



UNIVERSITY OF ILLINOIS
COLLEGE OF LAW

MEMORANDUM

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Re: Chicago's Regulation of Living Wages for Large Retailers

Date: July 22, 2006

I. Introduction

The Chicago City Council is currently considering an ordinance to establish minimum standards for certain retail businesses operating within the city. The ordinance raises the minimum wage for employees of large retailers (defined as those with premises exceeding 90,000 square feet and annual gross revenues over \$1 billion), provides protections against discrimination in employment for individuals with criminal convictions, and limits the enforceability of anti-competitive restrictive covenants in the retailers' leases.

Opponents threaten litigation if the proposal becomes law, arguing that it violates a number of state and federal constitutional standards. By ignoring the limited judicial role carefully established by the Illinois Constitution's home rule provisions, their legal arguments seek to involve the judiciary in a matter that the Illinois Constitution has removed from its purview. In essentially political battles such as this, where the debate boils down to conflicting political judgments about whether the general welfare of the citizens of Chicago is better protected by a law that increases the wages paid by large retailers, two forums are available. First, opponents can and have made their case to the City Council. If the City adopts the ordinance notwithstanding that opposition, opponents are free to seek legislative preemption of the local law by the Illinois General Assembly.

Under the state and federal Constitutions, the judiciary would of course have a role in evaluating the ordinance's legitimacy, but its review would be narrowly limited. This memo evaluates three important legal standards that would apply to Chicago's ordinance: (1) Is the ordinance within the scope of Chicago's home rule powers? (2) Is the ordinance consistent with the state and federal equal protection clauses? and (3) Is the ordinance consistent with the dormant Commerce Clause? It is my opinion that the ordinance is consistent with all three legal limits: in the first case, because the law deals with a local issue pertaining to Chicago's affairs and has not been preempted; in the second, because it is economic regulation that makes a rational classification between large and small retailers and does not implicate fundamental constitutional protections against invidious discrimination; and in the third, because the

ordinance neither discriminates against interstate commerce nor favors in-state economic activity.

II. Chicago's Home Rule Powers

A. The Contours of Home Rule in Illinois

Home rule did not exist in Illinois prior to the 1970 Constitution. With the adoption of Article VII, the state created home rule powers for local governments that were intended, in the words of the Chairman of the Local Government Committee of the Constitutional Convention, to be “the broadest in the country.”¹ The actual constitutional language emphasizes the breadth of Illinois home rule and provides an important backdrop to the debate over the propriety of Chicago's actions in this case. First is the Article's explicit statement that the “powers and functions of home rule units shall be construed liberally.” § 6(m). Second, the Constitution expressly authorizes concurrent state and home rule action. § 6(i). Third, the home rule article explicitly provides for legislative preemption of home rule enactments and is quite clear in its directives to the General Assembly. § 6(h).

These three provisions reflect the drafters' desire to reject the older, original system of home rule, in which plenary interpretative power resides in the judiciary. Well aware of the difficulties produced when the scope of home rule is left to judicial interpretation, the Illinois Constitution strikes a different, but clearly articulated, balance of power among the relevant participants. First, it grants extremely broad initiative powers to home rule units, empowering them to take action regarding any local issue. Second, it contemplates narrow judicial review of those initiatives. And third, it gives plenary preemptive power to the General Assembly, thereby shifting the locus of the power to limit home rule but not reducing the extent of the limits themselves. A decrease in judicial authority, then, does not mean that home rule authority becomes unchecked; the Constitution merely shifts the forum from judiciary to legislature. If the General Assembly determines that a particular home rule power should be limited or denied, it is completely free to do so. The Constitution details the manner in which that preemption can occur.² The Illinois Supreme Court's clear statement in a recent case shows that it recognizes the importance of that three-pronged home rule foundation: “Home rule units possess the same powers as the state government, except where such powers are limited by the General Assembly.” *Johnson v. Halloran*, 742 N.E.2d 741, 743 (Ill. 2001).

¹ See John C. Parkhurst, *Article VII – Local Government*, 52 Chicago Bar Record 94, 99 (1971).

² The Constitution details whether a simple majority or a 3/5 vote is required to limit home rule powers, depending on the type of power at issue. If the State is already involved in the field of regulation, a simple majority will suffice. § 6(h). If the state seeks to deny home rule units powers or functions that the State does not exercise or perform, preemption requires a 3/5 vote. § 6(g). Several narrow local powers, all dealing with home rule financial discretion, are immune from preemption. § 6(l).

B. Home Rule in the Illinois Supreme Court

Legal analysis of any home rule enactment should proceed along the following lines. First, does the law meet the Constitution's standard that "a home rule unit may exercise any power and perform any function pertaining to its government and affairs"? Ill. Const. Art VII, § 6(a). And second, even if the law pertains to local affairs, has the legislature "provide[d] specifically by law for the exclusive exercise by the State"? Ill. Const. Art. VII, § 6(h).

The question whether the Chicago law "pertains to" local affairs is informed by the Constitution's endorsement of maximum local initiative to deal with local problems. The drafters of the home rule provision intended §6(a) "to establish the broadest possible description of the powers that the receiving units may exercise,"³ yet they also recognized that home rule efforts must be focused on local problems, and not those of the state or nation. Thus, judicial involvement is required to set the outer limits of home rule authority, to determine whether a particular exercise of power pertains to the unit's "government and affairs." In general, the Illinois Supreme Court has used its powers sparingly, faithful to the Constitution's intent to limit the court's role in disputes over home rule enactments. My review of the relevant cases leads me to conclude that this ordinance is well within the scope of established legal doctrine, and that the opponents' attempt to portray it as an illicit power grab by the City of Chicago is based on a mischaracterization of the leading cases. Although the cases do not display perfect uniformity, the predominant judicial attitude recognizes expansive home rule power and vigorously defends the drafters' intent that home rule units use their powers creatively and independently without fear of judicial invalidation. The representative cases I briefly survey in the next paragraph were chosen because of their importance in the development of the court's jurisprudence in this area and also because of their similarities to the Chicago ordinance. Just like the proposal to regulate large retailers, the cases clearly pit local initiative against a pervasive and carefully balanced general state statutory scheme. In all of them, the home rule initiative prevails.

