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

Supreme Court No. 44511

APPELLANT'S REPLY BRIEF

Appeal from the District Court of the Fourth Judicial District Court
for Ada County, State of Idaho
Case No. CV OC 1605467

The Honorable Samuel Hoagland, District Judge Presiding

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I.

THE STATE'S THESIS IMPERMISSIBLY INSULATES THE IDAHO REIMBURSEMENT INCENTIVE ACT FROM JUDICIAL REVIEW IN VIOLATION OF STANDING PRINCIPLES

It is a fundamental principle of American jurisprudence that for every wrong there is a remedy. But the State argues, in effect, that, in this case, no one has standing to challenge the constitutionality of the Idaho Reimbursement Incentive Act. The State's brief does not contain a single example of a person or entity who would have standing to challenge the Act. There is a good reason for that omission. The State's reasoning leaves no room for any challenge. The State certainly is not in a position to challenge the validity of the law. Taxpayers and the general public have no right to challenge it. The business entity applying for benefits under the law cannot challenge its validity. If the business is granted the benefits of the law, it has no reason to challenge it. If a business filed an application that was denied, it would be limited to the statute's impotent judicial review provisions, which defer entirely to the judgment and discretion of the administrative agency. Once availing itself of the statute's provisions, a disgruntled applicant could appeal a denial, but could not challenge the validity of the law. The courts do not recognize "Sour Grapes" standing.

The only entity left that could conceivably challenge this law is an entity that has not submitted to the administrative process -- a business affected by the government providing aid to its competitor to compete more effectively against it. But the State's position in this case forecloses those business entities from the courts as well. Under our Constitution, no law can be written that is immune from judicial review. No law can stand that may never be challenged or reviewed by the Court.

The Separation of Powers and our system of constitutional checks and balances operate only if each branch has authority. The courts must have the ability to review and assess the constitutionality of laws passed by the legislature and administered by the executive branch. The legislature cannot pass a law that is unreviewable by the Court. This Court therefore has relaxed standing requirements in cases in which rigid application of the rules would foreclose judicial review. *See Koch v. Canyon County,* 145 Idaho 158, 162, 177 P.3d 372, 376 (2008), in which the Court granted taxpayers standing to challenge a lease agreement on grounds that it violated Article VIII, Section 3 of the Idaho Constitution. The Court reasoned that "[t]he parties agreed that other than taxpayers no person had standing. If no party was held to have standing the constitutional provision would effectually be deleted, as violations of that provision would be beyond judicial review." *Id.* at 162, 177 P.3d at 376.

Similarly, in *Miles v. Idaho Power Co.,* 116 Idaho 635, 642, 778 P.2d 757, 764 (1989), the Court refrained from imposing rigid standing requirements in order to allow ratepayers to challenge legislation enacted as a result of an agreement between Idaho Power and the State where the legislation affected a large number of citizens economically, but not the general public. The Court observed:

> When the impact of legislation is not felt by the entire populace, but only by a selected class of citizens, the standing doctrine should not be evoked to usurp the right to challenge the alleged denial of constitutional rights in a judicial forum.

Thus, there must be a scenario in which a business entity adversely affected by state action to aid its competitor has standing to challenge the constitutionality of that action. The State's argument tacitly concedes as much in arguing that even if a business entity such as Employers could have standing to challenge this law, Employers does not have standing in this case because it was not harmed enough, or because its injuries were too remote. But those questions are entirely dependent upon the facts. It is undisputed that Employers will be harmed by Paylocity's receipt of a massive tax break. The questions are what form will the injuries take, what are the extent of Employers' injuries, and how soon will they occur. That is, are the injuries serious, imminent and concrete. These questions require a factual inquiry. But the lower court did not hold an evidentiary hearing to flesh out the record on Employers' damage claims. Employers' suit was dismissed on the pleadings. Moreover, the court struck paragraph 10 from the Amended Complaint, which alleged facts regarding Paylocity's relocation to Idaho. In doing so, the court held that this additional information "would not have impacted the outcome of the decision." (Memorandum Decision, p. 9.) In effect, the district court held that there were no factual circumstances that would provide standing to Employers to complain about this legislation or its implementation.

