

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.

CASE NO. C14-848 RAJ

ORDER

I. INTRODUCTION

On June 3, 2014, the City of Seattle (“the City” or “Seattle”), enacted Ordinance Number 124490 (“the Ordinance”), which establishes a \$15 minimum hourly wage. In doing so, Seattle joined dozens of other cities nationwide that have increased the minimum wage beyond both federal and state minimums.¹ The City’s stated reason for

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

1 increasing the minimum wage was to reduce income inequality. Additionally, the
 2 increased minimum wage was intended to “promote the general welfare, health, and
 3 prosperity of Seattle by ensuring that workers can better support and care for their
 4 families and fully participate in Seattle’s civic, cultural and economic life.” Ordinance,
 5 WHEREAS clauses 1-12, § 1.

6 The current minimum wage in Seattle is \$9.47.² Although the Ordinance goes into
 7 effect on April 1, 2015, the shift to a \$15 minimum wage will not happen overnight.
 8 There are two phase-in schedules under the Ordinance: a faster phase-in, applicable to
 9 large businesses and a slower phase-in, applicable to small businesses. Large businesses
 10 will be required to incrementally raise the minimum wage to \$15 in just three years (*i.e.*,
 11 reaching \$15 by January 1, 2017) whereas small businesses will be allowed seven years
 12 (*i.e.*, reaching \$15 by January 1, 2021). Ordinance, § 4. Small businesses were given
 13 this extra time because they lack the same resources as large businesses and will face
 14 particular challenges in implementing the law. Ordinance, § 1, ¶ 9; (Feldstein Decl.) Dkt.
 15 # 63, ¶ 10.³

16 Seattle’s power to raise the minimum wage to \$15 is not at issue in this lawsuit.⁴
 17 Indeed, the plaintiffs accept that *eventually* all Seattle employers will be required to pay
 18 their employees at least \$15. The issue the court has been asked to address relates solely
 19 to how fast this increase will happen for employees of a specific type of business model:
 20 franchises (*e.g.*, your local Subways, McDonalds, and Holiday Inns, among many others).

22 ² Washington State Department of Labor & Industries, Minimum Wage, *available*
 23 *at* <http://www.lni.wa.gov/workplacerights/wages/minimum/> (last visited Mar. 16, 2015).

24 ³ Robert Feldstein is the Director of the Office of Policy and Innovation in the
 Mayor’s Office.

25 ⁴ It is well settled that raising the minimum wage is within the City’s police power.
 26 *See, e.g., RUI One Corp. v. City of Berkeley*, 371 F.3d 1137, 1150 (9th Cir. 2004)
 27 (acknowledging that “[t]he power to regulate wages and employment conditions lies
 clearly within a state’s or municipality’s police power”).

1 The crux of this lawsuit is the Ordinance’s categorization of franchisees as large
 2 businesses. Because these businesses are considered large, they will be subject to the
 3 faster three-year phase-in schedule. The plaintiffs object to this categorization. Although
 4 franchisees are connected to large franchisors, they are technically separate entities under
 5 the law. Additionally, individual franchisee outlets often employ only a handful of
 6 workers. According to plaintiffs, this makes them more similar to small businesses and
 7 equally likely to suffer challenges in implementing the new law. (Compl.) Dkt. # 1, ¶¶ 3,
 8 4; (Pls.’ Mot.) Dkt. # 37, p. 18.

9 Plaintiffs are the International Franchise Association (“IFA”), which is an
 10 organization of franchisors, franchisees, and suppliers, and five individual franchisee
 11 owners and/or managers. Together, they are seeking a preliminary injunction compelling
 12 the City to treat franchisees as “small” businesses rather than “large” businesses. They
 13 do not seek to invalidate the entire Ordinance; rather, they ask only that franchisees be
 14 subject to the slower (seven year) phase-in schedule applicable to small businesses.

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

19 For the reasons stated below, the court DENIES plaintiffs’ motion for a
 20 preliminary injunction.⁵

21 **II. BACKGROUND**

22 **A. History of the Ordinance**

23 Shortly after taking office, the Mayor of Seattle assembled an Income Inequality
 24 Advisory Committee (the “Advisory Committee”), which consisted of twenty-four
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26 ⁵The court heard oral argument in this matter on March 10, 2015. Neither party
 27 requested an evidentiary hearing.

members, including representatives of business interests and labor unions. Ordinance, § 1, ¶ 6. The Mayor formed the Advisory Committee to “address the pressing issue of income inequality in Seattle” and to seek input regarding a potential increase in the minimum wage. Ordinance, § 1, ¶¶ 6, 7; (Feldstein Decl.) Dkt. # 63, ¶ 8. The Advisory Committee reviewed scholarly studies on the impact of minimum wage laws in other cities and hosted numerous public engagement forums, including industry-specific forums. Ordinance, § 1, ¶ 8. In May 2014, the Advisory Committee transmitted its formal recommendation to the Mayor. The recommendation advocated for a phased increase in the minimum wage and acknowledged that small businesses should be subject to a slower phase-in schedule. Ordinance, § 1, ¶ 9; (Feldstein Decl.) Dkt. # 63, ¶¶ 10, 11. The recommendation said nothing specific about the categorization of franchisees.

B. The Franchise Business Model

The term “franchise business model” refers to a long-term business relationship in which one company (the franchisor) grants other companies (the franchisees) the right to sell products under its brand, using its business model and intellectual property, generally in exchange for ongoing royalty payments and other fees. (Gordon Decl.) Dkt. # 70-2, ¶ 6.⁶ Although franchisees are part of the larger organization of the franchisor, they are legally separate entities. (Shane Dep.) Dkt. # 81-4, p. 9.⁷ This business model provides the franchisor with the benefits of vertical control over retail units without the investment in assets required by full integration. Mick Carney and Eric Gedajlovic, *Vertical Integration in Franchise Systems: Agency Theory and Resource Explanations*, 12 Strategic Mgmt. J. 607 (1991). The employees of a franchisee are not employees of the franchisor. (Shane Dep.) Dkt. # 81-4, p. 10. Franchisees manage the day-to-day aspects

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

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

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

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

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

21 **C. Mechanics of the Ordinance**

22 1. The Two Phase-In Tracks: “Large” and “Small” Businesses

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

The second track applies to Schedule Two or “small” businesses (defined as those with 500 or fewer employees nationwide).⁹ These smaller businesses will have seven years to implement the new law. The exact incremental increases for each track are set forth below:

Schedule One -- large employers (> 500 employees)

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

Schedule One -- large employers offering health benefits

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

Schedule Two -- small employers ($\leq$ 500 employees)

- April 1, 2015 -- \$10
- January 1, 2016 -- \$10.50

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

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

- January 1, 2017 -- \$11
- January 1, 2018 -- \$11.50
- January 1, 2019 -- \$12
- January 1, 2020 -- \$13.50
- January 1, 2021 -- \$15

Ordinance § 4.