In *Kalodimos v. Morton Grove*, 470 N.E.2d 266 (Ill. 1984), the Supreme Court upheld the right of a home rule unit to ban the possession of handguns. The Court rejected the opponents' argument that the ordinance interfered with the state's numerous statutory schemes regulating firearms and recognized that home rule anticipates that "problems in which local governments have a legitimate and substantial interest should be open to local solution and reasonable experimentation to meet local needs free from veto by voters and elected representatives from other parts of the state..." *Id.* at 274. Similarly, in *City of Chicago v. Roman*, 705 N.E.2d 81 (1998), Illinois' highest court upheld Chicago's home rule authority to require mandatory imprisonment for the assault of an elderly person, even though state law had no such minimum sentence. Again, the court emphasized that home rule is predicated on the assumption that different communities will tailor laws to meet their community's particular needs, and that those laws may or may not be consistent with general state laws. And in *Village of Bolingbrook v. Citizens Utility Co. of Illinois*, 632 N.E.2d 1000 (1994), the court upheld a

³Sixth Illinois Constitutional Convention, Report of the Local Government Committee 47, Proceedings 1639-41.

home rule ordinance that imposed fines for illegal discharges of untreated sewage, notwithstanding the admittedly compelling statewide interests as reflected in comprehensive statewide environmental regulation and regulation of public utilities. The court's analysis of whether the law was a valid exercise of home rule powers was succinct and to the point: "Plaintiff's ordinances were designed to protect the public health, and are therefore a valid exercise of plaintiff's home rule power under section 6 of the 1970 Illinois Constitution." *Id.* at 1001. In case after case, the Illinois Supreme Court has embraced the narrow review contemplated by the Illinois Constitution. Its inquiry is limited to a determination whether the subject of the ordinance deals with a matter of local concern, and the existence of elaborate state statutory schemes are irrelevant to that inquiry.

C. Dissecting the Opponents' Legal Arguments

The opponents' memorandum argues that the Chicago ordinance addresses a state, rather than local, affair, and thus does not meet the Constitution's requirement that home rule enactments pertain to the local government's affairs. Chicago can point to a number of important local interests promoted by this ordinance. Chicago has the highest number and highest percentage of low income residents in the region, and people with low incomes are more likely to rely on low paying retail jobs as their primary employment than wealthier citizens. In many parts of the state, a larger percentage of big retailers' employees are likely to be individuals seeking to supplement their family's pension or income, or young adults in search of discretionary spending money. Chicago's concern for its many citizens who are likely to earn their primary income at big retail operations is a local concern justifying a local response. In addition, the cost of living in Chicago is substantially higher than in many other parts of the state; the same wage goes a lot farther in rural Illinois than in its urbanized core. Again, this factual difference makes Chicago's ordinance responsive to a local problem, and thus well within the limits of home rule.

The opponents also fault the ordinance for its potential to create a "checkerboard" pattern of regulation throughout the state. This argument is also wide of the mark. Far from being a legal infirmity, the "checkerboard" is actually the intended result of Illinois' home rule system. As the court noted in *Kalodimos*, "local solution and reasonable experimentation to meet local needs" is the fundamental premise of home rule. Much as the 50 states provide "laboratories" in which new social programs can be tested,⁴ local variation allows for similar experimentation and ultimately increases the possibility that solutions to difficult local problems may be found. Though the opponents condemn the checkerboard, the drafters of the Illinois Constitution intended that home rule would allow for "bold" and "innovative" local initiatives.⁵ Surely, they did not contemplate that those ordinances would all be the same. As the Chairman of the Local Government Committee of Constitutional Convention stated in somewhat hyperbolic terms:

⁴ That view of the virtues of federalism was famously articulated by Justice Brandeis in *New State Ice v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

⁵ See Parkhurst, *supra* note 1, at 94.

“We have freed our counties and our cities from the shackles of [the] 1870 [Constitution], [and] we have deposited ultimate sovereignty back in the people”⁶ These high hopes can only be fulfilled if home rule units are allowed, indeed encouraged, to find local solutions to local problems. The resulting checkerboard pattern is not a fatal flaw; rather, it is a sign that home rule is working.

And finally, opponents argue that the Chicago ordinance upsets the state’s “careful balancing of a variety of interests.” This argument proves too much. Presumably, all state enactments embody a careful legislative balancing of interests, yet the Illinois Constitution explicitly recognizes the legitimacy of concurrent state and local regulation. The home rule ordinances adopted in *Kalodimos*, *Roman*, and *Bolingbrook* all affected pervasive and carefully balanced state regulatory schemes, yet the court was quick to uphold them as well within the scope of home rule powers.

Opponents’ legal memorandum seizes on *Bernardi v. City of Highland Park*, 121 Ill. 2d 1 (1988) to support their argument that Chicago’s ordinance is beyond the scope of home rule power. In *Bernardi*, the court invalidated a local decision to ignore the state’s prevailing wage law, which requires that public works projects pay prevailing wages as determined by the government awarding the contract or by the state’s Department of Labor. The case is factually distinguishable from the Chicago ordinance in important respects. *Bernardi* involved a home rule unit’s attempt to provide less protection to the workers affected than the state law minimum; Chicago, of course, seeks to provide employee protections that go above the minimum required by state law. Moreover, the conflict in *Bernardi* was absolute: the city action clearly violated the standard established in the state law. In the present case, however, state law will continue to apply to all businesses operating in Chicago, including the large retailers subject to Chicago’s ordinance. The local law will in no way interfere with the protection of the state’s interests expressed in its widespread regulation of labor conditions. And finally, Highland Park’s actions did not involve the adoption of a local ordinance, but rather a failure of city officials to specify prevailing wages in its call for bids for one particular project. Here, in contrast, Chicago’s ordinance reflects a carefully crafted, clearly articulated general policy to improve the lives of its lowest paid residents.

