1-3-2017

Employers Resource Management Co. v. Ronk Appellant's Brief Dckt. 44511

Docket No. 44511

IN THE SUPREME COURT OF THE STATE OF IDAHO

EMPLOYERS RESOURCE MANAGEMENT COMPANY, an Idaho Corporation,

Plaintiff/Appellant,

-vs-

MEGAN RONK, in her capacity as Director of the IDAHO DEPARTMENT OF COMMERCE,

Defendant/Respondent.

APPELLANT'S BRIEF

Appeal from the District Court of the Fourth Judicial District Court
for Ada County, State of Idaho

The Honorable Samuel Hoagland, District Judge Presiding

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I.

NATURE OF THE CASE

In 2014, the Idaho Legislature enacted the Idaho Reimbursement Incentive Act, which delegated authority to an Economic Advisory Council ("EAC") within the Idaho Department of Commerce to grant tax subsidies to businesses that established an office in Idaho and created at least 20 new jobs. Under the Act, the EAC is granted broad discretion to grant or deny tax credits to businesses; the Act also strictly limits judicial review of agency action.

In 2016, the EAC granted a tax credit of $6.5 million to Paylocity, an Illinois Corporation. Paylocity is a direct competitor of Employers Resource Management Company, an Idaho Corporation ("Employers"). By providing a $6.5 million government subsidy to Paylocity, the EAC will cover a substantial portion of Paylocity's overhead and operating expenses, giving Paylocity a competitive advantage over Employers in attracting and servicing Idaho business. To compete with Paylocity, Employers will have to match or beat the fees Paylocity charges for its services, but without the benefit of a multi-million dollar government subsidy.

Employers filed this lawsuit, asserting standing as a business "competitor" aggrieved by arbitrary executive agency action, to challenge the Legislature's delegation of discretionary authority to the EAC to issue tax credits to selected Idaho businesses.

The Idaho Constitution empowers the Legislature, and it alone, to create tax policy for the state of Idaho and ensure the uniform application of Idaho's tax laws. The Legislature can delegate the administration of tax laws to executive agencies. However, by authorizing the EAC to waive taxes levied on selected companies, without strictly limiting the discretion that EAC exercises in selecting those companies, and by limiting judicial review of the EAC's decisions, the Legislature has abdicated its legislative taxing power and delegated it to an administrative body not elected by the people.

A. COURSE OF PROCEEDINGS

This appeal is taken from an order granting the Defendant's motion to dismiss for lack of standing and judgment thereon. Employers filed its Complaint on March 23, 2016. Defendant Megan Ronk is the Director of the Idaho Department of Commerce and was named in her official capacity in the Complaint. On May 4, 2016, the Defendant filed its Motion to Dismiss for lack of standing. On May 20, 2016, Employers filed its Opposition to the Defendant's motion. The Defendant's Reply Memorandum was filed on July 15, 2016. The Court set the motion for hearing on July 20, 2016. Employers filed a Motion for leave to file an Amended Complaint on May 26, 2016. At the hearing on July 20, 2016, the District Court granted ERMC's Motion to file an Amended Complaint. On July 26, 2016, the Order granting leave to file an amended complaint was entered by the Court and Employer's Amended Complaint was filed. On August 1, 2016, the Defendant renewed its Motion to Dismiss and a hearing was held on August 2, 2016.

At that hearing, the State objected to the inclusion of Paragraph 10 and the attached Exhibit A to the Amended Complaint, which the Court struck. At the conclusion of the hearing on the State's Motion to Dismiss, the Court took the matter under advisement and rendered its Memorandum Decision and Order Granting Motion to Dismiss for Lack of Standing on August 15, 2016. A judgment of dismissal was entered on August 15, 2016, from which this Appeal was taken. Notice of Appeal was filed and served on September 19, 2016.

B. STATEMENT OF FACTS

Article III, §1 of the Idaho Constitution provides: "The legislative power of the state shall be vested in a senate and house of representatives." Further, the Constitution provides that these powers are not to be exercised by any other branch of Idaho State Government. Article II, §1 states:

> The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial; and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others, except as in this constitution expressly directed or permitted.

The Idaho Constitution vests all taxing power in the Legislature. This plenary authority of the Legislature is not delegable, and the Idaho Constitution forbids a delegation of unrestricted and unguided taxing power.

The Legislature exercises its taxing power subject to Article VII, §5 of the Idaho Constitution, which states that "[a]ll taxes shall be uniform upon the same class of subjects[and] the legislature may allow such exemptions from taxation from time to time as shall seem necessary and just."

