The vast majority of franchisees in Seattle have out-of-state franchisors. There are 623 franchisees in Seattle, of which 600, or 96.3%, have out-of-state franchisors. All of the 23 franchisees in Seattle that have in-state franchisors are associated with franchisees outside of

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the State of Washington through the operation of their franchise networks. There are 850 franchise establishments in Seattle, of which 820, or 96.5%, have out-of-state franchisors.

18. Although some people when they think about franchise businesses initially think of quick service restaurants, the franchising industry is very diverse. In Seattle, franchise businesses occupy the following non-restaurant related business sectors:

- Real estate brokers/services
- Lodging
- Commercial/residential cleaning
- Tax services
- Hardware products/tool stores
- Fitness centers
- Hair care
- Tune ups, lubes & oil related
- Convenience stores
- Mailing, packaging, shipping
- Auto – general
- Education courses
- Carpet and upholstery cleaning
- Health – general
- Home health care
- Financial services
- Financial services
- Optical products and services
- Education – general
- Fitness and amusement centers
- Property inspection services

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- Children's educational programming
- General printing services
- Maid services
- Painting services
- Muffler, front end, shocks, etc.
- Travel agencies
- Pet-related products/services
- General auto repair services

19. Based on 2012 unit data reported in their Franchise Disclosure Documents, 7% of franchisors had more than 500 units (*i.e.*, franchised business locations) in the United States and only 26% had more than 100 units.

20. There are 54 publicly traded companies whose primary business is the franchising model.

21. Within the Fortune 100, there are no companies whose primary business is franchising. McDonald's Corporation is number 106 on the list. There are three companies in the Fortune 100 that have franchise brands as minority parts of their operations: UPS, Cardinal Health, and Berkshire Hathaway.

IFA Members in Seattle

22. IFA has 13 franchisee members that own and operate franchise establishments in the City of Seattle, each of which employs fewer than 500 employees. These 13 franchisees are associated with eight franchisors, each of which is based outside of the State of Washington.

23. Some of the 13 IFA franchisee members in Seattle are licensed to do business under the trade name or trademark of a franchisor whose establishments (both franchised and

corporately owned) collectively employ more than 500 employees in the United States and therefore are Schedule 1 employers for purposes of Seattle City Ordinance No. 124990 ("the ordinance"). The ordinance therefore puts these IFA members at a competitive disadvantage vis-à-vis similarly situated non-franchise competitors in Seattle that are treated as Schedule 2 employers.

24. IFA has three franchisor members whose corporate headquarters are located in Seattle: HomeTask, Inc., its subsidiary, Pet Butler, and HomeWell Senior Care, Inc. These franchisors, and their franchisees, must comply with the ordinance and must pay their employees in Seattle no less than the minimum wage prescribed by the ordinance.

Small Franchise Businesses

25. Small franchise businesses are like other small businesses. 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 workers to hire, how many people 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.

26. Franchisees independently invest in their businesses 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 service. No other party shares in these small business obligations.

27. Franchisees are merely licensees of the franchisor's brands and methods of doing business and that is their sole difference from other independently owned small businesses. As licensees, franchisees generally pay a continuing licensing fee or royalties for the use of the

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franchisor's brand and intellectual property, as well as certain services. Even though franchisors share a common brand with their franchisees, franchisors are not owners of their franchisee's independent businesses and do not necessarily share in their profits or their losses.

28. 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.

29. I have reviewed the declarations of Charles J. Stempler, Katherine M. Lyons, and Ronald Oh. All of them declare that the ordinance will give a competitive advantage to their similarly situated non-franchise competitors; increase their labor costs; force them to raise prices; and cause them to lose customers. The ordinance will have the same effect upon the hundreds of other small franchise businesses in Seattle. The small franchise businesses owned and operated by Mr. Stempler, Mrs. Lyons, and Mr. Oh are similar to other small franchise businesses in Seattle and elsewhere in the United States in terms of the competition they face from non-franchise businesses; the effect of rising labor costs on, among other things, the prices they must charge; and the price sensitivity of their customers.

AlphaGraphics, Inc.