As the opponents’ memorandum points out, the *Bernardi* court reasoned that application of the local law would frustrate the state’s “carefully crafted and balanced economic policies.” This dicta simply is not the standard against which the Illinois courts evaluate challenges to home rule enactments. If it were, the ordinances in all of the cases discussed above would have also been invalidated, because each one of them similarly supplemented a “carefully crafted and balanced” policy. The *Bolingbrook* opinion, decided six years after *Bernardi*, emphasized the court’s adherence to the principled pre-*Bernardi* line of cases, which protect expansive use of home rule powers and leave limitation or denial of those powers to the legislative branch. *Bernardi*’s expansive language is inconsistent with the holdings and rationales of the vast majority of the Supreme Court’s home rule pronouncements, and it is more of an exception to

⁶ *Id.* at 101.

the rule than the new rule that the opponents seek to establish.

Opponents also use *Bernardi* to argue that the State has entirely occupied the field of labor regulation, and that, as a result, Chicago's is powerless to regulate in the area. The question in *Bernardi*, however, was not whether state law occupies the field of labor regulation and thereby precludes *any* local labor law. Rather, the case presented a much narrower legal question: Does a home rule unit's decision to undercut the protections extended to workers in the Prevailing Wage Act fit within the constitutional standard that home rule actions must "pertain to its government and affairs?" Although there is language in the opinion that suggests a state interest in uniformity, that language is overshadowed by the Court's repeated references to the dangers of eroding state minimums. The Court's real concern in *Bernardi* was not that labor regulations be uniform statewide, but much more narrowly, the Court was insistent that local governments cannot eviscerate important state protections of workers' welfare. The Court repeatedly emphasized the perils of allowing local governments to erode minimum state standards, noting that upholding local powers in this instance would allow home rule units to "condone 12-hour work days, suspend minimum-wage requirements and repeal child-labor laws." It noted that the Prevailing Wage Act furthered important state interests in protecting local workers from the importation of "less expensive labor from areas outside the locality." State laws impose "minimum requirements," the Court stressed, and those standards are "outside the power of local officials to contradict." Chicago's ordinance is faithful to those same concerns and neither undercuts nor contradicts the state's important interests. The *Bernardi* Court neither considered nor answered the question presented by the proposed ordinance, which supplements the State's minimum standards.

The conclusion that *Bernardi* does not establish a *per se* rule that all labor regulation pertains to statewide, not local, affairs, is not mere gloss or wishful thinking. Careful reading of the Court's analysis makes clear that its holding was specific to the nature of the local conduct at issue in that case – namely, in the *Bernardi* Court's words, "Highland Park's attempt to abrogate the prevailing wage law." The Appellate Court's discussion of *Bernardi* in *Crawford v. City of Chicago*, 304 Ill.App.3d 818, 828 (Ill.App. 1 Dist.1999), supports this conclusion. In *Crawford*, plaintiffs cited *Bernardi* "[i]n support of their position that employee benefits are a matter of statewide concern." In concluding that their "reliance upon *Bernardi* in this regard [wa]s misplaced," the court explained that "Highland Park's attempt to opt out of the Prevailing Wage Act affected an issue of statewide concern *because it had an impact beyond its own borders.*" *Id.* (emphasis added). This was because under Illinois law, prevailing wages are calculated regionally, and so Highland Park's opting out would have depressed wage rates in other municipalities.

Read carefully, the *Bernardi* court's rationale should not apply to invalidate the Chicago ordinance. Just like the state law in that case, Chicago's ordinance seeks to promote a favorable labor climate, to mitigate against an impoverished work force, and to otherwise improve working conditions. Highland Park's action in *Bernardi* was deemed beyond the scope of its home rule powers because it undercut an overriding statewide interest in protecting workers' rights. Because Chicago's ordinance embodies goals that are identical to those important statewide

policies, and because it in no way interferes with the protection granted by any existing state law, it should stand as permissible concurrent regulation under the Illinois Constitution. Nor would Chicago's ordinance have the extraterritorial impact so crucial in *Bernardi*; the proposed ordinance applies only to businesses operating in Chicago.

In reality, opponents' legal arguments against the Chicago ordinance are nothing more than thinly disguised efforts to bring the doctrine of implied preemption back into Illinois jurisprudence. According to that doctrine, courts may invalidate local laws – even in the absence of a clear statement of legislative intent to preempt local authority – because of a judicial sense that they interfere with an overriding but unexpressed state desire for statewide uniformity. This intent is most frequently gleaned from the comprehensiveness of the state legislation, and the Illinois Supreme Court has repeatedly rejected that approach to home rule. Consider, for instance, its discussion of the constitutional standard for preemption of home rule ordinances in *Bolingbrook*: “In order to meet the [Constitution's preemption requirement], legislation must contain express language that the area covered by the legislation is to be exclusively controlled by the State. It is not enough that the State comprehensively regulates an area which otherwise would fall into home rule power.” 638 N.E.2d at 1002. Thus, the opponents' argument about careful state balancing is now essentially irrelevant to the judiciary's role in implementing the Illinois home rule system.

