CASE NOTES

S.D. Myers v. San Francisco: Satisfactory C's on the Domestic Partnership Benefits Report Card—The Constitutionality of Contingent City Contracts Under the Commerce Clause

I. INTRODUCTION

The plaintiff, S.D. Myers, Inc. (Myers), an Ohio-based corporation, filed an action challenging Chapter 12B of the San Francisco Administrative Code (Ordinance).[1] Myers alleged that limiting the award of City and County of San Francisco (City) contracts solely to contractors that provide nondiscriminatory benefits to registered domestic partners is invalid under the Commerce and Due Process Clauses of the United States Constitution, California law, and the Employee Retirement Income Security Act of 1974 (ERISA).[2] Myers rejected classification as an unresponsive bidder for failing to comply with the Ordinance and sought relief as the low bidder on the City construction contract.[3] Affording significant deference to the City's legislative authority, the district court entered summary judgment in favor of the City.[4] A de novo review by the United States Court of

1. *See* S.D. Myers v. City & County of S.F., 253 F.3d 461, 465 (9th Cir. 2001); *see also* SAN FRANCISCO, CA, ORDINANCE § 12B.1(b) (1997) (stating that no city contract shall be awarded or amended in favor of "any contractor that discriminates in the provision of bereavement leave, family medical leave, health benefits, membership or membership discounts, moving expenses, pension and retirement benefits or travel benefits as well as any [other] benefits" to the detriment of registered domestic partners); SAN FRANCISCO, CA, ORDINANCE § 12B.1(d) (1997) (delineating the scope of the ordinance to include contractor operations in San Francisco; contractor operations on real property either owned by San Francisco but outside the city limits, or on real property which the city has a contractual right to occupy; and in any other context where work is being performed for the city within the United States).

2. *See S.D. Myers*, 253 F.3d at 465.

3. *Id.* at 466; SAN FRANCISCO, CA, ORDINANCE § 12B.2 (stating that lowest bid contractors failing to certify intent to comply with the Ordinance shall have their bid rejected by the city); *see also* SAN FRANCISCO, CA, ORDINANCE § 12B.2(h) (1997) (stating that the City may impose, upon any party awarded a city contract, a $50 penalty per day for each employee affected by breach of the nondiscrimination requirements, and may terminate or suspend such breaching party's contract).

4. *See S.D. Myers*, 253 F.3d at 465.

Appeals for the Ninth Circuit failed to uncover the existence of any material fact which would have precluded summary judgment.[5] The Ninth Circuit *held* the Ordinance valid under the Commerce Clause, because the benefit of the City's indirect regulation outweighed the burden it imposed on commerce, and equally valid under the Due Process Clause, California law, and ERISA. *Myers v. San Francisco*, 253 F.3d 461, 471 (9th Cir. 2001).

II. BACKGROUND

Although the United States Supreme Court has thus far remained silent, the constitutional validity of a local government's extension of employee benefits to registered domestic partners has been continuously upheld in a majority of the jurisdictions which have considered the issue.[6] The constitutionality of predicating an award of city contracts on a contractor's nondiscriminatory benefits practices is, however, a matter of first impression yet to be addressed in any other jurisdiction.[7]

The Supreme Court, in *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, promulgated the "two-tiered approach" by which state attempts at regulation must be scrutinized under the Commerce Clause.[8] Tier one includes a state statute which "directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests."[9] State statutes fitting neatly into this first category have generally been struck down by the court without further investigation.[10] Tier two includes situations in which a particular state statute has "only indirect effects on interstate

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5. *Id.* at 466.

6. *See* Irizarry v. Bd. of Educ. of Chi., 251 F.3d 604 (7th Cir. 2001); Heinsma v. Vancouver, 29 P.3d 709 (Wash. 2001) (en banc); Lowe v. Broward County, 766 So. 2d 1199 (Fla. Dist. Ct. App. 2000); Slattery v. City of New York, 686 N.Y.S.2d 683 (N.Y. App. Div. 1999); Schaefer v. City & County of Denver, 973 P.2d 717 (Colo. Ct. App. 1998); City of Atlanta v. Morgan, 492 S.E.2d 193 (Ga. 1997).

7. *See generally* Robin Cheryl Miller, Annotation, *Validity of Governmental Domestic Partnership Enactment*, 74 A.L.R.5TH 439 (1999 Supp. 2000) (conducting a review of domestic partnership benefits caselaw, through September of 2000, indicating no other jurisdiction had yet addressed the constitutionality of contingent city contracts).

