No. 15-958

IN THE

Supreme Court of the United States

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

Petitioners,

v.

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

Respondents.

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

BRIEF FOR THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

ILYA SHAPIRO
Counsel of Record
JAYME WEBER
Cato Institute
1000 Mass. Ave. N.W.
Washington, D.C. 20001
(202) 842-0200
ishapiro@cato.org
jweber@cato.org

February 29, 2016

QUESTION PRESENTED

This brief addresses the question raised by the petition for certiorari:

Whether a state or local law that discriminates against certain instate businesses solely because of their ties to interstate commerce discriminates against interstate commerce.

Additionally, this brief submits the following question for this Court's consideration:

Whether a state or local government may constitutionally increase the burdens on an instate or local business based on an out-of-state business's hiring of additional employees.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Other Authorities

INTEREST OF THE *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public-policy research foundation established in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*. The present case concerns Cato because the Commerce Clause ensures a free-trade zone within the country and helps maintain the vertical separation of powers (or federalism) that protects liberty.

INTRODUCTION AND SUMMARY OF ARGUMENT

Seattle's new minimum-wage law separates businesses into two categories, subject to different implementation schedules. "Schedule One" includes local franchises that are associated with franchise networks that have 500 or more employees, even though such networks are composed of separate business entities. Local businesses without such networks are treated differently, thus violating the Dormant Commerce Clause. The Court should grant certiorari to reverse the Ninth Circuit's contrary holding.

---

[1] Rule 37 statement: All parties received timely notice of *amicus*'s intent to file this brief; letters consenting to its filing have been submitted to the Clerk. Counsel further certifies that no counsel for any party authored this brief in whole or in part and that no person or entity other than the *amicus* made a monetary contribution intended to fund its preparation or submission.

Among the main reasons for calling the Constitutional Convention in 1787 were the protectionist measures the states were enacting against each other under the Articles of Confederation. As a result, the Commerce Clause was included in the Constitution without opposition. This Court's early Commerce Clause cases involved state laws; accordingly, they addressed state interference with interstate commerce, not the scope of federal power to regulate such commerce. This case is in line with those early cases, and with others in which the Court considered unique forms of facial discrimination against interstate commerce. Seattle did not need to mention interstate commerce by name for its statute to constitute facial discrimination. That the burden also falls on in-state entities does not alter the fact that the law discriminates against interstate commerce. The Constitution and this Court's precedents are well-equipped to address even such a "marvelously ingenious" means of discrimination against interstate commerce.

Furthermore, the Seattle law violates the Dormant Commerce Clause by regulating extraterritorially. This "external consistency" test most often arises in the tax context, but it also applies to other types of regulation. By considering all of the employees—both in-state and out-of-state—when determining what regulations apply to local franchisees, business decisions made by out-of-state members of the franchise network can change the application of minimum wage laws in Seattle. The Ninth Circuit did not consider these effects of the law at all, and so this Court should also grant certiorari to address them—or at least to remand the case to the Ninth Circuit to do so in the first instance.

ARGUMENT

I. THIS COURT SHOULD GRANT CERT. TO CLARIFY THAT A LOCAL LAW THAT DISCRIMINATES BASED ON INTERSTATE TIES VIOLATES THE COMMERCE CLAUSE

A. The Commerce Clause Was Added to the Constitution to Prevent States from Passing Laws that Harm Interstate Commerce

The 1787 Constitutional Convention was held to revise the federal system of government, keeping in mind the flaws of the Articles of Confederation. Gordon S. Wood, *The Creation of the American Republic 1776-1787* 470-519 (2d ed. 1998). On one of the first days of that convention, Edmund Randolph of Virginia "observed, that, in revising the federal system we ought to inquire, first, into the properties which such a government ought to possess; [and] secondly, the defects of the Confederation." James Madison, *Debates in the Federal Convention of 1787* 6 (Gordon Lloyd, ed., 2014).

"The Confederation, resting only on good faith, had no power to collect taxes, defend the country, pay the public debt, let alone encourage trade and commerce." Catherine Drinker Bowen, *Miracle at Philadelphia* 5 (1966). Of particular concern was the interstate commerce situation. Thus the September, 1786 Annapolis Commission, which included James Madison and Alexander Hamilton, recommended to Congress that all 13 states send delegates to Philadelphia in May 1787 "to take into consideration the trade and commerce of the United States." *Id.* at 9.