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

2. Franchisees and Integrated Enterprises

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

A franchisee is considered a “large” business if its franchisor and/or its network of franchisees employ more than 500 employees in aggregate in the United States.

Ordinance, § 3. This means that the owner of a Subway outlet with only 10 employees will be considered a “large” employer because of his relationship with the Subway franchisor and other Subway franchisees.

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

Ordinance, § 3. This test applies only to *non-franchise* businesses.

III. LEGAL STANDARD

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

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

IV. ANALYSIS

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

A. The Dormant Commerce Clause

The Constitution was framed upon the theory that “the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.” *Baldwin v. G.A.F. Seeling, Inc.*, 294 U.S. 511, 523 (1935). Thus, the Court “has consistently held that the Constitution’s express grant to Congress of the power to ‘regulate Commerce ... among the several States,’ Art. I, § 8, cl.3,

1 contains, ‘a further, negative command, known as the dormant Commerce Clause’ ”
2 *Am. Trucking Ass’n, Inc. v. Michigan Public Service Comm’n*, 545 U.S. 429, 433 (2005)
3 (quoting *Okla. Tax Comm’n v. Jefferson Lines, Inc.*, 514 U.S. 174 (1995)).

4 The dormant Commerce Clause bars state and local governments from erecting
5 taxes, tariffs, or regulations that favor local businesses at the expense of interstate
6 commerce. *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 35 (1980). One of its core
7 purposes is to prevent states from engaging in economic protectionism -- i.e., shielding
8 local markets from interstate competition. *Dep’t of Revenue of Ky. v. Davis*, 553 U.S.
9 328, 337-38 (2008) (citing *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269 (1988)).

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

20 A determination that the law is non-discriminatory under the first tier, however,
21 does not end the analysis. The court must move on to the second tier and apply the *Pike*
22 balancing test when the non-discriminatory law nevertheless has some burden on
23 interstate commerce. *Nat’l Ass’n of Optometrists*, 567 F.3d at 528. Under *Pike*, the law
24 will only be invalidated if plaintiffs can show that the burden on interstate commerce is
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1 clearly excessive in relation to the putative local benefits.¹⁰ *Pike v. Bruce Church, Inc.*,
 2 397 U.S. 137, 142 (1970).

3 1. Tier One: The Anti-Discrimination Test

4 a. *Does the Ordinance discriminate on its face?*

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

10 b. *Does the Ordinance have a discriminatory purpose?*

11 Discriminatory purpose exists when a state or local statute is "motivated by an
 12 intent to discriminate against interstate commerce." *Family Winemakers of Cal. v.*
 13 *Jenkins*, 592 F.3d 1, 13 (1st Cir. 2010). The words of the legislative body itself, written
 14 contemporaneously with the passage of the law in question, are the most persuasive
 15 source of legislative purpose. See, e.g., *Minnesota v. Clover Leaf Creamery Co.*, 449
 16 U.S. 456, 463 n. 7 (1981) ("[T]his Court will assume that the objectives articulated by the
 17 legislature are actual purposes of the statute, unless examination of the circumstances
 18 forces us to conclude that they 'could not have been a goal of the legislation.'"). The
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20 ¹⁰ The court notes that the decisions interpreting the dormant Commerce Clause
 21 appear somewhat difficult to reconcile. See, *W. Lynn Creamery, Inc. v. Healy*, 512 U.S.
 22 186, 210 (1994) (Scalia, J., concurring) ("[O]nce one gets beyond facial discrimination
 23 our negative-Commerce-Clause jurisprudence becomes (and long has been) a
 24 quagmire.") (internal quotation marks omitted); see also Brannon P. Denning,
 25 *Reconstructing the Dormant Commerce Clause Doctrine*, 50 Wm. & Mary L. Rev. 417,
 26 423 (2008) (noting that "a number of the Court's [] cases are, in fact, impossible to
 27 reconcile...."). Nevertheless, the Court has attempted to apply the framework to serve
 the purpose of the dormant Commerce Clause --i.e., to prevent barriers to the flow of
 interstate commerce -- while keeping in mind the "residuum of power" in a municipality
 to make laws governing matters of local concern. *S. Pac. Co. v. State of Ariz.*, 325 U.S.
 761, 767 (1945).

1 legislature's stated purpose, however, is not dispositive. Several additional factors have
2 been recognized as probative of discriminatory intent: (1) evidence of a consistent pattern
3 of actions by the decision-making body disparately impacting members of a particular
4 class of persons; (2) historical background of the decision, which may take into account
5 any history of discrimination by the decision-making body or the jurisdiction it
6 represents; (3) the specific sequence of events leading up to the particular decision being
7 challenged, including any significant departures from normal procedures; and (4)
8 contemporary statements by decision-makers on the record or in minutes of their
9 meetings. *See, e.g., Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252,
10 267-68 (1977); *Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 336 (4th Cir.
11 2001).

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

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

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

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

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

10 Dkt. # 38-2, p. 2.

11 He also stated:

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

21 Dkt. # 38-10, p. 2.

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

24 I like the thinking but would love some additional thinking to
25 help think through how to answer concerns about the effect
26 on the individual immigrant business owner who decided to
27 open a Subway rather than a bahn mi shop. I will admit
upfront that I probably know least about [the] franchise model
so there might be big gaps that I don't understand. That's
part of why I'm asking for help in thinking this through....If

considered all of the emails and statements identified by the parties, despite not including
a verbatim recitation of each in its opinion.

1 we lose franchises in Seattle, I won't be sad – for the reasons
 2 you say. But are their ways for the cost to be born not on
 3 those franchise owners? Are they simply going to be a
 4 casualty of this transition? Are they less sympathetic or less at
 5 financial risk than I am imagining....