8. *See* 476 U.S. 573, 578 (1986). The plaintiff, a distiller selling several brands of liquor in New York and elsewhere, challenged New York's Alcoholic Beverage Control Law (ABC Law) requiring distillers to file price schedules with the State. *Id.* at 575. Distillers were required to ensure that stated prices were "no higher than the lowest price the distiller charges wholesalers anywhere else in the United States." *Id.* The Court found New York's ABC Law to be a direct regulation of interstate commerce, because it attempted to control sales in other states, and struck down the statute as facially invalid. *Id.* at 585.

9. *Id.* at 579.

10. *Id.*

commerce and regulates evenhandedly."[11] The constitutionality of a tier two statute remains wholly contingent upon the outcome of a balancing test, whereby the court examines "whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits."[12]

Therefore, the consequences of a tier one classification differ dramatically from those of tier two, in that tier one statutes are "virtually *per se* invalid" whereas under tier two the legislature is afforded a greater level of deference.[13] Complications have arisen, however, in that the *Brown-Forman* tiers are not mutually exclusive, and as such the task of the judiciary to determine the appropriate standard has become exceedingly difficult.[14] Given the uncertainty as to which standard is applicable, plaintiffs have typically challenged statutes as invalid under both tiers concurrently.[15]

In *C & A Carbone, Inc. v. Town of Clarkstown*, the Supreme Court attempted to clarify the rationale underlying the dormant Commerce Clause.[16] The foundation upon which the tier one inquiry rests is "to prohibit state or municipal laws whose object is local economic protectionism."[17] If protectionism was permitted to prevail, state and local entities "would excite those jealousies and retaliatory measures the Constitution was designed to prevent."[18] Furthermore, *C & A Carbone* is instructive insofar as the Court declared that when an "ordinance discriminates against interstate commerce, we need not resort to the [tier two] test."[19]

Tier one statutes include not only those which discriminate against interstate commerce, as was the case in *C & A Carbone*, but also those which directly regulate interstate commerce.[20] The Supreme Court has

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11. *Id.*
12. *Id.* (citing Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)).
13. *See id.*
14. *See id.*
15. *See id.*
16. *See* 511 U.S. 383 (1994). The plaintiff, a solid waste management company, sorts and bails bulk waste in Clarkstown, New York. *Id.* at 388. Carbone, having previously utilized less costly out-of-state processors, sought to enjoin a flow control ordinance which required it to process all waste at the local transfer station. *Id.* The Court held that "[s]tate and local government[] . . . use [of] regulatory power to favor local enterprise" discriminates against interstate commerce and is invalid under the Commerce Clause. *Id.* at 394.
17. *Id.* at 390.
18. *Id.*
19. *Id.*
20. *See, e.g.*, *Brown-Forman*, 476 U.S. at 579; *see also* NCAA v. Miller 10 F.3d 633, 638 (9th Cir. 1993) (emphasizing that any attempt to directly regulate interstate commerce "violates the Commerce Clause per se, and [] must [be struck] down without further inquiry").

instructed, in ascertaining what shall qualify as direct regulation, that "[t]he critical inquiry is [] the practical effect of the regulation."[21] Uncovering the practical effect is a twofold process that requires the evaluator to not only consider "the consequences of the statute itself, but also . . . how the challenged statute may interact with the legitimate regulatory regimes of other States," as well as the probability of other states adopting similar statutes.[22] In addition, one who elects to attack a statute on its face will have the increased burden of demonstrating that said statute has the practical effect of directly regulating interstate commerce in *all* contexts.[23]

The Supreme Court in *United States v. Salerno* instituted this heavy burden, stating that a facial challenger "must establish that no set of circumstances exists under which [an ordinance] would be valid."[24] Further muddying the waters, the Court more recently in *Planned Parenthood of Southeastern Pennsylvania v. Casey* adopted an alternative and arguably less stringent standard upon which to hold a law facially unconstitutional.[25] However, the applicability of the *Casey* standard outside the parameters of abortion statutes is unclear, as is the extent to which, if any, the Court's decision in *Casey* overruled the *Salerno* formulation.[26]

By contrast, the Court in *Pike v. Bruce Church, Inc.* elaborated on the standards to which a second-tier inquiry should adhere.[27] According to the Court, the goal is one of balance between the burdens and local

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21. *See* Healy v. Beer Inst., 491 U.S. 324, 336 (1989). The plaintiffs, a brewers' trade association and other major producers and importers of beer, challenged a Connecticut statute requiring prices of products sold to Connecticut wholesalers to be "no higher than the prices at which those products are sold in the bordering [s]tates." *Id.* at 324. The Court found that the Connecticut statute directly regulated interstate commerce, resulting in unconstitutional "extraterritorial effects" that are impermissible under the Commerce Clause. *Id.* at 342. *See also* Valley Bank of Nev. v. Plus Sys., Inc., 914 F.2d 1186, 1189-90 (9th Cir. 1990) (defining "direct regulation" as including instances in which state laws directly influence "transactions that 'take place across state lines' or entirely outside of the state's borders") (citation omitted).

