Honorable Richard A. Jones

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

INTERNATIONAL FRANCHISE ASSOCIATION, INC., *et al.*,	)	No. 2:14-cv-00848-RAJ
Plaintiffs,	)	**BRIEF OF AMICUS CURIAE FREE SPEECH FOR PEOPLE IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**
v.	)	
CITY OF SEATTLE, *et al.*,	)	
Defendants.	)	NOTE ON MOTION CALENDAR: OCTOBER 10, 2014 OR DATE TO BE SET BY THE COURT

Free Speech For People, Inc.
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INTEREST OF AMICUS CURIAE

Free Speech For People is a national non-partisan campaign advocating that the Constitution protects the rights of people rather than state-created corporate entities; that the people's oversight of corporations is an essential obligation of citizenship and self-government; and that the doctrine of "corporate constitutional rights" improperly moves legislative debates about economic policy from the democratic process to the judiciary, contrary to our Constitution.

SUMMARY OF ARGUMENT

The franchisees' challenge under the Fourteenth Amendment's Equal Protection Clause[1] fails because living wage laws occupy a privileged position under that Amendment. The Amendment's legislative history reveals that the Reconstruction government was keenly interested in whether freedmen could earn "fair, living wages," and took executive, legislative, and ultimately constitutional measures to ensure that they could. A complete Equal Protection Clause analysis requires that the Court consider the interests of workers, not just employers.

Seattle's minimum wage law fulfills the intent and spirit of the Fourteenth Amendment by helping the city's poor people of color, who are disproportionately paid low wages. The ordinance's findings note that 70% of the city's American Indian and Alaska Native workers, and over 40% of its African-American,

[1] "[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV § 1.

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Asian/Pacific Islander, and Hispanic workers, would benefit from an increased minimum wage. Quibbles about the law's phased implementation schedule pale in significance to the equal protection interests of the thirty thousand workers whom the law would benefit.

The Court should also reject franchisees' attempts to constitutionalize their business model under the First Amendment. Franchise business agreements and coordinated advertising use words, but these words are not protected speech and do not insulate franchisees from ordinary economic legislation.

ARGUMENT

I. The legislative history of the Equal Protection Clause demonstrates that "fair, living wages" were a principal concern of the Congress that enacted the Fourteenth Amendment.

The Reconstruction Congress was intently interested in whether newly-freed slaves would receive "fair, living wages." Because of the demonstrated importance of this issue to the framers of the Fourteenth Amendment, living wage laws deserve special solicitude under the Equal Protection Clause—especially where, as here, the law benefits large numbers of poor minority workers.

Living wages for freedmen became an immediate concern of the post-Civil War Reconstruction. A Congressionally-commissioned report on conditions in the South noted that employers continued to devise elaborate schemes to underpay freedmen. *See* Maj. Gen. Carl Schurz, *The Condition of the South* 10-11 (1865),

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available at http://bit.ly/1rCH19i. And in a widely-reprinted open letter to "the Colored People of North Carolina" published just five months after the Confederate surrender, Horace Greeley urged freedmen to take immediate steps to demand "fair, living wages." N.Y. Daily Tribune, Sept. 14, 1865, at 4, *available at* http://1.usa.gov/1milCpG.

In hearings of Congress's Joint Committee on Reconstruction, committee members repeatedly asked whether Southern white employers would pay freedmen what Senators and witnesses variously and interchangeably called "fair wages," "living wages," or both. For example, Senator Jacob Howard (the Fourteenth Amendment's Senate floor manager) asked an Army colonel in the Freedmen's Bureau[2] whether freedmen would work for "fair wages" and whether white Virginia employers would pay freedmen "fair, living wages." The colonel responded that, while Virginia freedmen would be willing to work for "what any northern man would consider fair wages," they could not presently receive "what would be considered living wages—wages to support a man and his family." *Report of the Joint Comm. on Reconstruction*, *39th Cong.*, pt. II at 124 (Feb. 15, 1866) (testimony of Col. Orlando Brown), *available at* Univ. of California Digital Library, Internet Archive, http://bit.ly/1yVscTc; *see also id.* at 130 (question by Sen. Howard to former

[2] The Freedmen's Bureau Bill, passed in 1865, established the Bureau to distribute food, clothing, fuel, and up to forty acres of land to freedmen and war refugees. *See* 13 Stat. 507 (Mar. 3, 1865), §§ 2, 4, *available at* Bruce Frohnen, *The American Nation: Primary Sources,* http://bit.ly/1pY1fwh.