6 Dkt. # 38-3, p. 2.¹²

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

10 It's important, before we get lost in to this false idea that
 11 franchisees are somehow struggling businesses, we should
 12 look at the evidence here, which compiles McDonald's,
 13 Burger King, and Wendy's owners in Seattle...Just six
 14 companies own every franchised big burger chain in Seattle,
 15 and those six companies own a total of 236 locations all
 16 across the country. These are not small businesses. And a
 17 McDonald's franchise requirement is \$750,000 of personal
 18 wealth, not borrowed money, and [a] \$45,000 franchisee fee,
 19 40% of the total cost to open a new restaurant must be paid in
 20 cash. Now yes, it's true that the McDonalds headquarters,
 21 corporate headquarters, takes away the lion's share of the
 22 profits, but in order to be a franchisee, you have to be very,
 23 very wealthy. Just a small business person of color from
 24 Rainier Beach is not going to be able to afford to open a
 25 franchise outlet.

26 Dkt. # 38-11, p. 4; *see also* Dkt. # 38-12, p. 2 (writing on her official website, she also
 27 stated, “It's clear that the current franchise model is rigged against workers.”); Dkt. # 38-
 28 15, p. 2 (tweeting from her official twitter account, she also stated, “Franchise owners:
 29 enough with the blame game! Organize, go to CorpHQ & renegotiate your rents.”).

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

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

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

21 Dkt. # 81-2, p. 2.

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

24 Franchises have resources that a small business in the Rainier
25 Valley or a small sandwich shop on Capitol Hill do not have.
26 Franchise restaurants have menus that are developed by a
27 corporate national entity, a food supply and products that are
provided by a corporate national entity, training provided by a
corporate national entity, and advertising provided by a
corporate national entity. They are not the same as a local
sandwich shop that opens up or a new local restaurant that
opens up in the city. Our process for reaching \$15 an hour in
Seattle recognizes that difference.

Dkt. # 38-16, p. 2.

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

1 First, the court gives little weight to the comments of an Advisory Committee
 2 member. Mr. Hanauer had no part in drafting the Ordinance and, unlike a lawmaker, he
 3 had no responsibility to consider and weigh opposing viewpoints. Because he was not
 4 the ultimate decision-maker, Mr. Hanauer was free to zealously lobby for and advance
 5 his own line of thinking on this issue.¹³ The same is true for other private citizens who,
 6 in fact, disagreed with Mr. Hanauer and voiced pro-franchise views. For example, David
 7 Meinert, another Advisory Committee member, stated in an email to the Mayor's staff:
 8 "From breaking franchise agreements to outside 'education' of workers funded by the
 9 city, to getting rid of tips to lack of training wage. I have to speak out against these
 10 things." Dkt. # 38-4, p. 2. MSA Worldwide, a franchise advisory firm, also wrote a
 11 detailed letter to the Mayor arguing that "[b]y its actions, the City of Seattle is statutorily
 12 denying franchisees the right to exist in Seattle...." Dkt. # 38-8, p. 2. Additionally, The
 13 Seattle Times wrote an editorial criticizing the categorization of franchisees as "large"
 14 businesses. *See, Editorial: Redefine franchises under Seattle's minimum-wage proposal*,
 15 The Seattle Times, May 30, 2014 ("[The Ordinance] effectively discriminates against a
 16 business model – franchises – by giving non-franchisees a slower phase-in."). If the
 17 court were to extend its inquiry into every statement made by every Advisory Committee
 18 member or other private person on an issue as politically charged as this one, it would
 19 surely discover a plethora of advocacy by both sides -- e.g., statements at public hearings,
 20 editorials, and letters to lawmakers -- some of which might well be discriminatory.

21 Second, the statements made by lawmakers do not expressly suggest an intent to
 22 discriminate against out-of-state interests. While they refer to the franchisor as the

23
 24 ¹³ The court has reviewed an email sent by Councilmember Tim Burgess to Mr.
 25 Hanauer thanking him for his "leadership on this important issue." Dkt. # 81-1. This
 26 email, when read in context, appears to be a simple acknowledgement of Mr. Hanauer's
 27 efforts to advance one line of thinking on the minimum wage ordinance. There is no
 evidence that Councilmember Burgess or any other Councilmember adopted any of Mr.
 Hanauer's opinions as their own.

1 “corporate headquarters,” the “corporate national entity” and the “parent corporation,”
2 the statements, when considered in context, are reasonably read to distinguish between
3 entities with more resources and those with fewer resources. Indeed, each of the
4 statements refers to the resources of franchisees and their ability to adjust to the increased
5 minimum wage on an accelerated basis. Councilmember Sawant stated, “[W]e [should
6 not] get lost into this false idea that franchisees are somehow struggling businesses....
7 These are not small businesses....” Councilmember O’Brien stated, “The ones not
8 struggling are the corporate parents of all these, and...I expect over time adjustments will
9 need to be made to accommodate the new minimum wage.” Finally, the Mayor stated,
10 “Franchises have resources that a small business in the Rainier Valley or a small
11 sandwich shop on Capitol Hill do not have...They are not the same as a local sandwich
12 shop that opens up or a new local restaurant that opens up in the city.” Whether accurate
13 or not, the statements made by these lawmakers are consistent with the Ordinance’s
14 stated purpose of differentiating between large and small businesses -- businesses with
15 more resources can more easily (and more quickly) adjust to the increasing minimum
16 wage, while small businesses, with fewer resources, may have difficulty in
17 accommodating the costs.

18 Third, the court notes that the Ordinance passed by unanimous vote and plaintiffs
19 have identified no objectionable comments made by any other City Council members.
20 Thus, even if the aforementioned statements could somehow be construed to indicate
21 some impermissible motivation, isolated and stray comments by two Council members
22 are insufficient to override the entire City Council’s formal statements of purpose in the
23 Ordinance itself. *Compare Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 161 (5th Cir. 2007)
24 (finding stray protectionist remarks of certain legislators were insufficient to condemn
25 statute under the dormant Commerce Clause where overall legislative record revealed
26 legitimate, nondiscriminatory purposes), *with Waste Mgmt. Holdings, Inc.*, 252 F.3d at
27 336-40 (finding discriminatory purpose when comments of lawmakers expressly referred

1 to imposing burdens and restrictions on actors “outside” the state and sequence of events
2 leading up to enactment of statute clearly established impermissible motive), *and Family*
3 *Winemakers*, 592 F.3d at 7, 15-17 (finding discriminatory purpose when protectionist
4 statements by lawmakers caused the state legislature to amend a statute to include a
5 unique exception that would favor a particular in-state winery).