The Idaho Department of Commerce is an agency within the executive branch of Idaho State Government. Pursuant to Article II, §1 of the Idaho Constitution, all agencies within the executive branch are prohibited from exercising any of the powers reserved to the legislative or the judicial branch of Idaho State Government.

In 2014, the Idaho Legislature passed the Idaho Reimbursement Incentive Act ("IRIA"), which was then amended in 2015. The IRIA authorizes tax credits to be issued by the Director of the Department of Commerce to a qualified business entity. To qualify for the tax credit, a business entity files an application with the Department of Commerce. The application is reviewed by the Director to determine if all the information required by the statute is present. The completed application is then reviewed by an Economic Advisory Council ("EAC") within the Dept. of Commerce, whose members are appointed by the Governor. The EAC is established under Idaho Code §67-4704.

Section 67-4739 provides:

> (1) A business entity may claim a refundable tax credit for creating a minimum number of new jobs in the state of Idaho. In order to be considered for participation, an applicant or its designated representative must submit an application to the director and shall include:
>
> (a) A complete description of the proposed project and the economic benefit that will accrue to the state as a result of the project;
> (b) A description or explanation of whether the project will occur or how it will be altered if the tax credit application is denied by the council;
> (c) Proof of a community match;
> (d) A letter from the tax commission confirming that the applicant is in good standing in the state of Idaho and is not in unresolved arrears in the payment of any state tax or fee administered by the tax commission;
> (e) A detailed statement with an estimate of Idaho goods and services to be consumed or purchased by the applicant during the term;
> (f) Known or expected detriments to the state or existing industries in the state;
> (g) An anticipated project inception date and proposed schedule of progress;
> (h) Proposed performance requirements and measurements that must be met prior to issuance of the tax credit;
> (i) A detailed description of the proposed capital investment;
> (j) A detailed description of jobs to be created, an approximation of the number of such jobs to be created and the projected average wage to be paid for such jobs;
> (k) A detailed description of the estimated new state tax revenues to be generated by the project;
> (l) Identification of any individual or entity included within the application that is entitled to a rebate pursuant to section 63-3641 or 63-4408, Idaho Code, or is required to obtain a separate seller's permit pursuant to chapter 36, title 63, Idaho Code; and
> (m) The federal employer identification or social security number for each individual or entity stated as the business entity in the agreement.
>
> (2) Upon satisfaction by the director that all requirements are met pursuant to this chapter, the director shall submit such application to the council [Economic Advisory Council]. The council shall review the application, may request additional information and shall approve or reject the application. An approval or rejection from the council shall not be considered a contested case pursuant to chapter 52, title 67, Idaho Code; provided, however, that nothing in this section shall prohibit an aggrieved applicant from seeking judicial review as provided in chapter 52, title 67, Idaho Code.

(3) If the council approves the application, the council shall instruct the director to enter into an agreement with the applicant with the terms of the council's approval. If the council rejects an application, the applicant may reapply with a new application.

The only requirement that the Legislature included in Idaho Code §67-4739 for a business to obtain EAC approval of a tax credit application, apart from providing information to the Director of the Department of Commerce, is the creation of "new jobs." In order to claim the tax credit, an entity must create a minimum number of new jobs in the state of Idaho. "Minimum new jobs" is defined in Idaho Code §67-4738(11) as "not less than twenty (20) such jobs over the term of the project if created within a rural community, or not less than fifty (50) such jobs over the term of the project if created within an urban community."

Idaho Code §67-4739(1)(a) - (m) specifies information required to be provided as part of the tax credit application process. However, in enacting this statute, the Idaho Legislature did not establish standards, guidelines, or requirements as to how or whether this information is to be used in the process of approving an application for issuance of a tax credit. Further, the statute does not mandate that the EAC issue any required factual findings in support of the approval or disapproval of an applicant's request for a tax credit. Without standards -- objective or even subjective -- in place, decisions of the EAC are, for all practical purposes, exempt from meaningful substantive review by the judicial branch of Idaho State Government.

Idaho Code §67-4739 gives the EAC discretion to grant or deny an application based on its subjective determination of a business's qualifications. The only requirement that is even potentially objective is the required number of "new jobs" that a business must create in order to qualify for the tax credit. But even that requirement is subject to the Department's determination that the jobs are in fact "new" and not simply renamed or artificially generated in some other way. What is more to the point is that creating "new jobs" is not the sole or determining factor for receipt of a tax credit. The EAC retains absolute discretion over other factors that are entirely subjective. For example, Idaho Code §67-4739(1) requires an applicant to provide the following:

> (a) A complete description of the proposed project and the economic benefit that will accrue to the state as a result of the project;
> (c) Proof of a community match;
> (f) Known or expected detriments to the state or existing industries in the state;
> (k) A detailed description of the estimated new state tax revenues to be generated by the project.