If this Court finds that the principles of standing and necessity for judicial review mandate that a business entity adversely affected by the Idaho Reimbursement Incentive Act have a right to judicially challenge the law, this case should be remanded for an evidentiary hearing to complete a factual record regarding Employers' damages.

II

THE STATE MISCONSTRUES EMPLOYERS' CLAIMS BY CONFUSING THE LEGITIMATE PURPOSE OF THE IDAHO REIMBURSEMENT ACT WITH ITS ILLEGITIMATE IMPLEMENTATION

The State's argument conflates the legitimate legislative purpose of the Idaho Reimbursement Act, to increase competition, with its illegitimate implementation through the EAC's unfettered discretion. The State's attack is therefore based on a faulty premise. The State implicitly assumes that Employers is challenging the legislature's ability to authorize tax credits to businesses to increase competition, and that therefore this case and Employers' claim is about government action to increase competition.

The State's tacit assumption is false. In fact, Employers has not challenged the legislature's ability to enact this type of law. Employers has challenged the language in the law that sub-delegates to the EAC unlimited discretion in doling out tax credits to businesses of its choosing. This case is about government interfering in the private marketplace in a way that alters competition between private businesses and about the legislature sub-delegating its constitutionally delegated authority to determine Idaho's tax policy, without appropriately limiting the arbitrary application of that authority.[1]

This fundamental distinction between the State's characterization of Employers' claims and the facts can perhaps be illustrated in the following hypotheticals.

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[1] The ultimate issue raised by this case, not yet before this Court, is whether the Idaho Legislature has violated the Separation of Powers by sub-delegating the authority delegated to it by the Idaho Constitution to determine tax policy. This issue is discussed at length by Professor Philip Hamburger in *Is Administrative Law Unlawful? (University of Chicago Press, 2014)* at pp. 125-26. He has observed:

"Even more clearly than the English constitution, the U.S. Constitution establishes only three powers. A legislative power to make law, a judicial power to adjudicate cases in accord with law, and an executive power to execute the lawful force of the government. None of these powers includes any authority to excuse persons from law. The power to excuse from law was the old dispensing power, and it simply does not exist in the Constitution. Nonetheless, agencies issue waivers.

The difficulty of understanding waivers as legislative power -- let alone a delegated legislative power -- is compounded by their form. Rather than declare new administrative rules, which modify or repeal prior administrative rules, waivers offer relief from rules that concededly remain in effect. Rather than apply to a group identified in general terms, each waiver excuses a specific person, usually a corporation or other such entity.

The power to waive compliance with law is evidently a fourth sort of power--one not granted by the Constitution to any part of government. Of course, Congress can authorize the executive to exercise a wide range of executive powers that are not inherent in the executive. According to administrative theory, Congress even can rearrange the constitutionally granted powers, primarily by authorizing the executive to exercise legislative and judicial powers. But Congress cannot authorize the executive to exercise a fourth sort of power that the Constitution carefully does not grant to any part of the government.

The Constitution, in other words, authorizes only limited types of power -- this being an instance of what has been called the *numerus clausu* principle. The Constitution thereby requires the government to work through the constitutionally authorized powers, not through others.

The resulting exclusion of waivers makes sense. In a government of laws, there is no room for a power to excuse compliance with the law. And especially in a government limited to legislative, judicial and executive powers, no amount of congressional authorization can constitutionalize the fourth, lawless power."

[The State's view.] The State grants a tax credit to some retailers, encouraging increased competition. The State's action cannot be challenged by any other retailers since the action is not directed at them.

[Permissible State action.] The State grants a tax credit to every retail store in the state, resulting in across the board lower costs of operation for all retailers and encouraging the establishment of new retailers, increasing competition.

[The facts in this case.] The State, acting through the Executive Branch, grants a tax credit to a few select retailers, resulting in lower costs for those retailers, enabling them to charge less than other retailers for their goods, potentially driving other retailers out of business.

With regard to the State's contention that State action was not directed at Employers, the following illustration may clarify the issue.

Suppose A and B meet for a duel. Neither has bullets in his gun. The referee gives bullets to A, but not to B. The State would claim that since the referee's actions were directed only towards A, the participant to whom he gave the bullets, and not B, his adversary, that B has no standing to complain, because the referee's actions were not directed at B and do not impact B, unless of course, A fires his weapon at B. Further, until A aims and fires his weapon, B's injuries are not "imminent."