6 Fourth, and finally, the record does not reveal any significant departures from
7 normal procedures in enacting the Ordinance. It is no secret that the minimum wage
8 increase was hotly debated and that interest groups from both sides weighed in on the
9 issue. These included both labor interests and franchise interests and both represented
10 Seattle voters. (Exs. to Groesbeck Decl. iso Pls.’ Mot.) Dkt. ## 38-1 to 38-17; (Exs. to
11 Grosebeck Decl. iso of Pls.’ Reply) Dkt. ## 81-1 to 81-3. Thus, the alleged statements by
12 some union leaders, for example, indicating a desire to “break the franchise model” do
13 not surprise the court. (Meinert Decl.) Dkt. # 37-2, ¶ 4. Even if true, such fervent
14 remarks and lobbying efforts by interest groups cannot be imputed to the City Council.
15 *See, W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 215 (1994) (Rehnquist, C.J.,
16 dissenting) (“Analysis of interest group participation in the political process may serve
17 many useful purposes, but serving as a basis for interpreting the dormant Commerce
18 Clause is not one of them.”). The City Council likely heard many opposing viewpoints
19 leading up to the enactment of the Ordinance. In response, the lawmakers asked
20 questions (for example, Mr. Feldstein requested additional information, stating “I will
21 admit upfront that I probably know least about [the] franchise model so there might be
22 big gaps that I don’t understand...Are [franchisees] less sympathetic or less at financial
23 risk than I am imagining?”) and inquired into the financial risks facing franchisees and
24 their potential resources. The findings by the Mayor and other lawmakers regarding the
25 benefits flowing to these entities from their franchisors support the conclusion that
26
27

franchisees were categorized as “large” employers based upon a determination that they could handle the faster phase-in schedule, not by any protectionist motive.¹⁴

Accordingly, the court does not find that the categorization of franchisees as large businesses was motivated by a desire to discriminate against interstate commerce.

c. Does the Ordinance have a discriminatory effect?

To prove discriminatory effect, plaintiffs have the burden of producing substantial evidence showing that the law discriminates in practice. *Black Star Farms LLC v. Oliver*, 600 F.3d 1225, 1232 (9th Cir. 2010); *Family Winemakers*, 592 F.3d at 11.

Discrimination means “differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.” *Or. Waste Sys., Inc. v. Dep’t of Env’tl. Quality*, 511 U.S. 93, 99 (1994). Of course, the “differential treatment” must be as between entities that are similarly situated. *See Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 298-99 (1997); *Nat’l Ass’n of Optometrists & Opticians LensCrafters, Inc. v. Brown*, 567 F.3d 521, 527 (9th Cir. 2009).

Although the dormant Commerce Clause protects against burdens on interstate commerce, it also respects federalism by protecting local autonomy. *Nat’l Ass’n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1148 (9th Cir. 2012) (citing *Dep’t of Revenue v. Davis*, 553 U.S. 328, 338 (2008)). The Supreme Court has recognized that “under our constitutional scheme the States retain broad power to legislate protection for their citizens in matters of local concern” and has held that “not every exercise of local

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

power is invalid merely because it affects in some way the flow of commerce between the States.” *Id.* (quoting *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366, 371 (1976)); *see also Nat’l Ass’n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1148 (9th Cir. 2012) (“A critical requirement for proving a violation of the Commerce Clause is that there must be a *substantial burden* on *interstate commerce*.”) (emphasis in original).

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

Here, plaintiffs claim that the Ordinance disproportionately impacts out-of-state franchisors. 623 franchises operate in Seattle; 600 (or 96.3%) of those have out-of-state franchisors. (Reynolds Decl.) Dkt. # 37-4, ¶ 17.¹⁵ Additionally, all of the 23 in-state franchisors are associated with franchisees outside of the state of Washington. *Id.* Thus, plaintiffs argue, the Ordinance overwhelmingly burdens out-of-state entities. Plaintiffs

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

1 also claim that the Ordinance will put franchisees at a competitive disadvantage as
2 compared to other similarly situated small businesses by increasing their labor costs.

3 As an initial matter, comparing franchisees and independent small businesses is
4 somewhat difficult; they are not “similarly situated” in all relevant respects. It is true that
5 they compete in the same markets and it is also true that a franchisee who owns only one
6 outlet may share some similarities with an independent small business. That said,
7 franchisees and independent small businesses have different business structures. See
8 *Nat’l Ass’n of Optometrists & Opticians Lenscrafters, Inc. v. Brown*, 567 F.3d 521, 527
9 (9th Cir. 2009) (“Because states may legitimately distinguish between business structures
10 in a retail market, a business entity’s structure is a material characteristic for determining
11 if entities are similarly situated.”). The franchisee has, through his contract with the
12 franchisor, made a business decision -- *i.e.*, to pay royalties and fees in exchange for use
13 of a brand name, training, advertising, established customer base, and other benefits --
14 presumably because he deemed this arrangement profitable. The City, however, has had
15 no part in creating or defining this structure and has no duty to promote it or protect it.
16 Increasing costs for a particular type of business model, even one that involves interstate
17 commerce, does not violate the dormant Commerce Clause without a further showing of
18 impact on the flow of goods among the states. The Commerce Clause simply does not
19 protect “the particular structure or methods of operation in a retail market.” *Exxon Corp.*
20 *v. Governor of Md.*, 437 U.S. 117, 127 (1978). Nor does it “give an interstate business
21 the right to conduct its business in what it considers the most efficient manner,” for “the
22 Constitution protects the interstate market, not particular interstate firms, from prohibitive
23 or burdensome regulations.” *Valley Bank of Nev. v. Plus Sys., Inc.*, 914 F.2d 1186, 1993
24 (9th Cir. 1990) (citing *Exxon*, 437 U.S. at 127-28).

