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No. _____

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In the
Supreme Court of the United States

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

v.

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

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

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

The question presented is:

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

PARTIES TO THE PROCEEDING

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

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

CORPORATE DISCLOSURE STATEMENT

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

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PETITION FOR WRIT OF CERTIORARI

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

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

The Ninth Circuit's ruling on discriminatory purpose was also irreconcilable with this Court's precedents. The Court of Appeals agreed that the city intended to place a special burden on franchisees based on their "out-of-state relationships." That is the definition of intentional discrimination and should have ended the court's inquiry. But the Ninth Circuit went on to hold that the ordinance did not flunk the purpose prong because the city had no "intent to harm franchises," App.15, but merely

targeted them because of “their relative ability to accommodate increased costs.” App.11. But purposefully targeting a business with ties to interstate commerce because of the perception that those interstate ties will enable the business to shoulder the discriminatory burden remains purposeful discrimination. This Court has long recognized that if a law intentionally discriminates against interstate commerce, the second-order purposes underlying the discrimination do not wash away that discriminatory intent. *See Bacchus Imps., Ltd. v. Dias*, 468 U.S. 263, 273 (1984). In other words, a discriminatory tax on those with ties to interstate commerce is unconstitutional without regard to whether the government expects the companies to pay the tax or break the ties.

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

difficult to reconcile” with this Court’s Commerce Clause holdings, App.16.

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

OPINIONS BELOW

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

JURISDICTION

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

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

STATEMENT OF THE CASE

A. The Franchise Business Model

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

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

Each franchisee is an independently owned and operated business. Franchisees manage and operate all of the day-to-day aspects of their business, including making their own human resource decisions on which and how many workers to hire, the benefits they offer, and how much each of them can afford to pay their staff—just like any other

small, independent business owner. Franchisees independently invest in and pay the operating costs of their businesses—as would any other small business owner—including but not limited to rent, wages, taxes, and debt. No other party shares in these small business obligations. ER141.

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

B. Legislative History of the Seattle Minimum Wage Ordinance

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

In early 2014, the IIAC made certain recommendations to the Mayor. According to the recitals in the ordinance, the IIAC recommended a \$15 per hour minimum wage with a significantly slower phase-in for small employers compared to large employers. *See* Seattle City Ordinance 124490, §1(9) (“Ordinance”) (App.93-117). The IIAC determined that “a benchmark of 500 employees is appropriate as distinguishing between larger and smaller employers in recognition that smaller businesses and not-for-profits would face particular

challenges in implementing a higher minimum wage.” *Id.* The IIAC as a body did not, however, make any recommendation that small franchisees be treated as large employers or otherwise subject to discriminatory treatment.

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

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

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

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

Robert Feldstein and Brian Surratt are members of the Mayor’s staff who were responsible for the IIAC and minimum wage matters. On May 5, 2014, they discussed Mr. Hanauer’s email. They did not contest his premises or explanation nor suggest he was ill-informed. Rather, in an email to Mr. Surratt, Mr. Feldstein recognized that it was “likely the individual owners will be hurt” by the ordinance and “may well face personal bankruptcy.” ER70. This did not bother the Mayor’s staffer, who stated that “[i]f we lose franchises in Seattle, I won’t be sad—for all the reasons [Hanauer said].” ER70. But

“channeling th[e] argument” for franchise owners, he asked “are there ways for the cost to be born not on those franchise owners? Are they simply going to be a casualty of this transition?” ER70. The answer to that last question turned out to be yes.

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

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

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

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

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

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

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

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

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

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

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

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

The ordinance defines a “Franchise” as a written agreement by which:

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

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

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

In contrast to the treatment of franchisees and other Schedule 1 employers, the minimum wage

increases for Schedule 2 employers are phased in much more slowly on the following schedule:

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

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

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

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

D. Additional Public Comments of City Officials

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

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

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

E. Proceedings Below

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

interstate franchise networks that collectively employ more than 500 employees.

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

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

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

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

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

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

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

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

REASONS FOR GRANTING THE PETITION

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

Instead, the Ninth Circuit concluded that while Seattle’s ordinance clearly harmed franchisees because of their ties to interstate commerce, only “in-state franchisees are burdened, not the wheels of interstate commerce.” App.21. But this Court has long affirmed the commonsense point that a disparate burden on any portion of the stream of commerce has an impermissible discriminatory effect on interstate commerce. For that reason, the Marshall Court struck down a discriminatory tax on “local” importers as impermissible discrimination

against interstate commerce. And ever since, the Court has invalidated numerous state and local efforts to discriminate against interstate commerce by imposing differential burdens on those within their limited reach based on their ties to interstate commerce.

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

By deviating from this Court's clear precedent, the Ninth Circuit has created a square conflict with the Eleventh Circuit, which has correctly recognized

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

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

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

"[L]aws that discriminate against interstate commerce face a virtually *per se* rule of invalidity," *Granholm v. Heald*, 544 U.S. 460, 476 (2005) (quotation marks omitted). That is so whether the law is facially discriminatory, discriminatory in effect, or discriminatory in purpose. *See Chem. Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 344 n.6 (1992) (noting three types of discrimination); *Bacchus*, 468 U.S. at 268-70 (same); *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 352-53 (1977) (finding evidence of discriminatory purpose "[d]espite the statute's facial neutrality"). Such laws face the "strictest scrutiny," *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979), and can only be sustained in the rare circumstance where a state or municipality can carry the "extremely difficult burden" of demonstrating that its discriminatory law

“advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.” *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 581-82 (1997) (quotation marks omitted).