While the Code specifies the categories of information that are to be provided, no standards, guidelines, or rules are set out as to how the information is to be used or evaluated by the EAC. Its determination as to whether an applicant is entitled to a tax credit is totally subjective and within the EAC's administrative discretion. It is therefore not subject to any meaningful judicial review.

EAC's conclusion that an entity qualifies for a tax credit is at once arbitrary and capricious, in that the EAC alone evaluates all of the information submitted, without any required objective criteria for that evaluation, and without any required findings of fact to support its decision. Thus, the EAC has virtually unlimited discretion to grant or deny any business's application, regardless of the quality and content of the information submitted.

Idaho Code §§67-4704(1) and (2) limit the duty of the Director of the Department of Commerce to determining whether the application is complete. If it is, the Director must submit the application to the EAC, whose decision to grant or deny a tax credit is conclusive.

Although provision has been made for judicial review of a rejected application by the aggrieved applicant, the law provides that a denial is not considered a "contested case," and the law with regard to appeal of an administrative agency decision requires the court to defer to the agency's exercise of discretionary authority. Ergo, as a practical matter, an aggrieved applicant has no genuine judicial remedy for arbitrary agency action.

The only purported limit on the EAC's discretionary authority to grant a tax credit to a business is the requirement that a business entity create "new jobs." Even as to that one requirement, however, the Idaho Legislature failed to enact any "standards, guidelines, restrictions or qualifications" in the IRIA. As a result, the EAC is the final arbiter with regard to whether an entity qualifies for or is denied favorable tax treatment. Without any objective standards and requirements, the exercise of EAC's grant of authority is subject to political favoritism, corruption and cronyism.

Plaintiff Employers Resource Management Company, an Idaho Corporation ("Employers"), is one of Idaho's top privately-held companies. Recently, the EAC granted one of Employer's competitors, Paylocity, an Illinois company, a 28% credit against its future tax liabilities in return for its promise to create "new jobs" in Boise. The estimated tax credit granted to Paylocity by the EAC is approximately $6,500,000.

The State of Idaho's grant of a massive tax break to Paylocity has given it an unfair economic advantage over Employers, including the ability to lure employees away from Employers. Employers has and will suffer damages as a direct and proximate result of the actions of the State Department of Commerce alleged herein. Those damages include the following:

a) Paylocity is a web-based company. In anticipation of the web requirements to effectively compete against Paylocity in Idaho, Employers has incurred additional expenses for internet competitive software;
b) Since Paylocity's receipt of tax credits is based in part on the number of employees it hires, Employers expects that its key employees will be targeted by Paylocity because of their training, experience, and familiarity with Employers' existing

Idaho customer base. Employers will incur additional expense in salaries and other benefits to retain its key employees;

c) Employers anticipates the need to protect its existing Idaho business since Paylocity can afford to undercut Employers pricing, in part due to its favorable tax treatment. Employers will incur additional expenses in advertising and marketing expenses to retain its clients, but will have to reduce the amount charged for its services to compete with Paylocity.

C. ISSUES PRESENTED ON APPEAL

1. **Whether the district court erred in its interpretation and application of "competitor standing" in this case.**
2. **Whether Employers established its standing in this action by alleging an injury in fact, fairly traceable to the action of the Economic Advisory Council, redressable by this action.**

D. SUMMARY OF ARGUMENT

Article VII, §5 of the Idaho Constitution provides that "[a]ll taxes shall be uniform upon the same class of subjects ... [and] the legislature may allow such exemptions from taxation from time to time as shall seem necessary and just."

Idaho State Government cannot interfere with the private market to un-level the playing field to favor one business at the expense of its competitors. The Idaho Constitution empowers the Legislature to enact exemptions that encourage competition in the marketplace. But government cannot selectively legislate tax breaks for favored companies. It cannot pick winners and losers among businesses. The Legislature has constitutional authority to enact tax laws that benefit businesses generally. But it cannot delegate that constitutional authority to an administrative agency by granting it unfettered discretion to choose which company benefits from tax breaks.

The Idaho Reimbursement Incentive Act ("IRIA") does precisely that. The Legislature created a list of criteria that are to be considered by the Department of Commerce's Economic

Advisory Council, but apart from the one requirement that a business create a minimum number of "new jobs," the EAC has absolute discretion to grant or deny any application for a tax credit. That discretion allows the EAC to play favorites -- to pick "winners and losers" among Idaho businesses on an arbitrary basis.