30. AlphaGraphics, Inc. is a franchisor. Its world headquarters are located in Salt Lake City, Utah.

31. AlphaGraphics, Inc. has franchise agreements with 216 franchisees that own and operate 245 business centers in the United States. Of those 245 business centers, seven are located in the State of Washington and 238 are located outside of the State of Washington.

BrightStar Franchising, LLC

32. BrightStar Franchising, LLC, is a franchisor. It is an Illinois limited liability company with its principal place of business in Gurnee, Illinois.

33. BrightStar Franchising, LLC, has franchise agreements with approximately 200 franchisees that own and operate 260 franchise locations in the United States. Of those 260 locations, 257 are located outside of the State of Washington.

Choice Hotels International, Inc.

34. Choice Hotels International, Inc. ("Choice"), is a franchisor. Choice is incorporated in Delaware and has its corporate offices in Rockville, Maryland.

35. Comfort Inn, Comfort Inn & Suites, and Comfort Suites are some of Choice's brands.

36. As of December 31, 2013, there were 1,887 Comfort Inn, Comfort Inn & Suites, and Comfort Suites hotels in the United States, all of which are owned and operated by franchisees. Of those 1,887 hotels, 29 were located in Washington State.

InterContinental Hotels Group PLC

37. InterContinental Hotels Group PLC ("IHG") is a franchisor.

38. IHG is a British company with its global headquarters in Denham, U.K. Its U.S. headquarters are in Atlanta, Georgia.

39. IHG's brands include Holiday Inn and Holiday Inn Express.

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40. As of March 31, 2014, there were 2,736 Holiday Inn and Holiday Inn Express hotels in North and South America, most of which are owned and operated by franchisees. Of those 2,736 hotels, 37 are located in Washington State.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 30 day of July, 2014, at Vancouver, British Columbia.

John R. Reynolds

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Honorable Richard A. Jones

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

INTERNATIONAL FRANCHISE ASSOCIATION, INC., *et al.*, *Plaintiffs*, v. CITY OF SEATTLE, *et al.*, *Defendants*.	No. C14-848RAJ **DECLARATION OF KATHERINE M. LYONS**

I, Katherine M. Lyons, declare as follows:

1. I am over 18 years of age, am competent to testify about the matters set forth herein, and submit the testimony below based upon personal knowledge and information.

2. I am a Plaintiff in the above-captioned action, as is my husband, Mark Lyons.

3. Mark and I own and operate BrightStar Care of North Seattle ("BrightStar Care"), a small business that provides both skilled and unskilled private duty home care and home services in the City of Seattle and surrounding areas.

4. BrightStar Care operates pursuant to a franchise agreement.

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5. Mark and I purchased our BrightStar Care franchise in February 2012. We invested about $200,000 of our personal savings and also borrowed $235,600 from the Small Business Administration ("SBA"). Our SBA loan is secured by a mortgage on our home.

6. We qualified for the SBA loan because our BrightStar Care franchise is a small business. If we were not a small business, the SBA would not and could not have made the loan to us.

7. In February 2012, Mark and I executed a Franchise Agreement with the franchisor, BrightStar Franchising, LLC, a company based in Illinois.

8. Our BrightStar Care business is incorporated under the laws of the State of Washington as MKL Services LLC.

9. MKL Services LLC is not owned in any part by the franchisor.

10. Mark and I have never received any salary or taken any profits from BrightStar Care.

11. The office of my BrightStar Care business is located in the City of Seattle.

12. My BrightStar Care business employs Certified Nursing Assistants, Licensed Practical Nurses, and Registered Nurses.

13. My BrightStar Care business employs 22 employees in Seattle, of whom 15 are paid by the hour. All of our hourly employees are paid more the current state minimum wage.

14. BrightStar Care now pays its 15 hourly employees between $12.00 per hour and $35.00 per hour. Fourteen of BrightStar Care's current hourly employees are paid less than $15.00 per hour.

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15. Although the BrightStar Care franchise that Mark and I own and operate employs far less than 500 employees, our BrightStar Care franchise is associated with a franchise network that collectively employs more than 500 employees. Therefore, Seattle City Ordinance No. 124990 ("the ordinance") treats our small business as a large, "Schedule 1" employer.

16. The market in which our BrightStar Care franchise competes is very competitive. We have literally hundreds of competitors in its market, including non-franchise competitors.