The specific ways in which states discriminated against interstate commerce during the Confedera-

tion varied. The Articles had given the national Congress "the sole and exclusive right and power of regulating" the value of coins it or the states made, but seven states printed their own money, which had to be kept within each state's boundaries. Articles of Confed., Art. IX; Bowen, *supra*, at 9. New Jersey had its own customs service and nine states had their own navies. Bowen, *supra*, at 9. The states with direct access to the Atlantic imposed duties on shippers from interior states. *Id.* In sum, "States were marvelously ingenious at devising mutual retaliations." *Id.* As James Madison said, "Most of our political evils may be traced to our commercial ones." *Id.* at 10.

With interstate commerce as one of their biggest concerns, the delegates to the Constitutional Convention met in Philadelphia to revise the Articles of Confederation. *See* Albert S. Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 Minn. L. Rev. 432, 444 (1941). "It seems to have been common ground that the general government as constituted—or reconstituted—by the convention was to possess a power of regulating commerce. . . [The shape of that power] depended on the larger preliminary question of the place of Congress and of the general government in the revised political system." *Id.* at 432. Indeed, "the matter of commercial regulation was to the delegates a mere detail of application." *Id.* at 435. The Commerce Clause was accepted in the Constitutional Convention and in the ratifying conventions without opposition and with little public criticism. *Id.* at 444–45.

Of course the Constitution did not enumerate and prohibit all of the "marvelously ingenious" mechanisms by which the states might discriminate against

interstate commerce to protect their own interests. The newly minted document did, however, give Congress the power "[t]o regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes," U.S. Const., art. I, Sec. 8, with the goal of creating "an unrestrained intercourse between the States," The Federalist No. 11 (Alexander Hamilton). The Dormant Commerce Clause, as this Court recently held in *Comptroller of the Treasury of Md.* v. *Wynne*, "strikes at one of the chief evils that led to the adoption of the Constitution, namely, state tariffs and other laws that burdened interstate commerce." 135 S. Ct. 1787, 1794 (2015).

B. Early Commerce Clause Cases Largely Concerned States' Discrimination Against Interstate Commerce

The Dormant Commerce Clause dates back at least as far as 1824, when Chief Justice John Marshall wrote the opinion for the Court in the famous steamboat case *Gibbons v. Ogden*, 22 U.S. 1 (1824). In fact, most of the pre-20th Century Commerce Clause cases involved state legislation and the Dormant Commerce Clause. David F. Forte, *Commerce, Commerce, Everywhere: The Uses and Abuses of the Commerce Clause*, The Heritage Found. (Jan. 18, 2011), http://www.heritage.org/research/reports/2011/01/commerce-commerce-everywhere-the-uses-and-abuses-of-the-commerce-clause.

In *Gibbons*, the Court considered whether New York violated the Dormant Commerce Clause by enacting a statute requiring all out-of-state steamboat operators traveling on the river between New York and New Jersey to get an expensive permit. Chief

Justice Marshall first addressed the context in which the Constitution was adopted, noting that,

> when these allied sovereigns [the states] converted their league into a government, when they converted their Congress of Ambassadors, deputed to deliberate on their common concerns, and to recommend measures of general utility, into a Legislature, empowered to enact laws on the most interesting subjects, the whole character in which the States appear, underwent a change, the extent of which must be determined by a fair consideration of the instrument by which that change was effected.

Gibbons, 22 U.S. at 187.

He then examined the text of the Constitution, focusing primarily on the Commerce Clause itself, to determine what power the clause left to the states. *Id.* at 187–196. Chief Justice Marshall declined to determine whether state power over commerce had been "surrendered by the mere grant to Congress, or [had been] retained until Congress [had] exercise[d] the power" because Congress had granted a license for the steamboat in question. *Id.* at 200, 205. Nevertheless, the Court struck down the state law as contrary to the Commerce Clause itself. *Id.* at 186. The Court also addressed the residual question of whether a state law might violate the Dormant Commerce Clause even when Congress had not passed legislation impacting the matter. *Id.* at 206–11.