The Illinois Constitution provides explicit details on how to preempt home rule enactments. As the *Roman* court noted: “When the General Assembly intends to preempt or exclude home rule units from exercising power over a matter, that body knows how to do it. In many statutes that touch on countless areas of our lives, the legislature has expressly stated that ... a statute is declared to be an exclusive exercise of power by the state and that such power shall not be exercised by home rule units.” 705 N.E.2d at 89 (listing eleven state laws with explicit preemption provisions). No provision of Illinois law purports to limit or deny the power of home rule units to adopt ordinances such as the one contemplated now by the City of Chicago.

The lesson from these cases is clear. Judicial review of the Chicago ordinance's faithfulness to Illinois' home rule scheme would be limited to the narrow question whether the ordinance deals with a local concern. The opponents' additional arguments that the Chicago ordinance is invalid because it interferes with a carefully balanced state program, because it creates a checkerboard of inconsistent regulation across the state, or because a comprehensive state statutory scheme is intended to be exclusive, are irrelevant to the legality of the home rule proposal currently before the Chicago City Council. The ordinance deals with a pressing local matter, and it has not been preempted by a state statute; therefore, I conclude that it is a valid exercise of Chicago's home rule powers.

III. Equal Protection

The opponents' equal protection objections repackage their home rule arguments in a slightly different form. In essence, they are based on nothing more than their political opposition to a local government regulation that will increase some costs of doing business for large

retailers. The equal protection clause imposes minimal, and well established, limits on local legislative discretion when the government's economic regulation does not implicate fundamental rights. The equal protection clause does not provide an avenue for those who lose a political battle to get a second hearing in another forum.

Both state and federal equal protection guarantees apply to ensure that government does not exercise its powers to deprive individuals, businesses, and other organizations of equal treatment. Those guarantees are, of course, applicable to this ordinance, but when it comes to economic regulation such as the Chicago ordinance, the legal standard is quite narrow, limited to ensuring that the classification adopted by the government bears a rational relationship to a legitimate government interest. *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993); *Big Sky Excavating, Inc. v. Ill. Bell Tel. Co.*, 217 Ill. 2d 221, 237-38 (2005). Under this deferential standard, so long as any set of facts can be reasonably conceived that justify the classification, then the classification will not be subject to judicial second-guessing. *Big Sky*, 217 Ill. 2d at 238. In this case, Chicago has determined that its heightened employee protections will initially apply only to large retailers. Under well-established principles of rational basis review, that classification fits easily within the scope of local government discretion in workplace regulation.

The Chicago ordinance classifies retailers on the basis of total square footage and annual revenue, creating employee protections for those who work in stores exceeding the limits established by clear, objective criteria. Classifications based on the business's size rationally reflect the City's judgment that large retailers have substantially different impacts on the local community in which they operate. This ordinance's standards are just some of many that reflect that difference. Just as larger physical structures may be subject to heightened standards involving design, parking requirements, landscaping, and developer exactions, so too larger economic operations may be regulated to reflect their more significant impact on the community's economic environment. In addition, Chicago's classification reflects the considered judgment that bigger retailers are more likely to be able to absorb the cost of heightened employee protection, as another one of the many costs of doing business imposed by government. The ordinance's classification reflects Chicago's sensitivity to the impact of the ordinance on its business community, and its conservative cut-off recognizes that government regulation of the marketplace must walk a delicate line between protecting, on the one hand, individual health, safety and welfare and, on the other, the economic viability of city business. This classification strikes that balance in a most reasonable way.

Illustrative of the approach of Illinois courts in conducting equal protection review of economic regulation are cases such as *Chicago Allis Manufacturing Corp. v. Metropolitan Sanitary District of Greater Chicago*, 52 Ill. 2d 320 (1972). In that case, the Illinois Supreme Court upheld a local environmental ordinance that banned discharge of industrial waste by large industrial plants, defined as those that produced at least 3,650,000 gallons of waste each year. Like the opponents of the proposed living wage ordinance, businesses challenging the environmental ordinance charged that it was arbitrarily discriminatory to regulate only industrial plants, while exempting other types of polluting businesses such as "laundries, bakeries, Laundromats, car washes, dairies, poultry processors, and sausage processors." 52 Ill. 2d at 329.

They similarly challenged the fact that the law regulated only businesses discharging more than 3,650,000 gallons of waste each year, while ignoring smaller polluters. 52 Ill. 2d at 332. Rejecting these claims, the State Supreme Court explained that local government may permissibly regulate by business category or size, beginning “where the need is deemed to be the clearest” to lawmakers. 52 Ill. 2d at 331.

Though opponents protest to the contrary, industry and business size-based classifications like those in the proposed ordinance are commonplace and found in laws adopted at all levels of government. Numerous local, state and federal statutes classify businesses on the basis of type (e.g., Federal Labor Standards Act’s overtime provisions do not apply to numerous professions, 29 U.S.C. § 213(b) (2006)), revenue (e.g., Illinois law limits loans to agribusinesses beyond a certain size, 20 ILCAS 3501/830-20(2006)), and physical size (e.g., numerous cities apply non-smoking restrictions only to large restaurants above a specified seating capacity, D.C. Code §7-1703.01 (2006)). Chicago’s proposed ordinance makes similar unexceptional classification decisions and is well within the scope of rational.

Industry- and size-based classifications are especially common in the labor standards area. For example, virtually all employment and labor laws have a business size threshold, whether based on number of employees, business revenue, or some other indicator of business scale. Moreover, many employment and labor laws target their coverage to specific industries. For example, the federal minimum wage, the Fair Labor Standards Act (FLSA), generally applies only to businesses with \$500,000 in annual revenue or more, 29 U.S.C. § 213(a)(2), and incorporates a range of industry or occupation-based exemptions and coverage definitions, *see* 29 U.S.C. § 213(a). In fact, during the 1960’s, in the retail industry, the federal minimum wage applied only to retail enterprises with sales exceeding \$1 million annually – a coverage rule quite similar to the proposed Chicago ordinance. *See* U.S. Department of Labor, History of Changes to the Minimum Wage Law (available at <http://www.dol.gov/esa/minwage/coverage.htm>).