25 Second, even if the court were to find that franchisees are similarly situated to
26 independent small businesses, plaintiffs have not produced substantial evidence showing
27 discriminatory effect. *Black Star Farms*, 600 F.3d at 1232. Pointing to a 96.3%

1 connection to out-of-state entities is insufficient. *See, e.g., Exxon*, 437 U.S. at 125-29
2 (finding that even when the burden of legislation falls 100% on out-of-state entities, that
3 fact alone “does not lead, either logically or as a practical matter, to a conclusion that the
4 State is discriminating against interstate commerce in the retail market”); *Valley Bank*,
5 914 F.2d at 1193 (“[E]ven a disproportionate effect on out-of-state residents...does not
6 necessarily violate the commerce clause.”). Instead, plaintiffs must show that the faster
7 phase-in schedule will cause local goods to constitute a larger share and goods with an
8 out-of-state source to constitute a smaller share of the market. *Black Star Farms*, 600
9 F.3d at 1233. While plaintiffs argue that this will necessarily occur, they have not
10 presented evidence of an actual, rather than potential, impact on interstate commerce.
11 Identifying a correlation between franchisees and out-of-state business entities, even a
12 very strong correlation, does not establish the further fact that a burden on franchisees in
13 Seattle will cause a reduction in the flow of commerce across state lines.

14 Plaintiffs’ cases are not to the contrary. For example, in *Cachia v. Islamorada*,
15 542 F.3d 839 (11th Cir. 2008), the court considered an ordinance which stated that
16 “[f]ormula restaurants shall not be permitted in any zoning district of [Islamorada].” 542
17 F.3d at 841. The court found that the ordinance had a discriminatory effect because it
18 served as “an explicit barrier to the presence of national chain restaurants, thus preventing
19 the entry of such businesses into competition with independent local restaurants.” *Id.* at
20 842 (emphasis added). Thus, the *Cachia* ordinance expressly banned formula restaurants
21 and erected a figurative wall around the local market.

22 In *Island Silver & Spice, Inc. v. Islamorada*, 542 F.3d 844 (11th Cir. 2008),
23 another case relied upon by the plaintiffs, the court considered an ordinance that limited
24 formula retail establishments (*e.g.*, Target or Walmart) to 2,000 square feet of retail space
25 and 50 feet of frontage. 542 F.3d at 846. The parties had stipulated that this restriction
26 “effectively prevents the establishment of new retail stores,” and “a facility limited to no
27 more than 2,000 square feet or 50’ of frontage can not accommodate the minimum

1 requirements of nationally and regionally branded formula retail stores.” *Id.* The court
2 acknowledged that even when the burden of a regulation falls onto a subset of out-of-
3 state retailers, that fact “does not, by itself, establish a claim of discrimination against
4 interstate commerce.” *Id.* (quoting *Exxon*, 437 U.S. at 126). The court found, however,
5 that the ordinance’s effective elimination of all new interstate retailers had the “practical
6 effect of...discriminating against” interstate commerce. *Id.* at 847 (emphasis added).
7 Thus, the playing field was rigged so sharply against interstate retailers, it effectively
8 eliminated them from the city -- a clear move toward economic isolation.

9 Similarly, in *Hunt v. Washington State Apple Advertising Commission*, 432 U.S.
10 333 (1977), the Supreme Court found that a North Carolina produce labeling statute had
11 “a leveling effect which insidiously operate[d] to the advantage of local apple producers.”
12 432 U.S. at 351. North Carolina had enacted a statute which required all closed
13 containers of apples shipped into the state to bear “no grade other than the applicable
14 U.S. grade or standard.” *Id.* at 335. This meant that any individual state’s grading
15 system could not be used on apple containers shipped into North Carolina. *Id.* At the
16 time, Washington State was the nation’s largest producer of apples, its crops accounting
17 for approximately 30% of apples grown domestically and nearly 50% of all apples
18 shipped in closed containers in interstate commerce. *Id.* at 336. Washington had its own
19 grading system, which reflected a stringent inspection program that required compliance
20 with quality standards that were the equivalent of or superior to the standards adopted by
21 the United States Department of Agriculture. *Id.* Washington’s system had become the
22 industry standard and Washington apple containers were, of course, labeled with
23 Washington grades. *Id.* at 351. North Carolina, by contrast, had never established a
24 grading or inspection system. Thus, the North Carolina law, which prohibited the use of
25 state grades, had no impact on North Carolina apple growers. The burden fell entirely on
26 out-of-state entities. *Id.* But that fact alone was not enough to lead the Court to conclude
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1 that the law discriminated against interstate commerce. *Id.*; see also *Exxon*, 437 U.S. at
2 125-29.

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

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

20 Although plaintiffs contend that by increasing franchisees’ labor costs, the City is
21 “rigging the playing field,” akin to *Hunt* or the *Islamorada* cases, to prevail on their
22 dormant Commerce Clause challenge, plaintiffs must present evidence that the City has
23 done so in a way that will impact the flow of interstate commerce. See, e.g., *Hunt*, 432
24 U.S. at 349 (“Not every exercise of state authority imposing some burden on the free
25 flow of commerce is invalid.”); *Milk Control Bd. v. Eisenberg Farm Prod.*, 306 U.S. 346,
26 351-52 (1939) (“Every state police statute necessarily will affect interstate commerce in
27 some degree, but such a statute does not run counter to the grant of Congressional power

merely because it incidentally or indirectly involves or burdens interstate commerce....”); *cf. Family Winemakers*, 592 F.3d at 11 (“Here, the totality of the evidence introduced by the plaintiffs demonstrates that the... [statute’s] effect is to significantly alter the terms of competition between in-state and out-of-state wineries to the detriment of the out-of-state wineries that produce 98 percent of the country’s wine.”).