Then in *Case of the State Freight Tax*, 82 U.S. 232, 271, 279–80 (1873), the Court struck down a Penn-

sylvania tax on freight passing between that state and another state under the Dormant Commerce Clause in the absence of any legislation by Congress. The Court there noted—and dismissed—the argument that the states may legislate respecting interstate commerce so long as Congress has not legislated on the subject. *Id.* at 279. Although the states are permitted to legislate with respect to wholly in-state commercial matters, the Commerce Clause itself prevents them from regulating in a way that discriminates against interstate commerce. *See id.* at 279–80; *see also Welton v. Missouri*, 91 U.S. 275, 282 (1876) (Congress's "inaction on [interstate commerce] . . . is equivalent to a declaration that inter-State commerce shall be free and untrammeled.").

Since *Gibbons v. Ogden*, the Court has struck down numerous state and local laws because they discriminated against interstate commerce. *See, e.g.*, *Welton*, 91 U.S. at 278, 283 (state law requiring peddlers of certain out-of-state goods to obtain license); *Guy v. Baltimore*, 100 U.S. 434, 440, 443–44 (1880) (law allowing Baltimore mayor to impose wharfage fee on vessels carrying out-of-state goods); *Walling v. Michigan*, 116 U.S. 446, 454 (1886) (state tax on out-of-state actors shipping liquor into the state).

Those cases, like many Dormant Commerce Clause cases, dealt with states discriminating against interstate commerce in the form of goods. Nevertheless, the Clause applies to all the "marvelously ingenious" means the states may adopt to carry out their protectionism. *See, e.g.*, *Wynne*, 135 S. Ct. at 1792 (invalidating the portion of the state's income tax code that did not give residents a full credit for income taxes paid in other states).

C. Seattle's Law Is the Kind of Discrimination the Commerce Clause Prevents, Regardless of Whether Seattle Used Explicitly Discriminatory Words in its Ordinance

The Ninth Circuit and the City of Seattle insist that the city's categorization of franchises is not facial discrimination against interstate commerce because the statute does not refer specifically to interstate commerce. *See Int'l Franchise Ass'n, Inc. v. City of Seattle*, 803 F.3d 389, 400 (9th Cir. 2015); Response Brief of Defendants-Appellees 18, *Int'l Franchise Ass'n, Inc. v. City of Seattle*, 803 F.3d 389 (9th Cir. 2015). That narrow view of facial discrimination does not align with other precedents of this Court, nor with the Commerce Clause's purpose to prevent all the "marvelously ingenious" ways in which states may discriminate against interstate commerce.

As this Court has said, "the dormant Commerce Clause precludes States from 'discriminat[ing] between transactions on the basis of some interstate element.'" *Wynne*, 135 S. Ct. at 1794 (quoting *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 332 n.12 (1977)). Even a noted Dormant Commerce Clause skeptic like Justice Scalia understood the Dormant Commerce Clause to protect against facial discrimination against interstate commerce. *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1185 (1989). That is what this case addresses: facial discrimination.

Consider *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984). There, this Court determined whether a Hawaii liquor tax violated the Dormant Commerce Clause by granting exceptions for fruit wine—the only kind produced in Hawaii at the time was pineapple

wine—and for a brandy distilled from the root of an indigenous Hawaiian shrub. *Bacchus Imports*, 468 U.S. at 265. The Court noted that the state argued for the constitutionality of the tax scheme "despite the fact that the tax exemption here at issue seems clearly to discriminate on its face against interstate commerce." *Id.* at 268. The Court easily concluded that the law violated the Dormant Commerce Clause by discriminating against interstate commerce in both purpose and effect. *Id.* at 273.[2]

Bacchus Imports is analogous to this case. Just like the statute at issue there, Seattle's law does not expressly mention interstate commerce but by its very operation discriminates against it: 100 percent of the Seattle franchisees who are subject to Schedule One treatment have ties to interstate commerce—either because they have an out-of-state franchisor or because there are out-of-state franchisees in the same network. *See* Petition for Writ of Certiorari 6, *Int'l Franchise Ass'n, Inc. v. City of Seattle*, No. 15-958.

Although there could, in theory, be franchises that would fall into Schedule One because of an entirely in-state franchise network, even that fact would not save Seattle's law from being facially discriminatory. In *Bacchus Imports*, there could, in theory, have been an out-of-state distillery that replanted and grew the indigenous Hawaiian shrub or an out-of-state vine-

---

[2] Although the Ninth Circuit and the City of Seattle addressed the discrimination of the Seattle law under three separate categories—facial, purpose, and effect, *see Int'l Franchise Ass'n*, 803 F.3d at 399; Response Brief of Defendants-Appellees 16, *Int'l Franchise Ass'n, Inc. v. City of Seattle*, 803 F.3d 389 (9th Cir. 2015)—this Court treats the purpose and effects analyses as forms of facial discrimination. *Bacchus Imports*, 468 U.S. at 273.

yard that made pineapple wine. Despite these possibilities, the Court saw the law for what it was: facial discrimination against interstate commerce.