In Illinois, examples of laws that establish labor protections for employers of a specific size in targeted industries are not uncommon. For example, the state has long regulated the law enforcement and fire protection sector with a set of standards tailored specifically to that field and which vary based on the size of the employing municipality. *See Nevitt v. Langfelder*, 157 Ill. 2d 116 (1993) (upholding law that mandated disability benefits for law enforcement officers and firefighters and exempted certain employing municipalities based on size); *People ex rel. Moshier v. City of Springfield*, 19 N.E.2d 598 (Ill. 1939) (upholding law that set different minimum wages for firefighters based on size of municipality). At the local level, examples of ordinances establishing labor protections for workers at large employers in a specific industry include Cook County’s recently enacted Displaced Building Service Workers Protection Ordinance. It provides employment security to employees in the janitor and security guard industry, and is tailored by industry size, applying to employees in commercial, retail or institutional buildings of 75,000 square feet or more, or residential buildings of 50 units or more. *See* Cook County, Ill., Ordinance 06-O-14 (Mar. 15, 2006).

Viewed from the employee rights perspective, the Chicago law reflects the local

government's determination that working people should earn a wage that better reflects the actual cost of living in Chicago. Although opponents are critical of the City's decision to grant some important legal protections to only a portion of the working population, describing it as an arbitrary benefit for a small number of individuals, this practice is also well established at all levels of government. As noted above, governments frequently establish individual rights in the market place and then exempt certain groups from the program's operation. Not infrequently, those exempted are small businesses, just as the Chicago ordinance has done here. For example, under Chicago's existing living wage ordinance, which was enacted in 1998 and applies to businesses receiving city contracts, employers with fewer than 25 employees are exempt. Chi. Mun. Code § 2-92-610 (2006). Just like Chicago's proposed ordinance, that classification reflects the legislative judgment that, on balance, there are good reasons to exempt smaller operations from the imposition of heightened individual protections. The proposed Chicago law similarly creates a system of employee rights and makes the reasonable decision to exempt some potential employers, those who are smaller in terms of physical size and revenue, from the imposition of the law's protections. Though the opponents describe the exemptions as creating an irrational distinction between employees, the line drawn by Chicago is a familiar and well-established one.

By imposing heightened requirements on big retailers, the City has made the rational decision to deal with the problem of low wage jobs in Chicago one step at a time. Illinois courts recognize that legislative discretion to take small steps towards solving a large problem is an essential tool for governmental protection of the health, safety and welfare: "The legislature is not bound ... to make the unrealistic choice of establishing total and exhaustive regulation or none at all." *Chicago Allis Manufacturing v. Metropolitan Sanitary District of Greater Chicago*, 288 N.E.2d 436, 443 (Ill. 1972). Stated in a slightly different way: "The legislature is not bound to extend its regulation to all cases which it might possibly reach. It may confine its restrictions to those classes where the need is deemed to be the clearest." *Thillins v. Morey*, 144 N.E.2d 735, 743 (Ill. 1957). Chicago simply cannot be faulted for acting cautiously, for initially limiting the availability of the important protections it has created. Instead of a major overhaul of the local labor market, Chicago has decided to take a first step, which will allow it to evaluate the impact of the ordinance on business and on the employees it seeks to protect. This "one step at a time" doctrine wisely preserves the city's discretion and protects its ability to move deliberately and cautiously in this important area of the law.

In their legal memorandum, opponents of the ordinance have failed to identify a single instance in modern times where an Illinois court has invalidated comparable economic regulation on equal protection grounds. Instead, they attempt to rely on cases involving different doctrinal areas. First, opponents attempt to rely on equal protection cases where courts have invalidated legislation that singles out politically vulnerable groups for different treatment. *See, e.g., Romer v. Evans*, 517 U.S. 620 (1996) (striking down state ban on legislation to protect persons from discrimination based on sexual orientation); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) (invalidating zoning ordinance limiting the freedom of mentally handicapped persons to live together in a group home).

This is precisely the argument that opponents of a Maryland health law raised in a lawsuit challenging the measure. However, just this month, a federal court rejected the claim, ruling that large businesses cannot claim vulnerable status in seeking to challenge regulatory legislation that applied to a small group of employers. *See Retail Industry Leaders Ass'n v. Fielder*, Civ. No. JFM-06-316, 2006 WL 2007654, at *15 (D. Md. July 19, 2006) (“Wal-Mart does not contend that it is similarly situated to the plaintiffs in *Romer* and *Cleburne*, and the fact that it is the only entity subject to the [Maryland health law] is not itself sufficient to make out a viable equal protection claim.”). The ruling is notable because the Maryland health law at issue in the case was more narrowly focused than the Chicago proposal. It affected only Wal-Mart, while Chicago’s proposed living wage ordinance would apply to the whole large retail industry in the city, covering many major employers.

Next, opponents invoke a line of Illinois Supreme Court cases that invalidated state laws that attempted to limit the right of certain tort victims and victims of consumer fraud to sue for relief, while not limiting recovery by other categories of victims. However, examination of these cases highlights that while Illinois courts conduct fairly searching review of classifications that limit remedies for victims, they apply the ordinary, and highly deferential rational basis standard to economic regulatory legislation. For example, *Allen v. Woodfield Chevrolet*, 208 Ill. 2d 12 (2003), presented a challenge to statutory amendments that made it more difficult for victims of consumer fraud to bring claims against automobile retailers. The court invalidated the measure, finding that immunizing automobile dealers from such responsibility would hurt consumers, contrary to the purported purpose of the consumer fraud statute as a whole. *Id.* at 31. By contrast, when called to review economic regulation targeting the very same industry – automobile retailers – the court had little difficulty rejecting an equal protection challenge to a measure that required only those retailers to close on Sundays. *Fireside Chrysler-Plymouth, Mazda, Inc. v. Edgar*, 102 Ill. 2d 1, 6 (1984). Indeed, the regulation upheld in *Fireside* was actually an example of an industry-focused labor standard, since the Sunday closing requirement ensured that workers received a day of rest.

