Dexter A. Johnson
LEGISLATIVE COUNSEL

900 COURT ST NE S101
SALEM, OREGON 97301-4065
(503) 986-1243
FAX: (503) 373-1043
www.oregonlegislature.gov/lc

STATE OF OREGON
LEGISLATIVE COUNSEL COMMITTEE

May 15, 2018

Representative David Gomberg
900 Court Street NE H471
Salem OR 97301

Re: Pet sourcing law compliance with dormant Commerce Clause

Dear Representative Gomberg:

You asked us whether an ordinance regulating the permissible sources of dogs, cats and rabbits sold by pet stores would violate the dormant Commerce Clause of the United States Constitution. The constitutionality of such an ordinance will necessarily depend on the language, intent and effect of the ordinance. We believe, however, that a properly crafted ordinance limiting the sources of dogs, cats and rabbits sold by retail pet stores can be consistent with the dormant Commerce Clause.

The Commerce Clause of the United States Constitution gives the federal government the power to regulate interstate commerce. "The dormant Commerce Clause is the negative implication of that provision . . . that 'denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce'." Columbia Pacific Building Trades Council v. City of Portland, 289 Or. App. 739, 745 (2018), quoting Oregon Waste Systems, Inc. v. Department of Environmental Quality of Oregon, 511 U.S. 93, 98 (1994). The dormant Commerce Clause applies to local ordinances. Columbia Pacific Building Trades Council at 745, citing C & A Carbone, Inc. v. Clarkstown, 511 U.S. 383, 389 (1994). Local law that facially favors in-state commerce or disfavors out-of-state commerce, or that is facially neutral but has discriminatory effect, usually violates the dormant Commerce Clause. Fulton Corp. v. Faulkner, 516 U.S. 325 (1996). "When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry." Brown-Forman Distillers Corp. v. New York State Liquor Authority, 476 U.S. 573, 579 (1986).

Since we cannot anticipate all possible forms that an ordinance might take, for illustrative purposes we will apply a dormant Commerce Clause analysis to House Bill 4045 (2018). That bill in part would have restricted the sources of dogs sold by retail pet stores.

House Bill 4045 provided in part:

> (a) "Animal shelter" means a facility in this or another state operated for the purpose of:
>
> (A) Providing shelter and other care for lost, homeless or injured animals;
>
> (B) Serving as an information center concerning missing or found animals; or

(C) Protecting animals from neglect, cruelty or abuse.

. . .

(c) "Dog control district" means a district declared as provided under ORS 609.030.

. . .

(f) "Rescue organization" means a nonprofit corporation that:

(A) Provides rescue services for animals including, at a minimum, for dogs;

(B) Is tax-exempt under section 501(c)(3) of the Internal Revenue Code; and

(C) Does not obtain dogs from a breeder or broker for payment or other compensation.

(g) "Retail pet store":

(A) Means a retail establishment open to the public that sells or offers to sell dogs.

(B) Does not include a person that sells or offers to sell only dogs that were bred or raised by the person.

(2) A retail pet store may not sell or offer to sell a dog that the store acquired from a source other than:

(a) An animal shelter;

(b) A dog control district;

(c) A humane society; or

(d) A rescue organization.

House Bill 4045 would have regulated retail pet store sales or offers to sell occurring within Oregon. It did not impose any penalties, requirements or restrictions on entities other than retail establishments open to the public engaged in selling, or offering to sell, dogs in Oregon. The definition of "animal shelter" expressly applies for facilities "in this or another state," so the bill did not facially discriminate with regard to those facilities. The definition of "rescue organization" does not distinguish between in-state and out-of-state nonprofit corporations, so the bill did not facially discriminate with regard to the ability of those entities to provide dogs to retail pet stores. Neither do we perceive a basis for concluding that House Bill 4045 would have had a discriminatory purpose or effect disadvantaging out-of-state rescue organizations in the provision of dogs to retail pet stores.

The bill did not define a humane society. Merriam-Webster Unabridged Dictionary online defines "humane society" specifically to mean "a society for the prevention of cruelty to animals." Http:unabridged.merriam-webster.com/unqbridged/humane%20society (visited May 14, 2018). The term appears in ORS 90.425, 167.374, 167.376, 475.190, 609.035, 609.405, 609.415, 646A.077 and 686.450. None of those occurrences suggest an intent to limit the term with regard to House Bill 4045. Since a society for the prevention of cruelty to animals could exist in any state, the bill did not facially discriminate with regard to those societies in the provision of dogs to retail pet stores.