17. We have four direct competitors that are non-franchised but otherwise very similarly situated to our business in terms of services provided, clients, employees, and revenue. In fact, our direct competitors currently have more clients, employees and revenues.

18. The ordinance will cause our BrightStar Care business to be at a competitive disadvantage relative to our non-franchise competitors because, between April 1, 2015, and January 1, 2021, a higher minimum wage will apply to us than to our non-franchise competitors, and thus we will face higher wage costs relative to our competitors.

19. The ordinance will cause us to lose customers. The typical client of the home care and home services that we provide lives on a fixed income. These clients are extremely price sensitive. The ordinance will significantly increase our labor costs. Many of our employees are now paid $12.00 per hour. All but one of our hourly employees are now paid less than $15.00 per hour. But as of January 1, 2016, the minimum wage applicable to our business will be $13.00 per hour, and as of January 1, 2017, it will be $15.00 per hour. A

wage will apply to our non-franchise competitors. As our labor costs go up, we will have to charge higher prices. Indeed, our product—home care and home services—is labor. Thus, as our labor costs rise, we have no choice but to raise our prices. As we raise prices due to the ordinance, we will lose current and future customers given our very competitive market, our extremely price-sensitive clients, and the fact that our non-franchise competitors will receive the advantage of a lower minimum wage.

20. The ordinance definitely threatens to put our BrightStar Care franchise out of business because, as explained, it will significantly raise our labor costs without doing the same for our direct non-franchise competitors. If our business fails, Mark and I could very well lose the home we live in, which we put up as security for the $235,000 loan we took out with the SBA.

21. Even if we manage to stay in business after the ordinance goes into effect, the ordinance has caused and will cause our business to lose goodwill in Seattle. The ordinance discriminates against small businesses like mine for no reason other than that they are franchise businesses. In so doing, the ordinance sends the message that small franchise businesses are not welcomed or valued in Seattle as are other small businesses. And in public comments in which he tried to defend the ordinance's blatant discrimination against franchisees, the Mayor of Seattle called the franchise business model a "problem." He thereby communicated to the people of Seattle that small franchise businesses like mine are bad and deserve to be treated worse than non-franchise businesses. The ordinance and the Mayor's public discourse about it send a clear message that he doesn't care that the ordinance discriminates against small

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franchise businesses or that it may cause business like mine to fail—and that the people of Seattle should not care either.

22. The Mayor said on television that franchisees are "part of a larger, national corporate monopoly"—which is not true. BrightStar Care is not a monopoly. Nor is it part of a larger corporation. We are not a subsidiary of the franchisor. My small business is owned and operated by me and my husband.

23. When I became a BrightStar Care franchisee, I received one week of sales training at the franchisor's headquarters in Illinois. I paid for the travel costs, as well as room and board.

24. The franchisor did no national advertising of the BrightStar Care brand prior to July 2014. The advertising fee that I pay to franchisor went up when the franchisor started doing some national advertising on a few television networks in July 2014.

25. The franchisor does no local advertising. I paid for some local radio advertising for approximately one year.

26. My BrightStar Care franchise is operated out of office space that we rent. The franchisor did not locate the office space, did not negotiate the rent, and does not pay any part of the rent.

27. The franchisor does not negotiate prices with vendors for the home care and home services supplies used in my business. The franchisor does negotiate prices for certain general office supplies, but because of shipping costs those prices are actually higher than the prices I can obtain locally. The franchisor requires me to purchase from particular vendors

certain materials, such as letterhead, containing the BrightStar Care trademark.

28. I belong to the Home Care Association of America ("HCAOA"), the Home Care Association of Washington ("HCAW"), and the Washington Home Care Association ("WAHCA"). In terms of support for my business, there is very little, if anything, that the franchisor makes available to me that I cannot get through membership in one or more of these associations. These associations include both franchisees and non-franchisees as members.

29. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed this 31 day of July, 2014, at Seattle, Washington.

Katherine M. Lyons

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Honorable Richard A. Jones

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

INTERNATIONAL FRANCHISE ASSOCIATION, INC., *et al.*, *Plaintiffs*, v. CITY OF SEATTLE, *et al.*, *Defendants*.	No. C14-848RAJ **DECLARATION OF RONALD OH**

I, Ronald Oh, declare as follows:

1. I am over 18 years of age, am competent to testify about the matters set forth herein, and submit the testimony below based upon personal knowledge and information.

