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STATE OF OREGON
LEGISLATIVE COUNSEL COMMITTEE

April 20, 2015

Representative Andy Olson
900 Court Street NE H478
Salem OR 97301

Re: Residency requirements for Oregon industry

Dear Representative Olson:

You asked whether the Legislative Assembly is able to impose residency requirements on an Oregon industry. Specifically, you asked whether it would be permissible (1) to prohibit out-of-state investors and companies from participating in an industry in Oregon, and (2) to prohibit Oregon businesses from spending proceeds from their businesses outside the state. The answer is that excluding out-of-state participants would probably violate the Privileges and Immunities Clause of the United States Constitution, and prohibiting expenditure of proceeds outside the state would violate the Commerce Clause of the United States Constitution.

1. Prohibiting out-of-state participation probably violates the Privileges and Immunities Clause.

The Privileges and Immunities Clause provides that "Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."[1] The purpose of this clause is to "help fuse into one Nation a collection of independent, sovereign States" by "insur[ing] to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy."[2] In short, the clause prevents a state from discriminating against out-of-state citizens in favor of its own citizens.

A court performs a two-step analysis when considering a challenge to a law under the Privileges and Immunities Clause. First, the court determines whether the law implicates a "fundamental" privilege or immunity—one that is so important as to "bear[ ] upon the vitality of the Nation as a single entity."[3] If the privilege or immunity is not fundamental, then the law will survive the challenge. If it is fundamental, the court considers whether the state has shown a "substantial reason" to discriminate against out-of-state interests.[4]

In this case, prohibiting out-of-state participation in an industry in Oregon would almost certainly implicate a fundamental privilege. It is well settled that the pursuit of a profession or

[1] Article IV, section 2, United States Constitution.
[2] *Toomer v. Witsell*, 334 U.S. 385, 395 (1948).
[3] *United Bldg. & Constr. Trades Council of Camden County v. Mayor & Council of the City of Camden*, 465 U.S. 208, 218 (1984), quoting *Baldwin v. Montana Fish and Game Comm'n*, 436 U.S. 371, 383 (1978).
[4] *Utility Contractors Ass'n of New England, Inc. v. City of Worcester*, 236 F. Supp. 2d 113, 118 (D. Mass. 2002).

occupation is a fundamental privilege under the Privileges and Immunities Clause. In *Supreme Court of New Hampshire v. Piper*, for example, the United States Supreme Court struck down a New Hampshire rule prohibiting nonresidents from being admitted to practice law in the state, noting that "one of the privileges which the [Privilege and Immunities] Clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State."[5] Regardless of what industry is being regulated, prohibiting out-of-state participation is very likely to implicate the fundamental privilege of pursuit of a profession or occupation.

The burden would then fall on the state to defend the law by showing a "substantial reason" for the law.[6] The state must demonstrate that nonresidents are "a peculiar source of the evil" at which the law in question is aimed and that the discrimination under the law in question bears a close relation to the purposes that animate the law.[7] This burden is a heavy one: courts have emphasized the high evidentiary standard that a state must meet to prove the existence of a specific danger caused by nonresidents. Courts will likely require quantitative evidence of the need for the law.[8] Courts will also consider whether less restrictive means of regulation are available.[9]

In *Piper*, for example, the state of New Hampshire argued that out-of-state attorneys were less likely to learn local rules and procedures, behave ethically, be available for court proceedings and do volunteer work. The Court refused to accept the stated reasons, both because they were unsupported by evidence, and because refusing to admit out-of-state lawyers was an overbroad solution to the stated problems.[10]

Similarly, in the case of *Hicklin v. Orbeck*, the United States Supreme Court struck down an Alaska statute that created a preference for Alaska residents for work on Alaska pipelines. The Court refused to accept Alaska's justification—the state's "uniquely high unemployment"—because the state failed to demonstrate that nonresidents were "a peculiar source" of such unemployment, and because the statute was not "closely tailored" to ameliorate the problem at which it was aimed.[11]

Without more information, we cannot opine on whether the State of Oregon would have a sufficiently substantial reason for barring out-of-state participants from an Oregon industry. We note, however, that a blanket ban on out-of-state participation is a strong remedy and would need an extremely strong justification—including a demonstration that less restrictive regulations are unavailable or impractical—in order to survive a challenge under the Privileges and Immunities Clause.