This Court in other contexts has often looked with a skeptical eye at statutes that have blatantly discriminatory effects. In *Guinn v. United States*, 238 U.S. 347, 364–67 (1915), for example, the Court held that a grandfather clause violated the Fifteenth Amendment. The statute exempted from voting literacy tests those who, or whose ancestors, were entitled to vote or resided in a foreign country on January 1, 1866. *Id.* at 364. Although we can imagine someone other than an African American who would be subject to the literacy test under this statute—for instance, a white man who could only trace his lineage to men whose legal status barred them from voting—the Court had little difficulty concluding that the statute operated to abridge the right to vote "on account of race, color, or previous condition of servitude" in contravention of the Fifteenth Amendment. U.S. Const., Am. XV; *Guinn*, 238 U.S. at 364–67.

Just as in racial-discrimination cases, there are many "marvelously ingenious" ways states can discriminate against interstate commerce. As this Court said last term in *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015), "[s]ome facial distinctions . . . are obvious, defining [the regulation] by a particular subject matter, and others are more subtle, defining [the regulation] by its function or purpose. Both are . . . subject to strict scrutiny."

D. Contrary to the Ninth Circuit Below, This Court Has Held that the Fact that a Law's Burden Falls on In-State Not Out-of-State Businesses Is Irrelevant to the Question Whether It Harms Interstate Commerce

The Ninth Circuit erred when it concluded that the Seattle ordinance does not discriminate against interstate commerce on its face. *See Int'l Franchise Ass'n*, 803 F.3d at 400. The court then went on to err by using circular reasoning to conclude that the statute was not discriminatory in either purpose or effect. *See id.* at 401, 406. These errors reflect a deeper misunderstanding of what it means to discriminate against interstate commerce—a misunderstanding shared by the City of Seattle, *see* Response Brief of Defendants-Appellees 25, *Int'l Franchise Ass'n, Inc. v. City of Seattle*, 803 F.3d 389 (9th Cir. 2015).

The Dormant Commerce Clause's prohibition on discrimination is distinct from other constitutional protections from discrimination in that it concerns a class of commerce rather than a class of people. It protects interstate commerce as opposed to wholly in-state commerce. To that end, the Clause applies regardless of whether a law's burden falls on in-state actors or out-of-state ones. The crux of the matter is not who the regulated party is or where he is located but whether the law at issue discriminates against interstate commerce—regardless whether that commerce originates from within or without the state.

Last term in *Wynne*, 135 S. Ct. at 1792, for example, the Court applied the Dormant Commerce Clause to invalidate a state's income tax policy of not granting a full credit to residents for the income tax they paid outside the state. The financial burden fell ex-

clusively on state residents who earned some income in another jurisdiction. But the burden on interstate commerce existed because "Maryland's scheme create[d] an incentive for taxpayers to opt for intrastate rather than interstate economic activity." *Id.* at 1792.

Similarly, this Court has found a Dormant Commerce Clause violation where a state required interstate shippers of beer to affirm that their in-state prices were no greater than the prices they charged in neighboring states. *Healy v. Beer Institute*, 491 U.S. 324, 326, 341 (1989). The statute applied to both out-of-state shippers selling products in the state and in a bordering state *and* to in-state brewers who chose to pursue border-state markets. *Id.* Thus, the law's burden fell not only on out-of-state businesses but also on in-state ones, and that fact had no effect on the Court's Commerce Clause analysis.

In *Boston Stock Exchange*, 429 U.S. at 319, 328, this Court struck down a state law that imposed a higher tax on stock transfers occurring out-of-state than ones occurring in-state, despite the fact that the tax's burden would fall on in-state taxpayers. The Court held that the law discriminated against interstate commerce even though "this discrimination is in favor of nonresident, in-state sales which may also be considered as interstate commerce." *Id.* at 334. Again, the Commerce Clause is concerned with discrimination against interstate commerce, regardless of where the cost for that discrimination is borne.