House Bill 4045 defined a "dog control district" to mean "a district declared as provided under ORS 609.030." An activity may constitute commerce even if conducted by government or another type of nonprofit entity. Camps Newfound/Owatonna v. Town of Harrison, 520 U.S. 564 (1997). House Bill 4045 would have burdened out-of-state dog control districts to the extent that those districts could not directly use retail pet stores to place dogs with new owners. However, we believe it unnecessary to apply strict scrutiny to the House Bill 4045 distinction between in-

state and out-of-state dog control districts. When a state or local government is a market participant engaged in providing public goods and services on their own, economic protectionism is less of a consideration. Since governments are vested with the responsibility of protecting the health, safety and welfare of their citizens, laws favoring market participant in-state units of government over market participant out-of-state units of government will be upheld if directed to legitimate government goals unrelated to protectionism. *See, e.g.,* Department of Revenue v. Davis, 553 U.S. 328 (2008); United Haulers Ass'n v. Oneida-Herkimer Solid Waste Management Authority, 550 U.S. 330 (2007); City of Seattle v. Department of Revenue, 21 OTR 269 (2013).

ORS 609.035 to 609.110 carry out several important state interests that are not normally considered commercial, such as achieving the most humane disposition possible for ownerless, unclaimed or forfeited dogs. Since opportunities to humanely dispose of dogs by adoption are finite, we believe that giving in-state dog control districts an advantage in the placement of dogs in retail pet stores is directed to a legitimate state interest unrelated to economic protectionism. To the extent that dog control district activities qualify as commerce, we believe that in-state districts would be viewed as units of government acting as market participants to which the state may give preferential treatment. For that reason, we believe that specifying a dog control district declared as provided under ORS 609.030 as a permissible direct source of dogs sold by retail pet stores would not violate the dormant Commerce Clause.

We do not perceive a dormant Commerce Clause problem in House Bill 4045 regarding sales by retail pet stores. A dormant Commerce Clause problem exists when state law favors in-state commerce or disfavors out-of-state commerce. The dormant Commerce Clause does not deprive a state of its police power to regulate for the general health and welfare. If state law treats in-state and out-of-state commerce in an equal and fair manner, and the practical operation and effect of the state regulation does not burden interstate commerce excessively in relation to the state benefit, the law is subject to a rational basis standard and will likely be upheld. Edgar v. Mite Corporation, 457 U.S. 624 (1982); Colon Health Centers of America, LLC v. Hazel, 813 F.3d 145 (2016), citing Maine v. Taylor, 477 U.S. 131 (1986).

The law that House Bill 4045 would have enacted does not facially discriminate in favor of in-state commerce or against out-of-state commerce. Neither would the law have had a discriminatory effect. An out-of-state breeder or other party engaged in the selling of dogs does not have a right to engage in commerce that is forbidden to in-state breeders, so foreclosing the retail pet store market to all breeders is not a problem. Limiting the supply sources of dogs sold by in-state retail pet stores does not provide those in-state retail pet stores with an economic advantage over retail pet stores located in states that do not restrict supply sources. Out-of-state retail pet stores selling in other states would have equal access to the same animal supply sources that are available to in-state stores, so the bill would have had no discriminatory intent or effect regarding supply source availability. House Bill 4045 would not have impacted sales occurring outside of Oregon, regardless of whether the purchaser subsequently took the dog into Oregon. If an out-of-state retail pet store did somehow manage to subject itself to Oregon jurisdiction, there would be no discrimination because the out-of-state retail pet store would not be treated any differently from an in-state retail pet store making a similar sale. Any adverse impact of the law on out-of-state commerce would therefore be an incidental effect. We believe that a court would find Oregon's interest in controlling animal populations and preventing animal cruelty sufficient to outweigh any incidental adverse impact on out-of-state commerce.

To summarize, we believe that an ordinance restricting the sources of dogs, cats and rabbits sold by retail pet stores could be crafted in a manner consistent with the dormant

Commerce Clause. There is more than one potential form for an ordinance that limits retail pet store animal sources while complying with the requirements of the dormant Commerce Clause. We believe that one form a valid ordinance could take is that used for House Bill 4045.

The opinions written by the Legislative Counsel and the staff of the Legislative Counsel's office are prepared solely for the purpose of assisting members of the Legislative Assembly in the development and consideration of legislative matters. In performing their duties, the Legislative Counsel and the members of the staff of the Legislative Counsel's office have no authority to provide legal advice to any other person, group or entity. For this reason, this opinion should not be considered or used as legal advice by any person other than legislators in the conduct of legislative business. Public bodies and their officers and employees should seek and rely upon the advice and opinion of the Attorney General, district attorney, county counsel, city attorney or other retained counsel. Constituents and other private persons and entities should seek and rely upon the advice and opinion of private counsel.

Very truly yours,

DEXTER A. JOHNSON
Legislative Counsel

Charles Daniel Taylor

By
Charles Daniel Taylor
Senior Deputy Legislative Counsel