Finally, opponents point to a pair of zoning cases decided nearly fifty years ago in which the Illinois Supreme Court invalidated aspects of certain zoning laws as violating equal protection. *See Ronda Realty Corp. v. Lawton*, 414 Ill. 313, 317-18 (1953); *Jack E. Frost v. Village of Glen Ellyn*, 30 Ill. 2d 241 (1964). But whatever the precedential vitality may be of these cases in the zoning field – and neither of them has been cited favorably by an Illinois court since 1965 – they clearly do not reflect the court’s modern approach to economic regulatory legislation.

To the opponents’ claim that the ordinance is unprecedented, two responses come to mind. First is that whether this law is the first or the one thousandth of its kind is legally irrelevant. To suggest that the label “unprecedented” is an indicator of illegality ignores the clearly articulated constitutional aspiration that home rule would allow local governments to be bold, innovative, and creative in dealing with local problems. Today’s “unprecedented” approach may tomorrow become the standard other home rule units are quick to follow. More narrowly, however, the label is simply inapplicable to Chicago’s proposed ordinance. In fact, the

City is now part of a rapidly growing number of communities around the country that are dismayed by the market forces that relegate their hard working citizens to the poverty level. Though no two ordinances may be the same, Chicago's approach fits well within the trend.

In sum, the Chicago ordinance is a clear example of a legislative judgment to deal with the important local concern about an overabundance of low paying jobs. Home rule has given the city a green light to be creative in its search for solutions to a serious local problem. By imposing heightened standards on a subset of the totality of Chicago employers, the city has taken an important, rational first step towards the goal that its citizens who work full time will be able to enjoy a decent standard of living with the fruits of their labor.

III. Other Claims

Opponents have raised two other sets of legal objections. One consists of contract and property claims concerning the proposed ordinance's leasing provision. However, it is my understanding that their memo's arguments are addressed to a prior version of that provision. I also understand that the current, revised leasing provision simply extends an existing Chicago law, which limits the scope of anti-competitive restrictive covenants in grocery and drug store leases. *See* Chi. Mun. Code § 17-1-1004. To my knowledge, the legal validity of the existing ordinance has not been challenged since it was enacted, and simply extending that law to cover large retailers should not raise any new legal issues.

Finally, opponents have suggested that the Chicago ordinance might violate the U.S. Constitution's dormant Commerce Clause. But even a cursory review of applicable case law leads me to conclude that this argument is not consistent with the prevailing judicial standards.

In some circumstances, the dormant Commerce Clause limits the power of states and cities to enact laws that restrict interstate commerce. The Supreme Court has established a two-part test for analyzing local economic regulation under the Commerce Clause. First, courts must look at whether the law discriminates against interstate commerce or has the effect of favoring in-state economic interests over out-of-state interests, in which case it is struck down without further inquiry. *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986). Under this approach, the courts are concerned about laws that involve economic protectionism by state or local governments. Thus, tariffs or customs duties on goods imported from other states are the paradigmatic example of laws that cannot withstand scrutiny under the dormant Commerce Clause, because they benefit local interests at the expense of burdening out-of-state competitors. *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 193 (1994).

Under the second prong of the Supreme Court's test, the courts examine whether the law serves a legitimate interest and whether "the burden on interstate commerce clearly exceeds the local benefits." *Brown-Forman Distillers Corp.*, 476 U.S. at 579. Under either prong, the Chicago ordinance would be upheld.

The Chicago ordinance clearly passes muster under the first prong of the judicial inquiry, since it does not distinguish between in-state and out-of-state firms and therefore has no direct effect on interstate commerce. The ordinance applies equally to all firms meeting the specified revenue and square footage threshold requirements. While more out-of-state firms may meet the ordinance's thresholds, "the fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination." *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 126 (1978). Courts applying this prong have upheld laws far more extreme than Chicago's ordinance. Laws with more restrictive burdens, and laws with a far greater disproportionate effect on out-of-state commerce, have survived challenge under this part of the test. *See, e.g., id.* (upholding law that prohibited oil refiners from taking part in retail gas market where all affected companies were out of state); *Lenscrafters, Inc. v. Robinson*, 403 F.3d 798 (7th Cir. 2005) (upholding law prohibiting optical retail stores from leasing space to optometrists that disproportionately affected out-of-state companies). Moreover, the businesses that are excluded from coverage under the Chicago ordinance because they do not meet the law's revenue or square footage requirements – and which opponents claim therefore benefit from the ordinance – include a wide range of both in-state and out-of-state retailers.

Moving on to the second prong, courts have almost never struck down regulatory statutes that protect local health, safety or welfare on the ground that the purported burden on interstate commerce does not exceed the local benefits. Minimum wage laws have for nearly seventy years been recognized as serving the substantial interest of protecting workers' health and welfare. *See West Coast Hotels v. Parrish*, 300 U.S. 379 (1937); *New Mexicans for Free Enterprise v. City of Santa Fe*, 138 N.M. 785, 126 P.3d 1149, 1162 (2005) ("The connection between wages and the general welfare of workers is well established in American jurisprudence and is clearly within the police power of a state [or city] to regulate."). For a city struggling to rebuild a strong base of good jobs for residents without college degrees, the benefits of extending living wages to retail workers could be substantial.