22. *See Healy*, 491 U.S. at 336.

23. *See* United States v. Salerno, 481 U.S. 739, 745 (1987) (stating that the fact that an ordinance "might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid").

24. *Id.*

25. *See* 505 U.S. 833, 895 (1992) (holding a statute facially unconstitutional where it imposes an *undue burden* on an otherwise legitimate action in a *substantial proportion* of relevant cases).

26. *See* City of Chicago v. Morales, 527 U.S. 41, 55 n.22 (1999) (Stevens, J., concurring) (stating that the *Salerno* standard is no longer viable); *see also* Stenberg v. Carhart, 530 U.S. 914, 1019 (2000) (Thomas, J., dissenting) (declaring the *Salerno* "no set of circumstances" standard as the applicable standard in all cases, with the limited exception of peculiar First Amendment cases which mandate an alternate standard) (citations omitted).

27. *See* 397 U.S. 137, 142 (1970).

benefits of a particular state statute.[28] If burdens are found to be "clearly excessive in relation to the putative local benefits," the statute is invalid under the Commerce Clause.[29] Once a legitimate purpose is established "the question becomes one of degree [a]nd the extent of the burden that will be tolerated will of course depend upon the nature of the local interest involved."[30] When striking a balance, however, courts must keep in mind the fact that "the Supreme Court has frequently admonished that courts should not 'second-guess the empirical judgments of lawmakers concerning the utility of legislation.'"[31]

It is important to note that the Court, in *White v. Massachusetts Council of Construction Employers, Inc.*, though prior to its holding in *Brown-Forman*, delineated a market participation exception to the traditional Commerce Clause inquiry.[32] Under the market participant doctrine, a statute's "[i]mpact on out-of-state residents figures in the equation only after it is decided that the city is regulating the market rather than participating in it."[33] Stated differently, given the Court's holding in *Brown-Forman*, factfinders need not engage in the two-tiered analysis where state or local action more closely resembles that of a market participant and not a regulator.[34] However, classification problems arise not unlike those of the *Brown-Forman* tiers, given that no clear line exists for determining what constitutes market participation.[35]

Commerce Clause challenges are often coupled with ancillary arguments under the Due Process Clause of the Fourteenth Amendment, as well as arguments under state law and applicable federal statutes such as ERISA.[36] Under the Due Process Clause, "a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States."[37] However, a provision of an ordinance may constitute economic penalties only where such

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28. *Id.*
29. *Id.* (citation omitted).
30. *Id.*
31. Pac. Northwest Venison Producers v. Smitch, 20 F.3d 1008, 1017 (9th Cir. 1994).
32. *See* 460 U.S. 204, 210 (1983). At issue in *White* was the validity of an executive order limiting the award of city construction projects to contractors with "a work force consisting of at least half bona fide residents of Boston." *Id.* at 206 (footnote omitted). Siding with the City of Boston, the Court held that the city entered the market as a participant and is therefore not subject to Commerce Clause constraints. *Id.* at 215.
33. *Id.* at 210.
34. *See id.*
35. *See id.*
36. *See, e.g.*, U.S. v. Oakland Cannabis Buyers' Co-Op., 532 U.S. 483, 494 (2001); S. Cent. Bell Tel. Co. v. Alabama, 526 U.S. 160, 165 (1999).
37. BMW of N. Am., Inc., v. Gore, 517 U.S. 559, 572 (1996).

penalties are not "supported by the State's interest in protecting its own consumers and its own economy."[38]

Distinct standards apply when examining a particular issue under state law or federal statutes.[39] The Ninth Circuit held, in *Strother v. Southern California Permanente Medical Group*, that when addressing state law issues a federal court is bound by the prior decisions of the particular state's highest court.[40] Moreover, should no guidance exist on a particular matter, the court "must predict how the highest state court would decide the issue" utilizing all appropriate resources available.[41]