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

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

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

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

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

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

“For over 150 years,” this Court’s “cases have rightly concluded that the imposition of a differential burden on any part of the stream of commerce—from

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

The Court has repeatedly reaffirmed this obvious point. For example, in *Camps Newfound/Owatonna*, Maine granted a tax exemption to in-state summer camps that served primarily in-state campers. 520 U.S. at 568-69. The reality that the only entities benefitted or harmed by the discrimination were in-state summer camps hardly saved the law. “As a

practical matter, the statute encourage[d] affected entities to limit their out-of-state clientele, and penalize[d] the principally nonresident customers of businesses catering to a primarily interstate market.” *Id.* at 576. Under the Ninth Circuit’s reasoning, the Maine law would have been upheld on the basis that it could be construed as merely “harming one type of in-state entity ... while benefitting another type of in-state entity,” App.20-21. But the *Camps* Court instead held that Maine’s law “functionally serves as an export tariff that targets out-of-state consumers by taxing the businesses that principally serve them,” 520 U.S. at 580-81. Seattle’s ordinance is no different. Any franchisor seeking to sell its marketing services to a small business in Seattle now faces, in effect, a steep tariff, as the ordinance “encourages [small businesses] to limit their out-of-state” connections. *Id.* at 576. “[T]his sort of discrimination is at the very core of activities forbidden by the dormant Commerce Clause.” *Id.* at 581.

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

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

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

The ordinance’s discriminatory impact on interstate commerce is no accident—the ordinance specifically targets small franchise businesses because of their ties to interstate commerce. The Ninth Circuit did not contest that the ordinance intended to place a disparate burden on franchisees based solely on their ties to interstate commerce. The court, however, concluded that the ordinance’s purposeful discrimination was constitutionally permissible because Seattle had no “intent to harm franchises,” App.15, but instead merely believed that these interstate ties improved franchisees’ “relative ability to accommodate increased costs.” App.11. But that analysis is wrong twice over. First, a discriminatory tax on businesses with ties to interstate commerce is no more constitutional if the government thinks those ties will allow the companies to pay the tax instead of breaking the ties. Second, to the extent the government believes the

out-of-state ties will enable the local entity to pay higher wages, that utterly belies the Ninth Circuit's conclusion that the effect of the differential wage law is purely in-state and does not slow the "wheels of interstate commerce."

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

The Ninth Circuit went to great lengths to write off clear evidence of discriminatory purpose. For example, IIAC member Nick Hanauer explained to City Council President Burgess that some of the "very good reasons for" discriminating against franchisees included "fewer franchises"; creating "[a] city dominated by independent, locally owned"

businesses rather than “than one dominated by extractive national chains”; and “forc[ing] [franchisors] to change their practices and business models,” which would be “a great contribution to our nations economy and democracy.” ER67-68. Despite the unmistakable thrust of these statements, the Ninth Circuit concluded that “they do not show that Hanauer intended to burden out-of-state firms or interfere with the wheels of interstate commerce.” App.13. Short of declaring war on interstate commerce itself, it is difficult to see how Hanauer could have made his intent any clearer.

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

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

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

this Court's precedents but is at war with the Ninth Circuit's theory for the absence of a discriminatory effect.

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

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

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

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

The Ninth Circuit acknowledged the Eleventh Circuit’s contrary precedent and recognized that the decisions were difficult to reconcile. App.17 n.7. The Ninth Circuit’s half-hearted effort to distinguish the Eleventh Circuit’s formula restaurant and retailer decisions is wholly unavailing. The Ninth Circuit emphasized that the ordinances in *Cachia* and *Island Silver* effectively prohibited formula businesses from locating in the City of Islamorada, while Seattle’s discriminatory wage did not have the same prohibitory effect. “Unlike *Cachia*, *Island Silver*, and decisions that have stricken measures that limit competition, Seattle’s minimum wage ordinance does not limit competition by prohibiting chain retailers and restaurants.” App.17-18 n.7 (citations omitted). But the Commerce Clause forbids discrimination against interstate commerce, and nothing in this Court’s precedents suggest that state and local governments can impose differential burdens on businesses with ties to interstate commerce as long as the burdens are not prohibitory. Tariffs are the quintessential Commerce Clause violation whether

or not they are prohibitory or simply increase the price of out-of-state goods. In similar fashion, the constitutionality of Seattle's discriminatory wage does not turn on whether the franchisees will pay it or go out of business. Some local franchises may well suffer the latter fate, ER70, ER148, but the ordinance is unconstitutional as to all. In all events, the Eleventh Circuit's rulings did not depend on whether the local laws in question *prohibited* businesses with interstate ties. To the contrary, the court relied on precedents invalidating laws that raise the costs of out-of-state businesses and concluded that laws that prohibited businesses with out-of-state ties from operating fail *a fortiori*. See *Cachia*, 542 F.3d at 842.

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

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

This case presents a uniquely well-suited vehicle to resolve this square split over whether local governments can discriminate against in-state

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

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

Multiple additional factors underscore the need for this Court's review. First, Seattle's effort to not just increase the minimum wage but to do so in a manner that discriminates against employers with out-of-state ties is being closely watched by other jurisdictions. Some jurisdictions have already followed suit. San Francisco, for example, recently

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

box stores,” then such discrimination will soon fill the statute books.

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

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

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

CONCLUSION

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

Respectfully submitted,

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