As for potential burdens, Congress has made clear that higher minimum wage levels imposed by local governments are *not* a burden on commerce. In the Fair Labor Standards Act, after establishing a federal minimum wage, Congress explicitly provided that nothing in the law "shall justify noncompliance with any . . . municipal ordinance establishing a higher standard than the standard established under [federal law]." 29 U.S.C. § 218. The courts in *Exxon Corp.* and *Lenscrafters, Inc.* found that the burdens created by the laws in question did not violate the excessive burden test, even though they effectively shut the plaintiff companies out of certain markets. *See Exxon Corp.*, 437 U.S. at 127; *Lenscrafters, Inc.*, 403 F.3d at 805-06. By contrast, nothing in the Chicago ordinance would exclude covered employers from the Chicago market. To the contrary, the ordinance contemplates that large retailers will continue to operate and expand in the city – and simply seeks to ensure that they as they do, they will provide family-supporting wages to their employees.

Because the local benefit of providing a living wage to Chicago's low-wage retail workers is substantial, and because it is not clearly outweighed by any purported burden on interstate commerce, I conclude that the Chicago ordinance does not violate the dormant commerce clause.



BRENNAN CENTER FOR JUSTICE
AT NYU SCHOOL OF LAW

MEMORANDUM

TO: Chicago City Council
FROM: Brennan Center for Justice at New York University School of Law
SUBJECT: Legal Analysis of Implications of Maryland Health Benefits Ruling for Proposed Chicago Retail Living Wage Ordinance
DATE: July 22, 2006

For more information, please contact Paul Sonn, (917) 566-0680, paul.sonn@nyu.edu

QUESTION PRESENTED

This memorandum examines the implications of the recent ruling in the Maryland health benefits law case, *Retail Industry Leaders Ass'n v. Fielder*, Civ. No. JFM-06-316, 2006 WL 2007654 (D. Md. July 19, 2006), for the proposed Chicago retail living wage ordinance. Specifically, it addresses whether ERISA (the federal Employee Retirement Income Security Act), which was found to preempt the Maryland law, would pose any obstacles for the proposed living wage ordinance.

SHORT ANSWER

Contrary to the assertion made by the *Chicago Tribune* in its editorial on July 22 (“Chicago, take a look at Maryland”), Chicago’s proposed large retail living wage ordinance is not preempted by ERISA. The Maryland law was a straight health benefits mandate. The trial court found that the Maryland law was preempted by ERISA because it effectively forced covered employers to modify their health benefits offerings in order to comply with the law.

By contrast, it is well-established that combined wage and benefits laws that require employers to provide a minimum level of compensation, and give them the option of providing some of that compensation in the form of health, vacation, disability or other benefits, are not preempted by ERISA. To date, four federal appeals courts have ruled on whether ERISA preempts such laws, and all four have ruled that they are not so preempted.

The proposed Chicago ordinance follows exactly the structure of the wage laws that have been upheld by the courts: it establishes a base minimum wage for large retailers – set at \$9.25 per hour in the first year – and asks employers to provide an additional \$1.50 per hour, which can be provided in the form of supplemental wages, benefits, or any combination thereof. Whether to provide any benefits at all, and what kind of benefits to provide – paid vacation days, health or other benefits, or just supplemental wages – is left to the employer’s discretion.

This feature was key to the rulings upholding combined wage and benefits laws – and distinguishes the Chicago ordinance from the Maryland law. The fact that the Chicago ordinance follows this approach means it will similarly survive ERISA preemption.

LEGAL ANALYSIS

1. The Federal Courts Have Repeatedly Held That Combined Wage and Benefits Laws Are Not Preempted by ERISA

ERISA is a federal statute that regulates certain categories of employee benefits plans (known as “ERISA plans”) – most significantly, health benefits plans. ERISA bars states and localities from adopting laws that require employers to establish or modify ERISA plans. Significantly, however, ERISA does not regulate all employee benefits. Paid vacation, paid sick leave, severance pay, and health savings accounts are common examples of employee benefits that are generally not considered ERISA plans. *See Massachusetts v. Morash*, 490 U.S. 107 (1989); *see also Cal. Div. of Labor Standards Enf’t v. Dillingham Constr.*, 519 U.S. 316, 326-27 (1997) (distinguishing between ERISA and non-ERISA benefits). Just as importantly, wages do not constitute ERISA plans either.

The fact that wages and many types of benefits do not constitute ERISA plans explains why the federal courts have repeatedly upheld laws that establish combined wage and benefits standards. In all four recent cases where the U.S. Courts of Appeals have addressed such laws, the courts have upheld the laws under ERISA. *See Burgio v. N.Y.S. Dep’t of Labor*, 107 F.3d 1000 (2d Cir. 1997); *WSB Electric v. Curry*, 88 F.3d 788 (9th Cir. 1996); *Minnesota Chapter of Associated Builders and Contractors, Inc. v. Minnesota Department of Labor and Industry*, 47 F.3d 975 (8th

Cir. 1995); *Keystone Chapter, Ass'd Builders & Contractors Inc. v. Foley*, 37 F.3d 945 (3rd Cir. 1994), *cert. denied*, 115 S. Ct. 1393 (1995). The U.S. Seventh Circuit Court of Appeals, which covers Chicago, has yet to address the issue. But there is no reason to believe that it would reach a different conclusion from the other federal appellate courts.¹

These cases all involved prevailing wage laws that established combined wage and benefits standards for construction contractors performing public works projects. Employers challenged the laws as preempted by ERISA. Each of the four laws set a minimum standard for employers' hourly compensation packages. Under each of the four laws, employers could provide the whole package in wages, or could provide a portion in benefits of any sort if the employer so chose. *See, e.g., Minnesota Chapter*, 47 F.3d at 977 (“[a]n employer can divide the amount between wages and benefits as it chooses, so long as the combined total meets or exceeds the prevailing wage rate”); *id.* at 980 (“benefits and wages can be used interchangeably”); *Burgio*, 107 F.3d at 1009 (“an employer may provide supplemental benefits in any form or combination so long as the sum total is not less than locally prevailing benefits”).