Likewise, in *Bacchus Imports*, this Court struck down certain exemptions to a Hawaii law that imposed a 20 percent excise tax on sales of liquor at wholesale. 468 U.S. at 265. In so holding, the Court rejected the state supreme court's determination that

the law did not violate the Dormant Commerce Clause because "incidence of the tax . . . is on wholesalers of liquor in [the state] and the ultimate burden is borne by consumers in [the state]." *See id.* at 267, 272. *Bacchus Imports* therefore provides clear contrary authority to the Ninth Circuit's focus on who bears the burden of a discriminatory law. The tax in *Bacchus Imports* would be imposed only on local sales and uses, just like Seattle's minimum-wage law will fall only on in-state businesses. A law may discriminate against interstate commerce even when in-state entities are paying for their state's protectionism.

Nevertheless, the lower court focused on the burdens borne by in-state businesses rather than the harm to interstate commerce: "[F]ranchisees independently pay the operating costs of their businesses including wages and . . . no other party shares these small business obligations. In other words, in-state franchisees are burdened, not the wheels of interstate commerce." *Int'l Franchise Ass'n, Inc.*, 803 F.3d at 406 (internal quotations and citations omitted).

Finally, the Commerce Clause applies not only to state laws that discriminate against out-of-state interests but also to local laws that discriminate against non-local interests. *See, e.g.*, *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 386 (1994) (striking down a municipal ordinance requiring all solid waste to be processed at a designated transfer station before leaving the municipality; the ordinance would have benefited the municipality to the detriment of both out-of-state businesses and non-local in-state ones). Thus there exists an entire class of Dormant Commerce Clause cases in which the Ninth

Circuit's emphasis on who bears the burden of a discriminatory law would be particularly incongruous.

II. THIS COURT SHOULD GRANT CERT. BECAUSE THE COURT BELOW FAILED TO CONSIDER HOW SEATTLE'S LAW ACTS EXTRATERRITORIALLY IN VIOLATION OF THE COMMERCE CLAUSE

Seattle's ordinance increases regulatory burdens based on a company's or franchise network's total number of employees, including those working entirely outside the state. But the choice to hire an employee in another state has no nexus to Washington—let alone a "substantial" one—and the law fails to apportion the employees between those that have an in-state connection and those that do not. The "key difference" between franchises and chain (or corporate) businesses is that "[f]ranchise locations each have different owners. . . [whereas] each chain location is owned by the corporate office." Samantha Garner, *The Difference Between a Franchise and a Chain*, Go-Forth Inst. (Mar. 2, 2013), canadianentrepreneurtraining.com/the-difference-between-a-franchise-and-a-chain. In other words, a McDonald's franchise in Seattle has no significant relationship with McDonald's franchises in other states.

Because the Seattle statute "establishes a substantial disincentive for [small] companies doing business in [Seattle] to engage in interstate commerce, essentially penalizing [Seattle companies] if they seek [other]-state markets and out-of-state [companies] if they choose to sell both in [Seattle] and in [another] State," the law unconstitutionally discriminates against interstate commerce. *See Healy*, 491 U.S. at 341.

A. States Cannot Regulate Extraterritorially in Ways that Have Little or No Connection to the State

It is a foundational principle of our federalist system that no state may regulate beyond its borders. Joseph Story, *Commentary on the Conflict of Laws* § 20 (1834) ("[N]o state or nation can, by its laws, directly affect, or bind property out of its own territory, or bind persons not resident therein."). This enables each state, "if its citizens choose, [to] serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country," and enables every American to decide which regulatory regime he or she wants to live under by choosing which state to live in. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

Thus, the Constitution guarantees "the autonomy of the individual States within their respective spheres," and forbids "the projection of one state regulatory regime into the jurisdiction of another State." *Healy*, 491 U.S. at 336–37. Two clauses enforce this requirement: the Due Process Clause and the Commerce Clause. Both prevent states from regulating without any connection to their own jurisdictions. *Bonaparte v. Appeal Tax Court of Baltimore*, 104 U.S. 592, 594 (1881) ("No State can legislate except with reference to its own jurisdiction.").