Employers is one of Idaho's top 75 privately held businesses, providing corporations with employee benefit services. Paylocity, an Illinois business offering similar services, received a \$6.5 million tax credit for agreeing to relocate its business to Idaho and compete with Employers for the same pool of business. The EAC's action in granting a tax credit to Paylocity allows it to provide the same services that Employers already provides at a substantially reduced cost, putting Employers at a severe competitive disadvantage.

II.

ARGUMENT

A. EMPLOYERS HAS STANDING TO COMPLAIN ABOUT THE STATE'S SUBSIDIZATION OF ITS BUSINESS COMPETITOR

1. Employers has suffered an injury in fact, fairly traceable to the EAC's action in granting a tax subsidy to Paylocity, its business competitor.

Employers initiated this lawsuit because the Idaho Department of Commerce exercised its discretionary authority under the Tax Reimbursement Incentive Act to grant a subsidy in the form of a tax credit to Paylocity, a direct competitor of Employers. The Complaint also alleges that the action of EAC in granting that tax credit will directly injure Employers by giving Paylocity an unfair economic advantage over Employers, which it can use to undercut Employer's pricing, lure its employees away, and can devote its tax savings to marketing and advertising expenses to compete for Employer's customers. (Clerk's Record "CR" p. 65, Complaint, ¶¶ 8-11.)

B. THE LEGAL STANDARD.

Idaho Code § 10-1202 provides:

> Any person . . . whose rights, status or other legal relations are affected by a statute . . . may have determined any question of construction or validity arising under the . . . statute, . . . and obtain a declaration of rights, status or other legal relations thereunder.

However, "[t]he [Uniform] Declaratory Judgment Act does not relieve a party from showing that it has standing to bring the action in the first instance." *Schneider v. Howe,* 142 Idaho 767, 772, 133 P.3d 1232, 1237 (2006).

The standard for standing was set forth in *Young v. City of Ketchum*, 137 Idaho 102, 103, 104, 44 P.3d 1157, 1159 (2002):

> Standing focuses on the party seeking relief and not on the issues the party wishes to have adjudicated. *Van Valkenburgh* at 124, 15 P.3d at 1132; *Boundary Backpackers v. Boundary County,* 128 Idaho 371, 375, 913 P.2d 1141, 1145 (1996) (quoting *Miles* at 639, 778 P.2d at 761). To satisfy the case or controversy requirement of standing, a litigant must allege or demonstrate an injury in fact and a substantial likelihood the relief requested will prevent or redress the claimed injury. *Id.* (citations omitted). This requires a showing of a distinct palpable injury and fairly traceable causal connection between the claimed injury and the challenged conduct. *Miles* at 639, 778 P.2d at 761 (internal quotations omitted).

A court may grant a motion to dismiss for failure to state a claim under I.R.C.P. 12(b)(6) only when it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle it to relief. *Harper v. Harper,* 122 Idaho 535, 536, 835 P.2d 1346, 1347 (Ct. App. 1992). As a practical matter, a dismissal under Rule 12(b)(6) is likely to be granted only in the unusual case in which the complaint includes allegations showing on the face of the complaint that there is some insurmountable bar to relief. *Id.* The issue is not whether the plaintiff will ultimately prevail, but whether the party is entitled to offer evidence to support the claims. *Losser v. Bradstreet,* 145 Idaho 670, 673, 183 P.3d 758, 761 (2008). "A motion to dismiss must be resolved solely from the pleadings and all facts and inferences from the record are viewed in favor of the non-moving party." *Taylor v. McNichols,* 149 Idaho 826, 832-33, 243 P.3d 642, 648-49 (2010).

Employers alleged facts in its Complaint that met the jurisdictional requirements for standing.

C. EMPLOYERS HAS COMPETITOR STANDING BASED ON INJURY RESULTING FROM THE AGENCY'S ACTION THAT BENEFITTED ITS COMPETITOR.

The lower court ruled that Employers did not have standing because (1) Employers did not have a protected legal interest in the marketplace; (2) the government action was directed at third parties, for the purpose of increasing competition, and not at Employers; and (3) Employers alleged only a possibility that competition against it would increase and it would be harmed.

With regard to the holding (1) that Employers did not have a "protectable legal interest in the marketplace" because the tax credit granted to Paylocity did not directly injure Employers, (CR, p. 81, *Memorandum Decision, p. 6),* there are a number of problems. First, whether Paylocity's receipt of a tax credit will cause economic injury to Employers is a question of fact that has yet to be litigated. Second, the test for standing is whether an injury in fact is "fairly traceable to the actions of the government," not whether the government action is directed at the injured party. Third, the question whether Employers has a protectable legal interest goes to the merits, not to the issue of standing, as noted in *Sherley v Sebellius,* 610 F.3d 69, 72 (D.C. Cir. 2010), vacated on other grounds by 644 F.3d 388:

> The requirement of a protected competitive interest, however "goes to the merits" of a plaintiff's claim, not to his Article III standing. See *Ass'n of Data Processing Serv. Orgs Inc. v. Camp.* 397 US. 150.