An employer's “total liability would thus be the same whether the [employer] had bargained to provide benefits exclusively through ERISA plans, exclusively through non-ERISA plans, through additional cash wages, or through some combination of the three.” *Burgio*, 107 F.3d at 1009. Because of this, “The [combined wage and benefits laws] do[] not force employers to provide any particular employee benefits or plans, to alter their existing plans, or to even provide ERISA plans or employee benefits at all.” *WSB Electric*, 88 F.3d at 793.

This feature – the fact that employers can mix and match wages, non-ERISA benefits, and ERISA benefits – was crucial to the courts in finding that these laws comply with ERISA. As the Eighth Circuit explained, “[A state or local government] can set a minimum cash wage, and allow an employer the option of paying part of that in benefits, without triggering ERISA preemption.” *Minnesota Chapter*, 47 F.3d at 980 (quoting *Keystone*, 37 F.3d at 961). “Where a legal requirement may be easily satisfied through means unconnected to ERISA plans, and only relates to ERISA plans at the election of the employer, it ‘affects employee welfare benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law ‘relates to’ the plan’” and so is not preempted. *Keystone*, 37 F.3d at 960. *Accord Burgio*, 107 F.3d at 1009; *WSB Electric*, 88 F.3d at 794.

2. The Chicago Retail Living Wage Ordinance Follows Exactly the Structure of the Combined Wage and Benefits Laws That Have Been Upheld by the Courts

The proposed Chicago retail living wage ordinance is structurally identical to the combined wage and benefits laws that have been upheld by the Second, Third, Eighth and Ninth Circuit

¹ One federal court of appeals, the Second Circuit, had held in 1989 that ERISA preempted combined wage and benefits laws. *See General Electric Co. v. N.Y. State Dep't of Labor*, 891 F.2d 25 (2d Cir. 1989). However, after that ruling, the U.S. Supreme Court issued a series of new opinions clarifying the ERISA preemption standard and New York modified its law to provide employers greater flexibility in mixing and matching wages and benefits. In light of those developments, the Second Circuit subsequently reversed itself and ruled in *Burgio v. N.Y.S. Dep't of Labor*, 107 F.3d 1000 (2d Cir. 1997), that combined wage and benefits laws are not preempted by ERISA.

Courts of Appeals. It establishes a base minimum wage for large retailers – set at \$9.25 per hour in the first year – and then asks employers to provide an additional \$1.50 per hour, which can be provided in the form of supplemental wages, benefits, or any combination thereof. Employers are allowed to mix and match wages, non-ERISA benefits, and ERISA benefits. Whether to provide any benefits at all, and what kind of benefits to provide – paid vacation days, health or other benefits, or just supplemental wages – are left to the employer’s discretion. Because the proposed ordinance mirrors the combined wage and benefits laws that have been approved under ERISA by the federal courts, one can expect that it would similarly be upheld.

The fact that the combined wage and benefits laws reviewed by the federal courts of appeals have to date been prevailing wage laws that applied to businesses performing public contracts – rather than direct regulation of private sector employers who do not receive public contracts as under the Chicago ordinance – does not matter for ERISA purposes. None of the analysis in the reported cases depended in any way on the fact that the laws regulated public contractors. *See, e.g., Council of the City of N.Y. v. Bloomberg*, 6 N.Y.3d 380, 846 N.E.2d 433 (2006) (holding that ERISA imposes the same limits on regulations that apply to government contractors as on those that regulate private employers).

3. Unlike the Combined Wage and Benefits Laws That Have Been Approved Under ERISA, the Maryland Law Was a Straight Health Benefits Mandate

Unlike the combined wage and benefits laws upheld by the federal courts of appeals, the Maryland health benefits law addressed only health benefits. It established a requirement that covered for-profit employers had to spend at least 8% of their payroll on providing health benefits (which are generally an ERISA benefit), or pay the balance in the form of a tax to the state. *Felder*, 2006 WL 2007654, at *1. The Maryland law did not allow employers the option of meeting the requirement by providing wages or non-ERISA plan benefits such as paid vacation, paid sick leave, severance pay, etc.

The court interpreted the Maryland law as “impos[ing] [an] employee health or welfare mandate[,]” and on that ground ruled that it was preempted by ERISA. *Id.* at *9-*10. In this regard, it was similar to an old federal court of appeals case that had struck down a combined wage and benefits law that had required employers to provide a specific amount of health benefits, and had not allowed employers the flexibility to mix and match wages, non-ERISA benefits and ERISA benefits. *See General Electric Co. v. N.Y. State Dep’t of Labor*, 891 F.2d 25 (2d Cir. 1989).

The defenders of the Maryland law had argued that it was not actually a mandate, since employers had the option of paying a tax to the state rather than providing the mandated benefits. However, the court held that such an option did alter the basic fact that the law was a health benefits mandate. *Felder*, 2006 WL 2007654, at *12.

Regardless of whether the *Felder* court’s ruling is correct – and there are good reasons to question aspects of it – it does not change in any way the established law regarding combined wage and benefits laws: that “[A state or local government] can set a minimum cash wage, and allow an employer the option of paying part of that in benefits,” without triggering ERISA

preemption.” *Minnesota Chapter*, 47 F.3d at 980 (quoting *Keystone*, 37 F.3d at 961). Because the proposed Chicago ordinance mirrors the wage and benefits laws that have consistently been upheld by the federal appeals courts, there is little reason to fear that it would be preempted by ERISA.