Equally important, to make an ERISA preemption claim, the party invoking federal jurisdiction must prove that they meet the case or controversy requirement promulgated in *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc*.[42] Two important elements of standing include: (1) that the plaintiff has suffered "injury in fact" traceable to the defendant and (2) that the harm would likely be redressed by a favorable decision.[43] The Court in *Larson v. Valente*, however, stated that "[the plaintiff] need not show that a favorable decision will relieve his *every* injury."[44]

III. THE COURT'S DECISION

In the noted case, the Ninth Circuit was asked whether Chapter 12B of the San Francisco Administrative Code (Ordinance) violated the Commerce Clause.[45] Following the protocol of analysis promulgated by the Supreme Court in *Brown-Forman*, the Ninth Circuit held an ordinance requiring city contractors to offer nondiscriminatory domestic partnership benefits as valid under the Commerce Clause.[46]

The court first assumed, without deciding, that the market participant doctrine was inapplicable because the City established and enforced the Ordinance in its capacity as a regulator.[47] Delivering the opinion of the court, Judge Wallace then turned his attention to the traditional *Brown-Forman* two-tiered Commerce Clause approach.[48]

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38. *Id.*
39. *See* Strother v. S. Cal. Permanente Med. Group, 79 F.3d 859, 865 (9th Cir. 1996).
40. *Id.* (citations omitted).
41. *Id.* (citations omitted).
42. *See* 528 U.S. 167, 180-81 (2000).
43. *Id.*
44. *See* 456 U.S. 228, 243-44 n.15 (1982) (emphasis in original).
45. *See* S.D. Myers v. City & County of S.F., 253 F.3d 461, 465 (9th Cir. 2001).
46. *Id.* at 469.
47. *Id.* at 467.
48. *Id.*

Consistent with this standard, Judge Wallace attempted to determine whether the Ordinance directly, under the first tier of inquiry, or indirectly, under the second tier, regulated interstate commerce.[49]

The Ninth Circuit, rejecting plaintiff Myers' facial challenge and flawed interpretations, held that the Ordinance did not constitute a direct regulation of interstate commerce.[50] Unlike classic state or local direct regulation, "the Ordinance contain[ed] no language explicitly or implicitly targeting either out-of-state entities or entities engaged in interstate commerce."[51] The court also emphasized the uniqueness of city ordinances, reasoning that local entities creating such regulation need not "actively engage in interstate commerce in order to function properly."[52] The court also accorded significant weight to the fact that contractors are subject to the Ordinance only after freely choosing to contract with the City.[53]

More importantly, the court narrowly construed the scope provision of the Ordinance, section 12B.1(d), which designates its applicability to situations in which "work is being performed by a contractor for the City within the United States."[54] In so doing, the court interpreted the Ordinance as requiring contractors to provide equal benefits only to: (1) those employees located in the City whether (a) working on City Contracts, or (b) performing work unrelated to City contracts; and (2) those employees located outside the City, working on City contracts.[55] The court qualified its narrow reading as constituting only one "set of circumstances" under which the Ordinance would be valid, and thereby facially constitutional given the *Salerno* formulation.[56]

Rounding out the tier one inquiry, the court examined the practical effect of the ordinance by analyzing "how the Ordinance [would] interact with the legitimate regulatory regimes of other state and local governments."[57] The primary objective of the Commerce Clause is to prevent interlocking or retaliatory local regulation.[58] Speculation, however, will not suffice and thus "the threat of such conflicting legislation [must be] both actual and imminent."[59] Therefore, given the

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49. *Id.*
50. *Id.* at 468.
51. *Id.*
52. *Id.*
53. *Id.* at 469.
54. *Id.* at 468.
55. *Id.* at 469.
56. *Id.* at 469 n.1 (citing United States v. Salerno, 481 U.S. 739, 745 (1987)).
57. *Id.* at 469.
58. *Id.* at 470.
59. *Id.* at 469-70.

absence of existing or pending conflicting legislation, the practical effect of the statute did not indicate an attempt at direct regulation.[60]

The court also refused to entertain plaintiff Myers' assertion that, even if the Ordinance was not facially invalid under tier one, the Ordinance violated the Commerce Clause under tier two because its burden on interstate commerce was "clearly excessive in relation to [its] putative local benefits."[61] Striking a balance in favor of the City, the court found that Myers had not adequately proven the existence of a clearly excessive burden.[62] In particular, Myers failed to show any reasonable "indication of the economic impact of the Ordinance on interstate commerce."[63] Thus, the Ordinance was held a constitutionally valid indirect regulation of interstate commerce under the second-tier of Commerce Clause inquiry.[64]