Nevertheless, "[a]lthough the two claims are closely related, the Clauses pose distinct limits on the . . . powers of the States," and "reflect different constitutional concerns." *Quill Corp. v. North Dakota*, 504 U.S. 298, 305 (1992) (citations omitted). The Due Process Clause focuses on the connection between the state and the *regulated entity* to ensure that those be-

ing regulated had "fair warning that [their] activity may subject [them] to the jurisdiction of a foreign sovereign." *Shaffer v. Heitner*, 433 U.S. 186, 218 (1977) (Stevens, J., concurring), *superseded by statute*, 10 Del. Code Ann. § 3114. The Commerce Clause, on the other hand, focuses on the connection between the state and the *activity being regulated*.

This Court has established a four-part test for applying this principle to the tax context: A tax does not violate the Commerce Clause if it "[1] is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 285 (1977). Each prong focuses on a different aspect of the connection between the state and the activity regulated.

The first prong is the most explicit in requiring that the connection between the regulated activity and the state be "substantial." The second requires a state to split mixtures of activities between those have a connection to the state and those that do not, so that a state only regulates what "reasonably reflects the in-state component." *Goldberg v. Sweet*, 488 U.S. 252, 262 (1989). The third prohibits facially discriminatory regulations, and the fourth prohibits regulations that are grossly disproportionate to the connection with the state. This final requirement is also sometimes referred to as the "external consistency" test or the prohibition on extraterritoriality—the burdens imposed must reasonably reflect the in-state component of the activity. *See Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 169 (1983).

This prohibition on extraterritoriality under the Commerce Clause is not limited to taxation. *See, e.g.*, *Healy*, 491 U.S. at 343 (striking down under extraterritoriality a state statute requiring interstate beer shippers to affirm that their in-state prices were no more than their prices in neighboring states); *Edgar v. MITE Corp.*, 457 U.S. 624, 626–27, 642–43 (1982) (striking down under the external consistency test a state statute requiring corporate takeover offers to be registered with the state when the corporation had certain minimal connections with the state); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 519, 521 (1935) (the state could not constitutionally prohibit a dealer from selling milk instate because he purchased it outside the state at a lower price than he would have been able to instate); *Am. Beverage Ass'n v. Snyder*, 735 F.3d 362, 366–67 (6th Cir. 2013) (the state could not constitutionally require certain returnable bottles and cans sold in the state to feature a state-unique mark); *Nat'l Collegiate Athletic Ass'n v. Miller*, 10 F.3d 633, (9th Cir. 1993) (the state could not require the NCAA to alter its enforcement procedures for those associated with the state). The key is that the regulation must reasonably reflect the in-state component of the activity being regulated.

Even Justice Scalia has agreed that a statute that acts in this way violates the Constitution, although under Due Process rather than Commerce. *See, e.g.*, *Amerada Hess Corp. v. Dir., Div. of Taxation, N.J. Dep't of Treasury*, 490 U.S. 66, 80 (1989) (Scalia, J., concurring) ("I would refrain from applying, for Commerce Clause purposes, the remainder of the analysis articulated in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). To the extent, however, that the *Complete Auto* analysis pertains to the

due process requirements that there be 'a minimal connection between activities and the taxing State, and a rational relationship between the income attributed to the State and the intrastate values of the enterprise' I agree with the Court's conclusion. . ."); *Trinova Corp. v. Mich. Dep't of Treasury*, 498 U.S. 358, 387 (1991) (Scalia, J., concurring) ("I would forgo the additional Commerce Clause analysis articulated in *Complete Auto Transit, Inc.* . . . . Some elements of that analysis, however, are relevant to the quite separate question whether the tax complies with the requirements of the Due Process Clause.").

B. Seattle's Law Is an Unconstitutional Extraterritorial Regulation

Under the Seattle law, if a local entrepreneur wanted to open Washington's first Culver's location and employ 20 people, she would be treated as a Schedule One employer simply because the franchise is popular elsewhere.[3] The burden that would fall on that business—like the burden that presently falls on small Seattle franchises—in no way reflects the in-state component of the business. When Seattle "penaliz[es] [companies] if they seek border-state markets," it fractures the common national market just as surely as if it had enacted protectionist trade barriers. *See Healy*, 491 U.S. at 341. Even if the hiring decisions of a franchise in another state somehow affected Washington franchises, "[t]he Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State." *Edgar*, 457 U.S. at 642–43. It

[3] Culver's is a fast-casual restaurant operating primarily in the Midwest. *See* http://www.culvers.com/locator/view-all-locations.

would be proper for Seattle to distinguish between companies based on the number of employees they have *within* the state, but it is improper for the city to increase burdens based on out-of-state activity that does not "reasonably reflect[] the in-state component" of those businesses—in this case, the number of people employed. *See Goldberg*, 488 U.S. at 262.