2. I am a plaintiff in the above-captioned action.

3. I am the General Manager of a Holiday Inn Express hotel ("Holiday Inn") located in Seattle.

4. My Holiday Inn operates pursuant to a franchise agreement.

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5. My Holiday Inn is owned by Advance Holdings, LLC, a corporation incorporated under the laws of the State of Washington. My Holiday Inn is family-owned business. I have an ownership interest in it.

6. I am a member of the Korean American Hotel Owners Association of Washington ("KAHOA") and a former member of the Asian American Hotel Owners Association ("AAHOA").

7. My Holiday Inn has 102 rooms and 28 employees. Twenty-two of those 28 employees are paid by the hour.

8. All of my 22 hourly employees are paid more the current state minimum wage. Those 22 employees are paid between $9.50 and $12.00 per hour.

9. My non-managerial employees are paid, on average, $10.25 per hour.

10. Because my Holiday Inn is associated with other franchise businesses that collectively employ more than 500 employees, Seattle City Ordinance No. 124990 ("the ordinance") deems my Holiday Inn to be a large employer.

11. My Holiday Inn faces competition from eight to ten similarly situated non-franchise hotels that are small employers.

12. The ordinance will cause my Holiday Inn to be at a competitive disadvantage relative to its non-franchise competitors because, between April 1, 2015, and January 1, 2021, a higher minimum wage will apply to my Holiday Inn than to its non-franchise competitors, and therefore my Holiday Inn will face higher wage costs relative to those non-franchised competitors.

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13. When the minimum wage goes to $11.00 per hour for large employers on April 1, 2015, that will add approximately $80,000 to my labor costs.

14. When the minimum wage reaches $15.00 per hour, that will add $250,000 to my labor costs compared to my current labor costs.

15. Because of the ordinance, my Holiday Inn will have to raise its room rates. As a result of raising its prices, the hotel potentially will lose customers during the non-peak season—the period after the first week of September through April.

16. The ordinance also may cause me to make changes to the workforce at the Holiday Inn. As General Manager, I am reviewing the hotel's employees. If I determine that a particular employee is not best for us at a higher wage level, I will initiate a new hiring process and replace that worker. Although the ordinance goes into effect on April 1, 2015, I need to be proactive. Therefore, I have already begun this employee review process.

17. My Holiday Inn has lost and will continue to lose goodwill because of the ordinance. It is on a boycott list which states that "Holiday Inn Express is supporting the lawsuit to block the minimum wage." http://www.supportseattleworkers.com/list.html. But we are not trying to block the minimum wage. We just don't want the minimum wage law to discriminate against small franchise businesses. The ordinance discriminates against my business. That is the reason why I am a plaintiff in this lawsuit.

18. My Holiday Inn opened on November 13, 2001. We did not turn a profit for four years.

19. The franchisor did not locate, own, acquire, or convey the property on which

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my hotel is located.

20. The franchisor did not build my hotel. It did not pay for or finance the construction of my hotel or provide any loan guarantees.

21. The franchisor does national advertising of the Holiday Inn brand, but I pay toward such advertising as part of the royalty fees that I pay. The franchisor does not do any local advertising in the Seattle area. The franchisor does not advertise my specific hotel.

22. It is easy for people to obtain information about hotels in places they wish to stay, including hotels they have not heard of before. Today, before people book a hotel, they go on the internet and use websites to find hotels and compare prices, amenities, reviews, and ratings. One can view hotels and hotel rooms on line and consider the ratings and reviews of people who have stayed at the hotel. This is the process through which people make hotel choices these days.

23. The franchisor negotiates prices for certain supplies and services from certain vendors, but this is not something that the franchisor is uniquely able to do. KAHOA and AAHOA also negotiate prices for their members. I am currently a KAHOA member. The KAHOA or AAHOA negotiated price sometimes is better than the price negotiated by the franchisor.

24. My franchisor provides training, but we pay for it.

25. As a franchisee, we get what we pay for.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

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Executed this 4th day of August, 2014, at Seattle, Washington.

Ronald Oh

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