III

EMPLOYERS HAS SUFFERED AN INJURY IN FACT FROM AGENCY ACTION GIVING ITS COMPETITOR A HUGE TAX BREAK

It is undisputed that the Idaho Reimbursement Incentive Act delegates so much discretion to the executive branch in deciding which businesses receive tax credits that the EAC can waive the requirements of the tax law for any entity it wants. In effect, the agency can legislate a tax break for individual businesses. This fact sets the Idaho Reimbursement Incentive Act apart from all other grant programs, because they have substantial legislative guidelines and restrictions to eliminate unfettered administrative discretion and prevent arbitrary application of the law.

Since this is not a typical grant program, the State's insistence that Employers has based its standing on a "bare claim of increased competition" is unsupportable. (Respondent's brief p. 1) This is not and has never been Employers claim. Employers claims that the EAC has provided special government economic assistance to Employers' competitor, so that Employers must compete not only against Paylocity, but against the State of Idaho as its *de facto* partner.

As noted above, if the State of Idaho legislated tax credits for Employers and all of its competitors on a fair and equal basis, Employers would have no complaint, even if the effect of such a tax break were to increase competition in the field. Such state action would not involve government altering the marketplace to benefit some private parties and disadvantage others. But by granting unfettered discretion to the EAC, the Idaho Legislature has given an executive agency the means to alter the private market by favoring some, but not all, competitors in the marketplace with government largesse. This isn't simply adding a new competitor to the marketplace. It is applying different rules to Paylocity to give it a competitive advantage over Employers.

Contrary to the State's argument, *Martin v. Camas County,* 150 Idaho 508, 248 P.3d 1243 (2011), has no bearing on Employers' claims. In *Martin,* the Plaintiff claimed his property was devalued because a county-wide zoning change increased the value of other properties. Martin was not competing against other property owners. The County simply made a policy decision to zone more properties for development. The County did not select one property adjacent to Martin's and upzone that property, nor did it offer government assistance to property owners to develop their properties.

The Supreme Court in *Allen v. Wright,* 468 U.S. 737, 751, 104 S. Ct. 3315, 3324, 82 L.Ed.2d 556 (1984), noted that a claimant establishes standing only if she alleges a "personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." The cases cited by the State on "competitor standing" were decided on the presence or absence of facts authorizing standing. None of those cases denied the principle of "competitor standing" in an appropriate fact setting.

The State notes that standing requires a claimant's injuries to be imminent and concrete. As Employers noted above, that is a fact question which would require an evidentiary hearing to resolve.

The cases cited by the State challenging §501(c)(3) status of tax exempt entities do not support the State's claim that competitor standing does not exist. In *American Society of Travel Agents, Inc. v. Blumenthal,* 566 F.2d 145, 148 (D.C. Cir. 1977), the plaintiffs challenged the authority of the IRS to grant tax exempt status to non-profit entities that provided similar services. The court did not reject the concept of "competitor standing," but decided the case on the absence of evidence that the plaintiff actually competed with the tax exempt entity. The court noted:

> Here, appellants claim to have been injured by appellees' improper administration of the Internal Revenue Code, and seek injunctive relief. However, appellants have not indicated with sufficient specificity either the manner in which their alleged injury occurred or the nature of that injury. Appellants point to no prospective customers who spurned the services of ASTA members because of appellees' allegedly inequitable tax treatment of § 501(c) (3) organizations. Nor do appellants identify tour package purchasers who in fact patronized the AJC or some other tax-exempt organization, but who might legitimately be expected to do business with a private travel agent in the event appellees enforced the relevant tax code provisions according to appellants' recommendations. Instead, appellants complain in more abstract terms, alleging injury arising from appellees' creation of an unfair competitive atmosphere, and seeking relief in the form of the more congenial competitive environment which would supposedly result from proper tax enforcement policy. We regard

> this sort of injury claim as too speculative to support standing under the circumstances presented here.