As for (2), regarding the holding that the agency's action was directed at third parties and not at Employers, the rules of standing do not have any such limitation. If agency action has the purpose and effect of manipulating the marketplace to aid the plaintiff's competitor, federal courts have held that the aggrieved business may assert "competitor standing."

Contrary to the district court's ruling in the present case that agency action must be directed at the complaining party to be actionable, "competitor standing" has been successfully asserted with regard to agency action directed at a plaintiff's competitor. The court in *Sherley v. Sebelius, supra at 72,* declared:

> The doctrine of competitor standing addresses the first requirement by recognizing that economic actors " suffer [an] injury in fact when agencies lift regulatory restrictions on their competitors or otherwise allow increased competition" against them. *La. Energy & Power Auth. v. FERC,* 141 F.3d 364, 367 (D.C.Cir.1998); *accord New World Radio, Inc. v. FCC,* 294 F.3d 164, 172 (D.C.Cir.2002) ("basic law of economics" that increased competition leads to actual injury); *see also Canadian Lumber Trade Alliance v. United States,* 517 F.3d 1319, 1332 (Fed.Cir.2008) (doctrine of competitor standing " relies on economic logic to conclude that a plaintiff will likely suffer an injury-in-fact when the government acts in a way that increases competition or aids the plaintiff's competitors"). The form of that injury may vary; for example, a seller facing increased competition may lose sales to rivals, or be forced to lower its price or to expend more resources to achieve the same sales, all to the detriment of its bottom line. ***Because increased competition almost surely injures a seller in one form or another, he need not wait until "allegedly illegal transactions ... hurt [him] competitively" before challenging the regulatory (or, for that matter, the deregulatory) governmental decision that increases competition.*** *La. Energy,* 141 F.3d at 367. (emphasis added).

Moreover, while increasing competition in general may be a laudable goal, an agency cannot pursue that goal by granting preferences to some businesses based on subjective criteria.

That is an abuse of its constitutional authority and constitutes usurpation of the power of the Legislature. An administrative agency cannot pick winners and losers among similar businesses.

The United States Supreme Court has applied the doctrine of competitor standing to the claims of an Idaho company harmed by federal executive action on tax policy that benefitted its competitors. In *Clinton v. City of New York,* 524 U.S. 417, 426-27, 118 S. Ct. 2091 (1998), the Court held that Snake River Potato Growers, Inc., an Idaho cooperative, had "competitor standing" to challenge the President's cancellation of a tax benefit that put Snake River at a disadvantage with its competitors. The Supreme Court discussed the application of the doctrine to Snake River as follows:

> Appellee Snake River Potato Growers, Inc. (Snake River) was formed in May 1997 to assist Idaho potato farmers in marketing their crops and stabilizing prices, in part through a strategy of acquiring potato processing facilities that will allow the members of the cooperative to retain revenues otherwise payable to third-party processors. At that time, Congress was considering the amendment to the capital gains tax that was expressly intended to aid farmers' cooperatives in the purchase of processing facilities, and Snake River had concrete plans to take advantage of the amendment if passed. Indeed, appellee Mike Cranney, acting on behalf of Snake River, was engaged in negotiations with the owner of an Idaho potato processor that would have qualified for the tax benefit under the pending legislation, but these negotiations terminated when the President canceled §968. Snake River is currently considering the possible purchase of other processing facilities in Idaho if the President's cancellation is reversed. Based on these facts, the District Court concluded that the Snake River plaintiffs were injured by the President's cancellation of §968, as they "lost the benefit of being on equal footing with their competitors and will likely have to pay more to purchase processing facilities now that the sellers will not [be] able to take advantage of section 968's tax breaks. *Id.*, at 177. *City of New York v. Clinton*, 985 F. Supp. 168, 177 (D.D.C. 1998).