Again, the evidence of discriminatory effect must be substantial. *See Black Star Farms*, 600 F.3d at 1233 (distinguishing *Family Winemakers* on this very point and finding that the “plaintiffs in that case, unlike the plaintiffs here, had *evidence* to prove their contentions”) (emphases added). Here, there is simply no credible evidence in the record that indicates franchisees will close up shop or reduce operations, or that new franchisees will not open up in Seattle. Although one plaintiff’s declaration indicates that the faster phase-in *may* cause her to go out of business, she is only speculating. (Lyons Decl.) Dkt. # 37-5, ¶ 20.¹⁶ Her declaration is merely anecdotal and does not include any data analysis or empirical evidence that would lead the court to believe that imposing a faster phase-in schedule on franchisees is going to impact interstate commerce. The same is true regarding the survey results presented by *amici curiae*, in which a minority of small business owners *predicted* that they were “likely” to limit expansion in response to the wage increase. (Br. of Am. Hotel & Lodging Ass’n et al.) Dkt. #43-1, p. 8. The survey is based upon little more than conjecture and, in any case, fails to differentiate the responses of independent small business owners from those of franchisees.¹⁷ Further, other *amici* have submitted contrary evidence, showing that although business owners in

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

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

San Jose made similar predictions in response to that City's minimum wage increase, "[f]ast-food hiring accelerated once the higher wage was in place."¹⁸ (Br. of. Nat'l Emp. Law Project) Dkt. # 76, p. 15. Indeed, as stated recently by the CEO of Togo's Eateries, a sandwich franchisor that is planning an expansion into Seattle, "[the increase in the minimum wage] is what it is. Every city passes its own laws. We have a way to adjust the pricing and labor models to help us still be competitive but also make a profit." Rachel Lerman, *Fast-food eatery Togo's will expand to Seattle (not afraid of \$15 wage)*, Puget Sound Bus. J. (June 11, 2014). Mr. Gordon, one of the franchise experts, confirmed this possibility, stating, "[F]ranchisors also have the ability to use their greater financial resources to support the franchise by aiding franchisees during time of business stress. Because of these advantages, franchisees and franchisors are better able than independent small businesses to identify and respond to changed business conditions, including regularly scheduled minimum wage increases." (Gordon Decl.) Dkt. # 70-2, ¶9.

Put simply, there is no evidence demonstrating whether the Ordinance will have an impact on interstate commerce one way or the other, and the court declines to infer that it will necessarily have a negative one. At most, plaintiffs have shown *possible* or *potential* discriminatory effect, and as the Ninth Circuit has already found, that showing is insufficient. *See Black Star Farms*, 600 F.3d at 1232, 1235 ("Courts examining a 'practical effect' challenge must be reluctant to invalidate a state statutory scheme...simply because it *might* turn out down the road to be at odds with our

¹⁸ See, e.g., Eric Morath, *What Happened to Fast-Food Workers When San Jose Raised the Minimum Wage? Hold the Layoffs*, Wall Street Journal, April 9, 2014; Timothy Egan, *For \$7.93 an hour, It's Worth a Trip Across a State Line*, N.Y Times, Jan. 11, 2007 (finding that when Washington State raised its minimum wage, businesses near the Idaho state line "prospered far beyond their expectations" and suffered no decrease in profitability).

1 constitutional prohibition against state laws that discriminate against interstate
2 commerce.”).

3 2. Tier Two: The *Pike* Balancing Test

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

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

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

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

26 Here, even if the court assumes that the Ordinance will have some incidental
27

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

B. Equal Protection

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

Whether embodied in the Fourteenth Amendment or inferred from the Fifth, equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. *F.C.C. v. Beach Commcn’s, Inc.*, 508 U.S. 307, 313 (1993). “In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against an equal protection challenge if there is *any reasonably conceivable state of facts* that could provide a rational basis for the classification.” *Id.* (citations omitted) (emphasis added). This standard of review is a paradigm of judicial restraint. *Id.* “The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be

1 rectified by the democratic process and that judicial intervention is generally unwarranted
2 no matter how unwisely we may think a political branch has acted.” *Vance v. Bradley*,
3 440 U.S. 93, 97 (1979). Thus, those attacking the rationality of the legislative
4 classification have the burden “to negative every conceivable basis which might support
5 it.” *Id.* at 315 (citing *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364
6 (1973)).

7 Moreover, because courts never require a legislature to articulate its reasons for
8 enacting a statute, it is entirely irrelevant for constitutional purposes whether the
9 conceived reason for the challenged distinction actually motivated the legislature. *United*
10 *States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980). In other words, a legislative
11 choice is not subject to courtroom fact-finding and may be based on rational speculation
12 unsupported by evidence or empirical data. *Vance*, 440 U.S. at 111. “Only by faithful
13 adherence to this guiding principle of judicial review of legislation is it possible to
14 preserve to the legislative branch its rightful independence and its ability to function.”
15 *Lehnhausen*, 410 U.S. at 365 (quoting *Carmichael v. S. Coal & Coke Co.*, 301 U.S. 495,
16 510 (1937)).

17 Here, there is certainly a “reasonably conceivable state of facts” that provides a
18 rational basis for the classification of franchisees as large businesses. Two experts, Scott
19 Shane and John Gordon, have provided declarations outlining the economic benefits
20 flowing to franchisees as a result of the franchise relationship. *See* (Shane Decl.) Dkt. #
21 62; (Gordon Decl.) Dkt. # 70-2. Those benefits include, among other things, national
22 advertising, extremely valuable and well-known trademarks, the market power of a large
23 corporation when purchasing supplies and raw materials, and access to valuable and
24 trustworthy information based on the experiences of other franchisees. Dkt. # 62, ¶¶ 10-
25 17; Dkt. # 70-2, ¶¶ 10-31.

26 Indeed, the individual plaintiffs in this matter do not deny that their franchise
27 relationships provide them with such benefits. For example, plaintiff Ronald Oh, a

1 partial owner of a Holiday Inn Express franchise, testified that through his franchise
2 network he receives the use of a large on-line reservation system which provides at least
3 twenty-percent of his hotel's guests; he receives the benefit of a loyalty reward system
4 that has 74 million members worldwide; he is able to consult with others in his franchise
5 network and receive assistance on a host of issues. (Oh Dep.) Dkt. # 87-1, pp. 10-12, 13-
6 14, 15, 16, 21-24. Mr. Oh's franchise agreement identifies other benefits, including use
7 of Holiday Inn's trademarks, training, and certain marketing benefits. (Oh Franchise
8 Agreement) Dkt. # 87-2, pp. 9-11.

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

18 A third plaintiff, Charles Stempler, confirmed at his deposition that there are
19 benefits to becoming an AlphaGraphics franchisee, including continuous training and
20 support, lease assistance, buying power via global contracts with major suppliers,
21 management consultation, and ongoing regionalized field and sales support among other
22 things. (Stempler Dep.) Dkt. # 87-5, p. 4; (Stempler Franchise Doc.) Dkt. # 87-6, p. 3.
23 Mr. Stempler's AlphaGraphics franchise agreement also identifies a number of benefits
24 that AlphGraphics has contractually agreed to provide its franchisees including assistance
25 with site selection; advice on financing; detailed plans for a print shop; three to four
26 weeks of training; up to forty-eight hours per year of free consultation; operating
27

1 manuals; and use of trademarks. (Stempler Franchise Agreement) Dkt. #87-7, pp. 16, 17,
2 19-20, 23-26.