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Confederate General Robert E. Lee whether former slave-masters would pay freedmen "fair, living wages for their labor").

The Army and the Freedmen's Bureau were particularly concerned about living wages for freedmen. An 1865 Army work plan instructed officers to assist freedmen in obtaining "fair wages for their labor." *Id.* at 186 (testimony of Col. E. Whittlesey). When employers in two recalcitrant Southern counties refused to pay fair wages, an Army general contemplated relocating the entire freed population of those counties *en masse* to areas that would pay "fair wages." *Id.* at 234 (testimony of Capt. Alexander Ketchum). By 1866, the Bureau had resorted to distributing standard labor contracts, with fixed labor rates that the Bureau determined to be conducive to "prosperous relations between capital and labor" and "satisfactory to the freedmen." *See* S. Exec. Doc. No. 39-6, at 2, 4 (1867), *available at* http://1.usa.gov/ZItPcL.

The Committee asked a wide range of witnesses—black, white, government, and civilian—whether black workers could earn "fair wages" in the South, and heard mostly negative answers.[3] And while "fair" can refer to parity, the usage of

[3] *See, e.g., Report of the Joint Comm. on Reconstruction, supra,* pt. II at 12-13 (testimony of Lewis McKenzie) (stating that "Union whites" in Virginia paid "fair wages," but that other employers' wages were not adequate for clothing and medical care), 52 (testimony of Dr. Daniel Norton) (in response to Senator Howard's question whether freedmen could earn "fair wages," answering that such work was scarce, and many freedmen were paid a dollar per month or less), 54 (testimony of Madison Newby) (stating that Virginia employers "expect colored people . . . to work for ten or eighteen cents a day… [H]e may have a family of six to support on these wages, and of course he

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the Committee and the witnesses indicates that "fair wages" were understood to mean wages that could support a family:

> Question. Are they [returned rebels] willing to pay the freedmen fair wages for their work?
> Answer. No, sir; they are not willing to pay the freedmen more than from five to eight dollars a month.
> Question. Do you think that their labor is worth more than that generally?
> Answer. I do, sir; because, just at this time, everything is very dear, and I do not see how people can live and support their families on those wages.

Report of the Joint Comm. on Reconstruction, *supra*, pt. II at 56 (testimony of Richard Hill).

The Committee ultimately concluded that without federal protection "the colored people would not be permitted to labor at fair prices," and the Southern employers who would "accept the situation" and "employ[] the freedmen at fair wages" were a minority. *Id.* at XVII. The Committee then proposed the Fourteenth Amendment. *See id.* at XXII.

To be sure, the Equal Protection Clause does not require or enact a living wage law. But it should be interpreted in light of Reconstruction's broad goals,

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cannot do it."); *id.* pt. IV at 2 (testimony of John Recks) (in response to Senator Williams' question whether Florida black workers would work for "fair wages," answering that they were eager to work for "anything like a fair or reasonable compensation"). To be sure, some witnesses testified that, in their regions, freedmen *could* find work at "fair wages," *e.g., id.* pt. I at 109 (testimony of Maj. Gen. George Thomas) (in response to Senator Grimes' question whether Tennessee freedmen could earn "fair wages," answering yes), or that employers *might* pay fair wages under certain conditions, *e.g., id.* pt. II at 124 (testimony of Col. Orlando Brown). The important point is that the Senators considered the issue so important to the Reconstruction project that they kept asking the question.

including Congressional concern, and widespread federal action, that freedmen could earn "fair, living wages" and support their families.

II. The equal protection interests of Seattle's low-wage workers in "fair, living wages" vastly exceed any purported equal protection interests of franchised businesses.

The Seattle minimum wage law is completely consistent with, and eminently fulfills, the overall goals of equal protection. Consequently, the Court's equal protection analysis should be especially deferential, and not subordinate an interest that the Reconstruction Congress demonstrably *was* concerned about ("fair, living wages") to another (protection of a particular corporate business model) that played no part in Congress's thinking.

Seattle's increased wage will bring major economic benefits to the city's racial minorities. A study prepared for the city, and cited in the ordinance, found that 70% of American Indian/Alaska Native workers, 49% of Hispanic workers, 43% of African-American workers, and 41% of Asian/Pacific Islander workers earn less than the new minimum wage of $15/hour. *See* Marieka M. Klawitter et al., *Who Would be Affected by an Increase in Seattle's Minimum Wage?: Report for the City of Seattle, Income Inequality Advisory Committee* 12 (Mar. 21, 2014), *available at* http://go.usa.gov/EsmW; *see also* Ordinance, Dkt. #38-1 at p.4 ¶ 2 (citing this data).