The President's action in cancelling IRS Code §968 was not directed at Snake River, but the Idaho company had competitor standing because it was directly injured by the loss of the tax benefit. The Court noted:

> The Snake River farmers' cooperative also suffered an immediate injury when the President canceled the limited tax benefit that Congress had enacted to facilitate the acquisition of processing plants. Three critical facts identify the specificity and the importance of that injury. First, Congress enacted § 968 for the specific purpose of providing a benefit to a defined category of potential purchasers of a defined category of assets. The members of that statutorily defined class received the equivalent of a statutory "bargaining chip" to use in carrying out the congressional plan to facilitate their purchase of such assets. Second, the President selected §968 as one of only two tax benefits in the Taxpayer Relief Act of 1997 that should be canceled. The cancellation rested on his determination that the use of those bargaining chips would have a significant impact on the federal budget deficit. Third, the Snake River cooperative was organized for the very purpose of acquiring processing facilities, it had concrete plans to utilize the benefits of §968, and it was engaged in ongoing negotiations with the owner of a processing plant who had expressed an interest in structuring a tax-deferred sale when the President canceled § 968. Moreover, it is actively searching for other processing facilities for possible future purchase if the President's cancellation is reversed; and there are ample processing facilities in the State that Snake River may be able to purchase. By depriving them of their statutory bargaining chip, the cancellation inflicted a sufficient likelihood of economic injury to establish standing under our precedents. See, *e. g., Investment Company Institute v. Camp,* 401 U.S. 617, 620 (1971); 3K. Davis & R. Pierce, Administrative Law Treatise 13-14 (3d ed. 1994) ***("The Court routinely recognizes probable economic injury resulting from [governmental actions] that alter competitive conditions as sufficient to satisfy the [Article III 'injury-in-fact' requirement] . . . .[i]t follows logically that any . . . petitioner who is likely to suffer economic injury as a result of [governmental action] that changes market conditions satisfies this part of the standing test").*** (emphasis added)

Id. at 432-33.

In *United States Telecom Association v. Federal Communications Commission,* 295 F.3d 1326, 1331 (D.C. Cir. 2002), the court held that U.S. Telecom Association ("USTA") members had standing to challenge an FCC order directed at its competitor, the Iowa Communications Network, finding it was a common carrier and therefore eligible for federal subsidies to provide discounted telecommunication services in competition with USTA. The court stated:

> USTA contends that the FCC's order injures its members by making ICN eligible for a subsidy that permits it to offer lower prices for the same telecommunications services. We have repeatedly recognized that parties "suffer constitutional injury in fact when agencies . . . allow increased competition" against them. *Louisiana Energy & Power Auth. v. FERC,* 141 F.3d 364, 367 (D.C. Cir. 1998); *see, e.g., Wabash Valley Power Ass'n v. FERC,* 268 F.3d 1105, 1113 (D.C. Cir.2001); *MD Pharm., Inc. v. Drug Enforcement Admin.,* 133 F.3d 8, 11 (D.C. Cir. 1998). And we have likewise recognized that regulatory decisions that permit subsidization of some participants in a market can have the requisite injurious impact on those participants' competitors. *See Exxon Co., U.S.A, v. FERC,* 182 F.3d 30, 43 (D.C. Cir. 1999); *Liquid Carbonic,* 29 F.3d at 701.

Because the *US Telecom* case was decided by summary judgment motion rather than by judgment on the pleadings, USTA had submitted member affidavits showing that it was ready, willing and able to compete with ICN. The court remarked that these affidavits were sufficient to satisfy the remaining two requirements of constitutional standing, noting:

> [T]he competitive injury suffered by USTA's members is fairly traceable to the FCC's decision to render ICN eligible for the subsidy, and that injury would likely be redressed by a favorable decision of this court vacating the FCC's order. *See High Plains Wireless, L.P. v. FCC,* 276 F.3d 599, 605 (D.C. Cir. 2002); *Exxon,* 182 F.3d at 43; *Liquid Carbonic,* 29 F.3d at 701. We therefore conclude that USTA has constitutional standing to seek judicial review of the order on behalf of its members.

Id. at 1331.

In the present case, the EAC granted a tax credit to Paylocity. If that tax credit were withdrawn, Employer's injury would be redressed because both entities would be competing with each other on equal economic terms.

The district court also found that Employers lacked standing because (3) it alleged only a possibility that competition against it would increase and that it would be harmed. The Federal Court of Appeals rejected this limitation on standing in *Sherley v. Sebelius, supra:*

> This mere possibility of injury does not establish competitor standing, argues the Government, which, as did the district court, reads our cases to require that a plaintiff asserting competitor standing show a challenged agency action will "almost surely cause [him] to lose business." *El Paso,* 50 F.3d at 27.
>
> As the parties' arguments demonstrate, our cases addressing competitor standing have articulated various formulations of the standard for determining whether a plaintiff asserting competitor standing has been injured. Regardless how we have phrased the standard in any particular case, however, **the basic requirement common to all our cases is that the complainant show an actual or imminent increase in competition, which increase we recognize will almost certainly cause an injury in fact**.

Sherley, 610 F.3d at 75. (emphasis added).