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

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

23 Notably, no one disputes the City’s decision to draw a line defining “large”
24 businesses as any employer with 500 or more employees. But who is to say an employer
25 with 501 employees has more resources than one with 499? And who is to say
26 businesses with 501 employees can actually accommodate a faster phase-in schedule?
27 The court is in no position to answer these questions, nor is the court obliged to do so.

1 The City Council, based upon its research, review of historical data, legislative hearings,
2 and communications with the public, saw fit to draw the “large” business line at 500
3 employees. *See Beach Commc’ns, Inc.*, 508 U.S. at 315 (“These restraints on judicial
4 review have added force where the legislature must necessarily engage in a process of
5 line-drawing.”). And absent a reason to infer antipathy, the court cannot second-guess
6 the wisdom, fairness, or logic of that choice.

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

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

25 Thus, the court finds plaintiffs have neither shown a likelihood of success nor
26 raised serious questions going to the merits of their equal protection claim.
27

1 C. First Amendment

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

14 Plaintiffs’ argument is unconvincing. The Ordinance does not penalize speech or
 15 association. Rather, it uses certain factors common to franchises to identify them as one
 16 type of business subject to the faster phase-in schedule. The definition used by the City
 17 here is no different than many other federal and state laws which regulate franchises.
 18 *See, e.g.*, 16 C.F.R. § 436.1(h) (“Franchise means any continuing commercial
 19 relationship or arrangement...in which the terms of the offer or contract specify...that the
 20 franchisee will obtain the right to operate a business that is identified or associated with
 21 the franchisor’s trademark...”); R.C.W. § 19.100.010(6) (“Franchise means... the
 22 operation of the business is substantially associated with a trademark...”); Cal. Bus. &
 23 Prof. Code § 20001 (“Franchise means...the operation of the franchisee’s business...is
 24 substantially associated with the franchisor’s trademark...”); N.J.S.A. § 56:10-3
 25 (“Franchise means a written arrangement...in which a person grants to another person a
 26 license to use a...trade mark...”). If the court were to accept plaintiffs’ argument, it
 27 would mean that any regulation that impacts a franchisee’s operation costs implicates the

1 First Amendment because it would necessarily reduce funds that would otherwise be
 2 available for “coordinated marketing and advertising” and other forms of commercial
 3 speech. Plaintiffs, however, cite no case to support this expansive theory of First
 4 Amendment rights.

5 Indeed, as recognized by the First Circuit, “the mere fact that the joint activities
 6 that define the business relationship between the franchisor and its franchisees have some
 7 communicative component cannot, in and of itself, establish an entitlement to the
 8 prophylaxis of the First Amendment.” *See Wine & Spirits Retailers, Inc. v. Rhode Island*,
 9 418 F.3d 36, 51, 53 (1st Cir. 2005); *see also Roberts v. U.S. Jaycees*, 468 U.S. 609, 634,
 10 638 (1984) (O’Connor, J., concurring) (“[T]here is only minimal constitutional protection
 11 of the freedom of commercial association,” and that in all events, “no First Amendment
 12 interest stands in the way of a State’s rational regulation of economic transactions by or
 13 within a commercial association.”).

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

16 **D. Lanham Act Preemption**

17 Next, plaintiffs contend that the Ordinance is preempted by the Lanham Act.
 18 Though novel and creative, this argument is untenable. Under the Supremacy Clause,
 19 U.S. Const., art. VI, cl. 2, when a local law “stands as an obstacle to the accomplishment
 20 and execution of the full purposes and objectives of Congress,” it is preempted. *Hillman*
 21 *v. Maretta*, 133 S. Ct. 1943, 1950 (2010). Thus, where conflict is alleged between federal
 22 and state law, “the specific purpose of the federal act must be ascertained in order to
 23 assess any potential erosion of the federal plan by operation of the state law.” *Golden*
 24 *Door, Inc. v. Odisho*, 646 F.2d 347, 352 (9th Cir. 1980) (citing *Mariniello v. Shell Oil*
 25 *Co.*, 511 F.2d 853 (3d Cir. 1975)). Deciphering the purposes of the Lanham Act requires
 26 no guesswork, as the Act itself includes an “unusual and extraordinarily helpful”
 27

1 statement of its purposes. *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S.
2 Ct. 1377, 1389 (2014). The purposes of the Lanham Act are to:

3 “[R]egulate commerce within the control of Congress by
4 making actionable the deceptive and misleading use of marks
5 in such commerce; to *protect registered marks used in such*
6 *commerce from interference by State, or territorial*
7 *legislation*; to protect persons engaged in such commerce
8 against unfair competition; to prevent fraud and deception in
9 such commerce by the use of reproductions, copies,
10 counterfeits or colorable imitations of registered marks; and
11 to provide rights and remedies stipulated by treaties and
12 conventions respecting trademarks, trade names, and unfair
13 competition entered into between the United States and
14 foreign nations.”

15 15 U.S.C. § 1127 (emphasis added).

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

21 Indeed, there is a presumption against preemption in areas where the states have
22 traditionally exercised their police powers. *N.Y. State Conference of Blue Cross & Blue*
23 *Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995). Here, the regulation of
24 wages is firmly within the local police power. *See, e.g., RUI One Corp.*, 371 F.3d at
25 1150 (acknowledging that “[t]he power to regulate wages and employment conditions
26 lies clearly within a state’s or municipality’s police power.”). To overcome this
27 presumption, plaintiffs must show that preemption was Congress’ “clear and manifest
purpose.” *Travelers Ins., Co.*, 514 U.S. at 655. Plaintiffs have made no such showing.