As noted above, each franchise is a separate business entity (except where the same franchisee owns and operates multiple locations under the same corporate entity). Nevertheless, even if they were part of a single unitary business, the Seattle statute would violate the external consistency test by failing to apportion its burden based on the in-state properties of the overall business. This Court has permitted an extraterritorial burden on a single unitary business where the "source" jurisdiction of the activities is difficult to identify but the state has created an apportionment formula based on in-state properties. *Mobil Oil Corp. v. Comm'r of Taxes of Vermont*, 445 U.S. 425, 438 (1980). But this special case does not apply here. Nothing in the Seattle ordinance restricts its application to unitary businesses—it aims specifically at franchises, which are not unitary by definition—nor is there any apportionment formula at all: the statute purposely counts out-of-state-franchise employees to determine the burden on local franchises.

The fact that Seattle's minimum-wage law is designed to bring its two schedules into alignment by 2021 does not excuse the constitutional violation that occurs every day until then. Statutes often have sunset provisions, but that does not mean that they are protected from legal challenge or temporarily operate in a Constitution-free zone. Moreover, Seattle's dis-

crimination against interstate commerce vis-à-vis franchises creates a dangerous precedent. If this discrimination is allowed to stand, other state and local governments—or even Seattle itself in the future—may so discriminate permanently.

The Seattle statute is a more glaring violation of the external-consistency test than those previously addressed by this Court. The statute does not merely regulate a company for economic activities that are entirely unrelated to the state; it regulates them based on the out-of-state activities of other companies that share the franchise. In this way, Seattle unconstitutionally increases regulatory burdens based on the activity of businesses over which the in-state business has no control (or likely even knowledge). Each franchise operates independently and yet the Seattle law mandates that local franchisees pay more because of the independent hiring practices of unrelated business entities in distant parts of the country.

Three hypothetical scenarios demonstrate the burden Seattle's regulation places on interstate commerce. First, imagine that Fred is seeking employment in the out-of-state office of a business which pays the minimum wage and has 300 employees in Seattle and 199 employees out-of-state. The employer refuses to hire Fred. When he asks why, the reply is: "If we hire you, then we have to pay 36% more to all 300 employees in Seattle. If each of them works an eight-hour day and five-day week, that's about $2.5 million dollars per year that hiring you would cost." Fred might object that he does not live in Seattle, that his job would have nothing to do with the Emerald City (or the whole Evergreen State), and that he didn't get a vote on this law. Luckily, he—or at least

his would-be employer—has a constitutional remedy to this perverse disincentive: the Commerce Clause prevents Seattle from impeding hiring decisions that occur in other states.

Or, imagine that Fred owns a company in Seattle with 300 employees and he's considering expanding by buying and franchising a 200-employee company in Oregon. Such a decision—again assuming eight-hour days and five-day weeks—would now subject him to that additional $2.5 million annual cost as a penalty for out-of-state expansion. That would substantially burden Fred's business and effectively prohibit it from choosing to compete interstate. This operation of Seattle's law is more isolationist than protectionist—preventing Washington businesses from building out-of-state connections—but the Constitution was written "to form a more perfect Union," curing both protectionism and mere isolation.

Finally, imagine that Fred owns an Idaho company that already employs more than 500 people. If he chooses to start a new business in Seattle competing with local companies with fewer than 500 employees, Fred will be subjected to substantially higher burdens that effectively prevent him from entering the market on an even playing field. Of course his Idaho company would be competing on an even playing field with large Washington companies, but there are likely a number of national chains whose Seattle competition would be under-500-employee businesses.

The Ninth Circuit did not consider extraterritoriality at all, despite the Dormant Commerce Clause so obviously looming before the court. This Court should thus also grant certiorari to consider the Seattle statute's violation of the external-consistency test—or at

least to remand the case to the Ninth Circuit to examine this extraterritoriality question.

CONCLUSION

For the foregoing reasons, and those stated by the Petitioners, this Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

ILYA SHAPIRO
Counsel of Record
JAYME WEBER
Cato Institute
1000 Mass. Ave. N.W.
Washington, D.C. 20001
(202) 842-0200
ishapiro@cato.org
jweber@cato.org

February 29, 2016