The district court below rendered its decision based on the pleadings. No affidavits or other evidence were considered by the court. In its Complaint and Amended Complaint, Employers alleged that the agency's grant of a tax credit to Paylocity, its competitor, would increase competition for business on terms favorable to Paylocity and unfavorable to Employers, which constituted an imminent and actual threatened injury.

Employers alleged:

> 1. Plaintiff Employers Resource Management Company, an Idaho Corporation, ("Employers Resource") is one of Idaho's top privately-held companies. Recently, the EAC granted Paylocity, an Illinois company, and one of Employers' Resource competitors, a 28% credit against its future tax liabilities in return for its promise to create 'new jobs' in

> Boise. The estimated tax credit granted to Paylocity by the EAC is approximately $6,500,000.
>
> 2. The State of Idaho's grant of a massive tax break to Paylocity has given it an unfair economic advantage over Employers' Resource, including the ability to lure employees away from Employers' Resource.
>
> 3. Employers Resource has and will suffer damages as a direct and proximate result of the actions of the State Department of Commerce alleged herein. Those damages include the following:
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> > a) Paylocity is a web-based company. In anticipation of the web requirements to effectively compete against Paylocity in Idaho, Employers Resource has incurred additional expenses for internet competitive software;
> >
> > b) Since Paylocity's receipt of tax credits is based in part on the number of employees it hires, Employers Resource expects that its key employees will be targeted by Paylocity because of their training, experience, and familiarity with Employers' existing Idaho customer base. Employers will incur additional expense in salaries and other benefits to retain its key employees;
> >
> > c) Employers anticipates the need to protect its existing Idaho business since Paylocity can afford to undercut Employers' pricing, in part due to its favorable tax treatment. Employers will incur expenses in advertising and marketing expenses to retain its clients.

(CR., pp. 41-42).

The Federal Court of Appeals held in *Sherley* that the two doctors had competitor standing when the agency promulgated new guidelines that authorized the agency to fund more research projects. The agency action was not directed at the two doctors, but they suffered an "injury in fact" because the agency action meant increased competition for a limited number of grants. Just like those two doctors, Employers will clearly face increased competition in Idaho from Paylocity's entry into the marketplace with government assistance. That fact satisfies the standing requirement of an "injury in fact."

D. IDAHO CASE LAW ON "COMPETITOR STANDING" IS CONSISTENT WITH THE PRINCIPLES ESTABLISHED BY FEDERAL COURT PRECEDENT.

1. Idaho's legal standard for standing mirrors the federal legal standard.

Prior to the present case, Idaho courts have not been presented with facts that have justified a finding that the plaintiff had "competitor standing." However, in virtually every other application of standing rules, Idaho courts have applied the same principles as the federal courts. Idaho's legal standard for standing is set out in *Boundary Backpackers v. Boundary County,* 128 Idaho 371, 375, 913 P.2d 1141, 1145 (1996). The Court noted:

> In *Miles v. Idaho Power Co.,* 116 Idaho 635, 778 P.2d 757 (1989), the Court stated three basic propositions concerning standing that guide our decision here:
>
> 1. "The doctrine of standing focuses on the party seeking relief and not on the issues the party wishes to have adjudicated."
>
> 2. "[T]o satisfy the case or controversy requirement of standing, litigants generally must allege or demonstrate an injury in fact and a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury."
>
> 3. "[A] citizen and taxpayer may not challenge a governmental enactment where the injury is one suffered alike by all citizens and taxpayers of the jurisdiction."

Id. at 641, 778 P.2d at 763.

In the federal courts, a three-part test governs whether a dispute presents a "case or controversy" sufficient for Article III standing: (1) "the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical"; (2) "there must be a causal connection between the injury and the conduct complained of"; and (3) "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Doran v. 7-Eleven,* *Inc.*, 524 F.3d 1034, 1039 (9th Cir. 2008) (quoting *Lujan*, 504 U.S. at 560-61 (internal quotation marks omitted)).

Although couched in slightly different terms, the federal and state standards are virtually identical. Both require an "injury in fact" and a "likelihood that judicial relief will redress the injury." Idaho courts and the federal courts also require a causal connection between the challenged action and the injury. The plaintiff's injuries must be different than injuries suffered by all citizens and taxpayers in the jurisdiction.

2. "Competitor standing" flows directly from standing principles applied by Idaho courts.

The federal courts did not create a new body of law or depart from established standing rules to formulate the rule of "competitor standing." The rule flowed directly from the application of the universally applied standing rules to facts that showed government action causing injury to a plaintiff, different from injuries suffered by citizens and taxpayers in general.