Similarly, in *Fulani v. Brady,* 935 F. 2d 1324 (D.C. Cir. 1991), the court acknowledged the viability of "competitor standing." The court declared:

> Unquestionably, there is such a concept as "competitor standing." That standing has been recognized in circumstances where a defendant's actions benefitted a plaintiff's competitors, and thereby caused the plaintiff's subsequent disadvantage. See, e.g., Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970) (data processing agency had standing to challenge rulings by the Comptroller of the Currency allowing national banks to enter the data processing field); see also Clarke v. Securities Industry Ass'n, 479 U.S. 388, 107 S.Ct. 750, 93 L.Ed.2d 757 (1987) (securities brokers had standing to challenge ruling that national banks could act as discount brokers); Investment Co. Inst. v. Camp, 401 U.S. 617, 91 S.Ct. 1091, 28 L.Ed.2d 367 (1971) (open-end investment companies had standing to challenge ruling that banks could deal in collective investment funds).
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> ...
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> In the Data Processing line of cases, the government's actions benefitted the plaintiffs' competitors and disadvantaged the plaintiffs. Thus, cessation of the government's actions would redress the plaintiffs' disadvantage by removing the benefit to plaintiffs' competitors. Cf. also Common Cause v. Bolger, 512 F.Supp. 26 (D.D.C.1980) (allowing candidates for public office to challenge statutes establishing franking privileges that benefitted their incumbent competitors). Arguably, if the IRS were depriving Fulani of a benefit that it afforded to others similarly placed, she might be able to challenge that action based on her own tax liability.
>
> See also Lawrence v. State Tax Comm'n, 286 U.S. 276, 52 S.Ct. 556, 76 L.Ed. 1102 (1932) (allowing taxpayer to make equal protection challenge to tax exemption available to competitors); Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 79 S.Ct. 437, 3 L.Ed.2d 480 (1959) (same). However, where a party is seeking simply to remove a third party's entitlement to a tax exemption, the exemption likely will not bear sufficient links of traceability and redressability to the alleged injury to warrant standing under Allen v. Wright, supra. See, e.g., Khalaf v. Regan, 55 A.F.T.R.2d 85-647, 1985 WL 392 (D.D.C.1985), aff'd, No. 85-5274 (D.C.Cir. Sept. 19, 1986) (beneficial tax treatment of third party lacked causal link to plaintiffs' alleged harm).

The *Fulani* decision was based on the absence of facts linking the grant of tax exempt status to the plaintiff's claimed injuries. The court stated:

> We conclude that Fulani's alleged injury fairly cannot be traced to the IRS's grant of tax-exempt status to the CPD, but is instead dependent on the intervening actions of both the FEC and the CPD. For this reason, we hold that Fulani's claim does not warrant standing under the Supreme Court's test in *Allen v. Wright*.

The State also claims that Employers' injuries are self-inflicted. But the State's argument pre-supposes that there is no imminent or concrete threat of harm from the government's grant of a huge tax break to Employers' competitor. In *Clapper v. Amnesty International,* ___ U.S. ___, 133. S. Ct. 1138 (2013), there was no claim that the government was engaging in any surveillance of the plaintiffs or intended to do so. In contrast to the *ASTA, Fulani* and *Clapper* cases, Employers asserts in Paragraph 9 of its Amended Complaint that "[t]he 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 Plaintiffs' employees away from Employers' Resource." In Paragraph 11 of its Amended Complaint, Employers identified categories of damages it would incur as a direct result of the government assistance provided to its competitor, Paylocity. The cases cited by the State did not "[i]ndicate with sufficient specificity either the manner in which their alleged injury occurred or the nature of that injury." To the contrary, in this case, Employers alleges that the EAC has taken action to induce Paylocity, Employers' competitor, to relocate to Idaho and provided economic aid to Paylocity so that it could compete with Employers more effectively.

IV.

CONCLUSION

The effect of the lower court's decision, based on the pleadings alone, is that no business can challenge the application of the Idaho Reimbursement Incentive Act. If no business has "competitor standing" to challenge the constitutionality of the Idaho Reimbursement Incentive Act, it is not subject to judicial review, which is contrary to the Idaho Constitution.

At a minimum, this case should be remanded for an evidentiary hearing to create a record of the imminent and concrete harms that Employers claims it will suffer by reason of this State action.

Respectfully submitted this 21st day of February, 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 21st day of February, 2017, as indicated below and addressed as follows:

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