[5] 470 U.S. 274, 280 (1985), quoting *Toomer v. Witsell* at 396.
[6] 236 F. Supp. 2d at 118.
[7] *Id*.
[8] *See, e.g.*, *W.C.M. Window Co. v. Bernardi*, 730 F.2d 486, 497-498 (7th Cir. 1984) (noting that evidence relevant to defense of a local hiring preference might include the local unemployment rate, the cost to the state of unemployment, data regarding the relationship between unemployment and nonresident employment in public projects, and the costs to the state of allowing nonresident labor in public projects).
[9] 470 U.S. at 284.
[10] *Id.* at 285-287.
[11] 437 U.S. 518, 526-528 (noting that an approach that granted employment preferences to unemployed residents or to residents in job training programs "might" be permissible).

2. Prohibiting the expenditure of proceeds outside the state violates the dormant Commerce Clause.

The Commerce Clause, which grants power to the federal government "[t]o regulate [c]ommerce . . . among the several [s]tates,"[12] includes a concomitant aspect, known as the dormant Commerce Clause, "that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce."[13] In general, the dormant Commerce Clause prohibits states from enacting protectionist measures that benefit in-state interests at the expense of out-of-state interests.

A law prohibiting the expenditure of industry proceeds outside the state would almost certainly fall afoul of the dormant Commerce Clause. On its face, the law explicitly prohibits industry participants from engaging in interstate commerce with industry proceeds. As the United States Supreme Court has held, such facial discrimination is "virtually per se invalid" under the dormant Commerce Clause.[14] Indeed, if every state enacted such a measure, it would lead to the "economic Balkanization" that the Commerce Clause was intended to prevent.[15]

The United States Supreme Court has repeatedly struck down laws that discriminated against interstate commerce, either on their face or in effect. In *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, for instance, the Court considered a tax scheme under which the state of Maine granted a real estate tax exemption to charitable organizations but reduced the benefit for charities operated principally for the benefit of nonresidents.[16] The Court struck down the tax scheme, holding that the statute impermissibly burdened interstate commerce by "singling out camps that serve mostly in-staters for beneficial tax treatment, and penalizing those camps that do a principally interstate business."[17]

In *Bacchus Imports v. Dias*, the Court struck down a Hawaii statute exempting specific locally produced liquors from a generally applicable excise tax.[18] The Court held that, by discriminating in favor of local industry, the statute constituted "economic protectionism" and was invalid under the dormant Commerce Clause, regardless of the intent of the statute or the robustness of the local industry.[19]

And in *Boston Stock Exchange v. State Tax Commission*, the Court struck down a scheme in which the state of New York imposed a generally applicable tax on transfers of securities but reduced the tax for transfers that involved an in-state sale.[20] The Court unanimously held that, by creating "a large tax penalty for trading on out-of-state markets," the provision impermissibly burdened interstate commerce.[21]

As in the above-cited cases, a law prohibiting industry participants from taking proceeds out of the state would most likely constitute discrimination against interstate commerce—both on its face and in effect—and thus would be invalid under the dormant Commerce Clause.

[12] Article I, section 8, United States Constitution.
[13] *Oregon Waste Systems, Inc. v. Dept. of Environmental Quality of the State of Oregon*, 511 U.S. 93, 98 (1994).
[14] *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 575-576 (1997).
[15] *Wardair Canada, Inc. v. Florida Dept. of Revenue*, 477 U.S. 1, 7 (1986).
[16] 520 U.S. at 568.
[17] *Id*. at 576.
[18] 468 U.S. 263 (1984).
[19] *Id.* at 272-273.
[20] 429 U.S. 318, 330-331 (1977).
[21] *Id.* at 334.

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Very truly yours,

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