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

1 **E. ERISA Preemption**

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

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

20 Nevertheless, for the sake of completeness, the court will address plaintiffs’
 21 argument. To begin with, it is important to reiterate that there is a presumption against
 22 preemption when the statute under review relates to a matter of local concern, such as the
 23 regulation of wages. *See, WSB Elec., Inc. v. Curry*, 88 F.3d 788, 791 (9th Cir. 1996) (“It
 24 is well settled that wages are a subject of traditional state concern, and are not included in
 25 ERISA’s definition of employee benefit plan. Thus, regulation of wages per se is not
 26 within ERISA’s coverage.”) (internal quotation marks omitted). Nevertheless, it is
 27 possible, under certain circumstances, for ERISA to preempt local wage regulations.

ERISA preempts and supersedes any and all state laws that “relate to” any employee benefit plan. *See* 29 U.S.C. § 1144(a). Recognizing that the term “relate to” potentially had no limits, the Supreme Court narrowed its scope in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Company*, 514 U.S. 645 (1995) and *California Division of Labor Standards Enforcement v. Dillingham Construction Company*, 517 U.S. 316 (1997). Under the more narrow construction, the “relate to” criterion is analyzed by determining if the state law: (1) has a “connection with” or (2) a “reference to” employee benefits plans.

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

To determine whether a state or local law has a “connection with” ERISA, courts consider (1) the objectives of ERISA and (2) the nature of the impact that the challenged law has on ERISA plans. *Dillingham*, 519 U.S. at 325; *Golden Gate Rest. Ass’n v. City & County of San Francisco*, 546 F.3d 639, 655-56 (9th Cir. 2008).

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

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

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

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

A statute has an impermissible “reference to” ERISA plans if it acts immediately and exclusively upon the plans or if the plans are essential to the law’s operation. *Dillingham*, 519 U.S. at 324-25; *S. Ca. IBEW-NECA Trust Funds v. Standard Indus. Elec. Co.*, 247 F.3d 920, 525 (9th Cir. 2001). Thus, the challenged statute must do more than mention ERISA to be preempted; it must have some effect upon ERISA plans. *WSB Elec., Inc. v.*, 88 F.3d at 793.

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

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

F. Privileges and Immunities Under Washington State Constitution

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

Article I, section 12 of the Washington Constitution provides:

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

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

1. Does the Ordinance Involve a Privilege or Immunity?

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

The privileges and immunities clause is not violated anytime the legislature treats similarly situated businesses differently.¹⁹ *Am. Legion Post No. 149 v. Dep’t of Health*, 164 Wash. 2d 570, 607 (2008). “[N]ot every legislative classification constitutes a ‘privilege’ within the meaning of article I, section 12 but only those where it is, ‘in its very nature, such a fundamental right of a citizen that it may be said to come within the prohibition of the constitution, or to have been had in mind by the framers of that organic law.’” *Ockletree*, 179 Wash. 2d at 778. As the court found in *Ockletree*,

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

1 Accepting Ockletree’s definition means recognizing a
 2 privilege anytime a statute grants a right to some but not
 3 others...As a result, we could be called upon to second-guess
 4 the distinctions drawn by the legislature for policy reasons
 5 nearly every time it enacts a statute. For example, the
 6 property tax exemptions for citizens “[s]ixty-one years of age
 7 or older” and “veterans with one hundred percent service-
 8 connected disabilities” could be challenged as
 9 unconstitutional grants of special privileges to certain classes
 10 of citizens but not others. Similarly, exemptions from
 11 emission control inspections for “[f]arm vehicles,” “[s]treet
 12 rod vehicles,” “[h]ybrid motor vehicles,” and “[c]lasses of
 motor vehicles exempted by the director of the department of
 ecology,” among others, would all be subject to challenge
 under article I, section 12. RCW 46.16A.060(2)(e), (f), (h),
 (i). We therefore reject Ockletree’s invitation to broaden the
 meaning of the word “privilege” for purposes of article I,
 section 12 and reiterate that a privilege in this context is
 limited to those fundamental rights of citizenship.

13 *Id.* at 779 (emphasis added).

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

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

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

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

Even if the court were to find that the Ordinance implicates a “privilege or immunity,” plaintiffs’ article I, section 12 challenge still fails because reasonable grounds exist for the distinction between franchisees and small independent businesses. To meet the reasonable ground requirement, distinctions must rest on “real and substantial differences bearing a natural, reasonable, and just relation to the subject matter of the act.” *Ockletree*, 179 Wash. 2d at 783. The Ordinance readily satisfies this standard for the reasons previously stated. Franchisees enjoy certain benefits as a result of the franchise relationship and those benefits have recognizable economic value to the franchisees. These benefits support the reasonableness of the Ordinance’s distinction between franchises and independent small businesses.

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

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

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

1 1. Irreparable Harm

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

10 Here, plaintiffs have not met their burden of demonstrating the requisite
11 irreparable harm. Although plaintiffs assert that they will suffer competitive injury,
12 loss of customers, loss of goodwill, and the risk of going out of business, Dkt. # 37, p.
13 32, the court finds that these allegations are conclusory and unsupported by the facts
14 in the record. It is true that “evidence of threatened loss of prospective customers or
15 goodwill” supports a finding of irreparable harm, *Stuhlberg Int’l Sales Co. v. John D.*
16 *Brush & Co.*, 240 F.3d 832, 841 (9th Cir. 2001), but that *evidence* is lacking here.
17 Although the court is sympathetic to the concerns of franchisees, the individual
18 plaintiffs’ declarations in this matter consist only of speculation. There is no actual
19 evidence of the alleged negative impacts that plaintiffs fear will occur as a result of
20 the faster phase-in schedule. *See Oakland Tribune Inc. v. Chronicle Pub. Co., Inc.*,
21 762 F.2d 1374, 1377 (9th Cir. 1985) (discounting conclusory statements concerning
22 irreparable harm made by interested party); *see also Am. Passage Media Corp. v.*
23 *Cass Commc’ns, Inc.*, 750 F.2d 1470, 1474 (9th Cir. 1985) (reversing a preliminary
24 injunction and finding that plaintiff’s forecast of large losses was insufficient to show
25 it was “threatened with extinction”).
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27

2. Balance of the Equities and Public Interest

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

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

H. The "Serious Questions" Test

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

1 that the balance of the equities tips sharply in their favor. Accordingly, the court cannot
2 grant a preliminary injunction under the alternative standard.

3 **V. CONCLUSION**

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

6 Dated this 17th day of March, 2015.

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10 The Honorable Richard A. Jones
11 United States District Judge
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