This effort to uplift poor workers and reduce inequality fulfills, rather than offends, the Fourteenth Amendment's equality principle. *Cf. Ry. Mail Ass'n v. Corsi*,

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326 U.S. 88, 98 (1945) (Frankfurter, J., concurring) ("To use the Fourteenth Amendment as a sword against such State power would stultify that Amendment."). The increased minimum wage will palpably improve the lives of minority workers, while simultaneously lifting the boats of their white co-workers in equal measure.

In contrast, the equal protection interests claimed by franchise businesses are *at best* peripheral, *cf. Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 426 (2010) ("When economic legislation does not employ classifications subject to heightened scrutiny or impinge on fundamental rights, courts generally view constitutional challenges with the skepticism due respect for legislative choices demands"), and they directly oppose the equal protection interests of the workers whom Seattle's law would uplift. Indeed, the franchisees' arguments evoke Justice Black's observation that "of the cases in [the] Court in which the Fourteenth Amendment was applied during the first fifty years after its adoption, less than one-half of 1 per cent invoked it in protection of the negro race, and more than 50 per cent asked that its benefits be extended to corporations." *Conn. Gen. Life Ins. Co. v. Johnson*, 303 U.S. 77, 90 (1938) (Black, J., dissenting).

It would seem absurd to the Reconstruction Congress to suggest that the Equal Protection Clause means that franchised businesses are entitled to relief that would not only rewrite the City Council's considerations, but also condemn thousands of Seattle's workers to seven lean years. The Court should not twist the

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Equal Protection Clause into a barrier against lifting the poor of all races from poverty by means of "fair, living wages."

III. The franchisees' attempt to constitutionalize franchise business arrangements under the First Amendment fails because the ordinance does not restrict any speech.

Plaintiffs' First Amendment[4] challenge rests on the theory that a franchised business's decision to "associate itself with a franchisor's trademark" is association, its decision to "engage in coordinated marketing and advertising" is speech, and both are abridged by a minimum wage law.[5] But courts have rejected First Amendment challenges to state franchise regulations for two principal reasons.

First, even though the activities underlying franchise relationships (such as joint advertising or use of trademark) involve words, they are best categorized as conduct, not speech. *See Wine & Spirits Retailers, Inc. v. Rhode Island*, 481 F.3d 1, 6 (1st Cir. 2007) (rejecting franchisor's First Amendment challenge to ban on liquor licenses for chain stores, and noting that "the launching of advertisements resulting from pre-agreed commercial strategies" is conduct, not speech); *Peoples Super Liquor Stores, Inc. v. Jenkins*, 432 F. Supp. 2d 200, 206 (D. Mass. 2006) (rejecting claim by putative franchisor and franchisee that state liquor license law "prevent[ed] them from forming an expressive association").

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[4] "Congress shall make no law … abridging the freedom of speech …" U.S. Const. amend. I.
[5] *See* Pl. Mot. for a Limited Prelim. Inj., Dkt. #37 at p.21.

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Second, laws that do not restrict speech, but simply make franchise business models less profitable, do not implicate the First Amendment. *See Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S. of America, Inc.*, 646 F.3d 983, 985 (7th Cir. 2011) (Posner, J.) (rejecting First Amendment challenge to state dealership law, and noting that even though Girl Scouts is an expressive association, "the First Amendment [does not] exempt[] the Girl Scouts from state laws of general applicability that have only a remote, hypothetical impact on the organization's message"); *Wine & Spirits Retailers, Inc. v. Rhode Island*, 418 F.3d 36, 48 (1st Cir. 2005) (noting that "[t]he First Amendment's core concern is with the free transmission of a message or idea from speaker to listener, not with the speaker's ability to turn a profit"); *see also Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 78 (1976) (Powell, J., concurring) ("The inquiry for First Amendment purposes is not concerned with economic impact; rather, it looks only to the effect of [the] ordinance upon freedom of expression.").

A court order delaying implementation of Seattle's living wage law at franchised business locations for seven years would not enhance public access to information or further any First Amendment values. The Court should reject plaintiffs' attempt to constitutionalize the franchise business model on the backs of their employees.

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CONCLUSION

Plaintiffs are not likely to prevail on the merits of their Equal Protection Clause and First Amendment claims, and the court should deny their motion for a preliminary injunction with respect to those claims.

DATED this 2nd day of October, 2014.

Respectfully submitted,

/s/ Ronald A. Fein
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CERTIFICATE OF SERVICE

I certify that on October 2, 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following.

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