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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

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