The court further found no merit in Myers' challenges under the Due Process Clause, California law, and ERISA.[65] Judge Wallace quickly disposed of the Due Process claim, stating that sanctions imposed upon violators of the Ordinance did not constitute "economic penalties."[66] Supporting this proposition, the court relied upon the fact that a contractor is subject to penalties, including fines, only after he "consents to be bound by its terms."[67] Should a contractor elect not to abide by the provisions of the Ordinance, he is free to seek his livelihood elsewhere.[68]

The Ninth Circuit resolved Myers' state law claim by looking to the Supreme Court of California's decision in *Associated Builders & Contractors, Inc. v. San Francisco Airports Commission*.[69] Although Myers contended that the Ordinance was invalid as it "regulat[ed] outside the geographic boundaries of the City,"[70] the court held that "the mode in which a city chooses to contract is a municipal affair."[71] As a result, the City's chosen mode of contracting, as delineated by the Ordinance, did not violate the California Constitution.[72]

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60. *Id.* at 470-71.
61. *Id.* at 471 (citing Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)).
62. *Id.*
63. *Id.*
64. *Id.* at 472.
65. *Id.*
66. *Id.* (citing BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 568 (1996)).
67. *Id.*
68. *See id.*
69. *Id.* at 474 (citing *Associated Builders*, 981 P.2d 499 (1999)).
70. *Id.* at 473.
71. *Id.* at 474 (quoting *Associated Builders*, 981 P.2d at 506).
72. *Id.*

Lastly, the court held that Myers did not have standing to bring an ERISA preemption claim.[73] Under the Ordinance, contractors were required to extend equal ERISA and non-ERISA benefits.[74] The Ninth Circuit determined that Myers' injury was not "actual or imminent," because Myers had declared that it would not be willing to extend non-ERISA benefits to the domestic partners of its employees.[75] Stated differently, had Myers succeeded in an ERISA claim, the City would still refuse Myers' bid on non-ERISA grounds. It is important to note, however, that Myers would have had standing for its ERISA preemption claim had it (1) denied non-ERISA benefits to all employees, or (2) extended only non-ERISA benefits to its employees' domestic partners.[76]

IV. ANALYSIS

It is no secret that married individuals in today's society enjoy numerous privileges unavailable to lesbian and gay domestic partners. Some of these benefits include access to spousal health and insurance coverage, inheritance rights, and societal recognition. In an effort to level the playing field, many local governments have established domestic partnership registries.

Currently, over forty U.S. cities maintain domestic partnership registries and more than ninety governmental employers offer domestic partnership benefits.[77] The City and County of San Francisco have opted not only to implement their own domestic partnership benefits program, but have also adopted a city contracting policy which promotes other public and private entities to provide equal benefits. The Ninth Circuit's decision will likely prove integral in the equal benefits movement, as its "constitutional stamp of approval" could persuade other state and local entities to adopt similar or identical contracting policies.

One must caution, however, that although the Ninth Circuit upheld the constitutionality of such practices the issue has yet to be addressed by other circuits, or more importantly the Supreme Court. Determining the applicability of the market participant exception, distinguishing between direct and indirect regulation, and implementing the balancing test are all

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73. *Id.* at 475.

74. *Id.* at 465. ERISA benefits include, but are not limited to, pension and retirement benefits, whereas non-ERISA benefits include bereavement leave and family medical leave, among others. *Id.* at 474.

75. *Id.* at 475.

76. *See id.*

77. *See* American Civil Liberties Union, *Domestic Partnerships: List of cities, states and counties*, *at* http://www.aclu.org/issues/gay/dpstate.html (last visited Jan. 24, 2002).

far from an exact science. Malleable standards serve as an invaluable tool in providing tailored results given particular circumstances, but they also give rise to greater uncertainty. Thus, in the absence of a bright-line rule, the Ninth Circuit's analysis of the Ordinance under the Commerce Clause is both prudent and consistent with existing precedent. However, much of Commerce Clause analysis is left to the subjective judgment of the factfinder, and as such, less socially progressive circuits may be apt to construe similar ordinances broadly. Until the Supreme Court acts as the final arbiter in this dispute, domestic partners can do little more than hope that the Ninth Circuit's holding remains the rule and does not become the exception.

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