The facts shown in the present case support a similar determination, that Employers has "competitor standing" to complain of the EAC's action in granting a tax subsidy to Employers' competitor, Paylocity. The lower court correctly noted that *Martin v. Camas County,* 150 Idaho 508, 248 P.3d 1243 (2011), stated that Idaho courts have not yet recognized "competitor standing." But the *Martin* facts are not remotely similar to the present case, and *Martin* is therefore readily distinguished. First, *Martin* was a challenge to a zoning amendment applicable to undeveloped properties throughout the County. Martin argued that upzoning other properties placed his property at a competitive disadvantage because it increased the supply of developable properties. The Court in *Martin* noted:

> None of the parcels that Martin owns -- or holds contractual interests in -- were downzoned as a result of the 2008 zoning amendments. Martin's argument concerning the palpable harm he

> has suffered seems to be that: (1) the upzoning of property Martin has no interest in, which is located in Camas County, decreases the value of the property that Martin owns or holds an interest in; and (2) the 2008 zoning amendments prevent Martin from developing the properties he owns, or in which he holds an interest, in the same manner that he would have been able to prior to the 2007 and 2008 zoning amendments.
>
> Martin cites to no authority in support of his argument that a comprehensive county-wide change in zoning designations (wherein some parcels of land receive a higher zoning density classification than they previously enjoyed) constitutes an injury to a property owner, absent some resultant specific and traceable harm. Martin argues that the upzoning of approximately 20,000 acres of property in Camas County will decrease the value of his property for development, because of the increase in supply. Martin contends that *Ameritel Inns, Inc. v. Greater Boise Auditorium District,* 141 Idaho 849, 119 P.3d 624 (2005), stands for the proposition that an increase in competition may constitute a particularized injury.

Id. at 513, 748 P.3d at 1248.

In the present case, the agency action is not action directed at all businesses or the public generally. The EAC action specifically benefitted one business entity, Paylocity, Employers' competitor. Employers has not alleged that government action has altered the marketplace by increasing competition generally and equally for everyone, but that the government has subsidized Employers' competitor so that Paylocity can compete against Employers from an advantageous position artificially created by the State. This is a particularized injury unique to Employers.

With regard to the lower court's statement that competitor standing exists only when a successful challenge will set up an absolute bar to competition, Employers asserts that a successful challenge to the EAC's grant of a tax credit to Paylocity will achieve the end that Paylocity would have to compete with Employers on an equal basis, without government subsidy.

While Martin had only a generalized grievance based on speculation, Employers has alleged a specific harm to it fairly traceable from the action of the State that subsidized Paylocity, its competitor. These facts place Employer's claims in the category that the Idaho Supreme Court in *Coeur D'Alene Tribe v. Denney,* No. 43169, 2015 Idaho Lexis 294 (Nov. 20, 2015), noted would have demonstrated a "distinct and palpable injury" sufficient to confer standing.

In that case, the Court reiterated the *Martin v. Camas County* holding that "increased competition alone is insufficent to confer standing," but then clarified that if the tribe had pointed to facts "to show actual or imminent losses of profit or rights greater than the average citizen," the tribe would have demonstrated a "distinct and palpable" injury sufficient to confer standing.

The rationale applied by the Idaho Supreme Court in the *Coeur d'Alene Tribe* case is consistent with the "competitor standing" rules formulated by the United States Supreme Court in *Clinton* and followed by other federal courts in *Sherley* and *U.S. Telecom.*

In *Clinton,* the Court held that Snake River Farms had standing to bring a claim challenging action by the executive branch of the federal government that placed it at a disadvantage with its competitors. In the present case, the executive branch of the State of Idaho, the Department of Commerce, has taken action that has put Employers at an economic disadvantage with one of its competitors.

In both *Clinton* and this case, the legislative branch of government has created a tax benefit that was supposed to be available to all companies. In this case, the Idaho Legislature invested the Department of Commerce with so much discretion in the administration of the law that its actions exceed its constitutional authority.

Here, the Legislature enacted the IRIA, which delegates so much discretion to the executive agency that its implementation is entirely arbitrary and capricious. In this case, the Department of Commerce has used that discretion to put Employers at a competitive disadvantage *vis a vis* its competitor, Paylocity, by granting Paylocity a government tax subsidy.

III.

CONCLUSION

Based on the foregoing, Employers has standing to bring this action, and this Court should reverse the decision of the district court, and remand this action for consideration of the merits of Employers' claims.

Respectfully submitted this 3rd day of January, 2017.

EBERLE, BERLIN, KADING, TURNBOW
& McKLVEEN, CHARTERED

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing document was served upon the following attorney(s) this 3rd day of January, 2017, as indicated below and addressed as follows:

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