MEMORANDUM

TO: Associated General Contractors of America
FROM: Philip E. Beck & Kathleen Hsu, Smith, Currie & Hancock LLP
DATE: April 8, 2015
RE: Constitutionality of Hiring Preferences for In-State and/or Local Residents

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QUESTION PRESENTED

On March 6, 2015, the U.S. Department of Transportation (Department) announced a pilot program on "local and other geographic-based hiring preferences," and simultaneously proposed a new rule on "geographic-based hiring preferences."[1] The pilot program is a Department "initiative to permit, on an experimental basis, [FHWA and FTA] recipients and subrecipients to utilize various contracting requirements [for the hiring of in-state and/or local residents that the Department has] disallowed in the past."[2] The proposed rule would specifically "permit recipients and subrecipients to impose geographic-based hiring preferences."[3] For reasons that remain elusive, neither the announcement of the pilot program nor the preamble to the proposed rule makes any reference to the Privileges and Immunities Clause of the United States Constitution or the many cases interpreting and applying it.

The question presented is whether the Department has designed the pilot program and the proposed rule to protect state and local recipients and subrecipients of the Department's financial assistance from the extremely high risk that any hiring preferences for in-state or local residents will violate the Privileges and Immunities Clause of the U.S. Constitution.

SHORT ANSWER

The short answer is no. The Department's pilot program and proposed rule ignore the Privileges and Immunities Clause and could easily mislead the recipients and subrrecipients of its financial assistance to believe that hiring preferences for in-state or local residents are lawful so long as they do not unduly limit competition. Merely complying with the Department's pilot program and proposed rule, even on "an

[1] Contracting Initiative, 80 Fed. Reg. 12257 (Mar. 6, 2015); Geographic-Based Hiring Preferences in Administering Federal Awards, 80 Fed. Reg. 12092 (Mar. 6, 2015).

[2] *Id.*

[3] *Id.*

experimental basis,"[4] would not be enough – in most if not all cases – to comply with the Privileges and Immunities Clause and the case law interpreting and applying it.

The Department's pilot program and proposed rule are overbroad to the very great extent that they would authorize hiring preferences for in-state or local residents in complete disregard for the U.S. Supreme Court's landmark ruling in *United Building & Construction Trades Council of Camden Cnty. v. Mayor & Council of the City of Camden*[5] (*Camden*) and its progeny. The Department has not provided recipients and subrecipients with any guidance on the Privileges and Immunities clause. It has not even warned them that the encouraged discrimination against non-residents would, in all likelihood, be unconstitutional and lead to costly litigation.

The *Camden* case makes it clear that a nonresident's interest in employment with a private company constructing a public project is a fundamental right protected by the U.S. Constitution's Privileges and Immunities Clause.[6] The case adds that this protection is strong and that a public authority may lawfully impair an individual's right to such employment ***only*** if, when, and to the extent: (1) it has a substantial reason for doing so, in order to achieve a legitimate objective; (2) the nonresidents themselves are the "peculiar source" of the problem being addressed; and (3) less restrictive means of achieving the objective are not available.[7]

While the *Camden* decision left public authorities some small room to argue that they have a good reason to discriminate against nonresidents, subsequent federal and state lower court decisions have routinely rejected those arguments and have made it clear that very few, if any, state and local governments can satisfy the very high threshold established by the U.S. Supreme Court in *Camden*. In fact, courts have specifically rejected the two arguments the Department makes for discrimination against non-residents: that such discrimination is necessary (1) to alleviate high unemployment in a particular jurisdiction or (2) to steer the short-term economic benefits of a public construction program to the local taxpayers funding the work.

The preamble to the proposed rule does state that the "deviation [from the Department's prior policy] would only apply to the extent that such geographic hiring preferences are not otherwise prohibited by Federal statute or regulation."[8] This blanket statement is, however, far from enough to justify the Department's glaring omission of any discussion of the Privileges and Immunities Clause, which the courts have specifically held to prohibit the very requirements the pilot program and the proposed rule invite recipients and subrecipients to impose. The

[4] State and local governments are not permitted to "experiment" with violations of citizens' fundamental constitutional rights.

[5] 465 U.S. 208 (1984).

[6] U.S. CONST. amend. XIV, § 1, cl. 2.

[7] *Camden*, 465 U.S. at 219-23.

[8] 80 Fed. Reg. 12092 (Mar. 6, 2015).

Department has created a significant risk that the pilot program and the proposed rule will lead states and local governments to unwittingly violate the Privileges and Immunities Clause.

The Department's omission is not only surprising but also troubling, for it was just two years ago that the Department participated in a legal research project that reached the same conclusions that we have independently arrived at in the process of preparing this memorandum.[9]

It was just two years ago, in April of 2013, that the National Cooperative Highway Research Program (NCHRP) issued "Legal Research Digest 59 – ENFORCEABILITY OF LOCAL HIRE PREFERENCE PROGRAMS,"[10] in which the NCHRP stressed that the Privileges and Immunities Clause and the *Camden* decision severely restrict any discretion that state or local governments may have to require hiring preferences for in-state or local residents. The digest correctly concludes that "challenged local hire programs and policies are unlikely to meet the burden of establishing a substantial reason to discriminate against nonresidents," and accordingly, "they most likely will be held unconstitutional."[11] Citing the state court rulings on discrimination against non-residents, the digest adds:

> Because the showing needed to overcome a violation of the Privileges and Immunities Clause is so difficult to make, nearly all state courts that have adjudicated Privileges and Immunities Clause challenges to local hire laws have found such resident preferences to be unconstitutional.[12]

EXPLANATION

The Privileges and Immunities Clause states that: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."[13] This clause applies to both states and municipalities[14] and prohibits discrimination on the basis of both citizenship and residency.[15] The analysis of a Privileges and Immunities Clause claim consists

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[9] Transportation Research Board of the National Academies, *Legal Research Digest 59 – ENFORCEABILITY OF LOCAL HIRE PREFERENCE PROGRAMS* (Apr. 2013).

[10] *Id.*

[11] *Id.* at 8.

[12] *Id.* at 8 (footnote omitted). For additional support for this statement, see the five cases cited in footnote 74 of the Transportation Research Board paper, three of which precede *Camden*, but are still good law; and two of which post-date *Camden*. These cases stand for the proposition that state and local hiring preferences are unconstitutional unless there is strong evidence that the nonresidents harmed by these preferences are a "peculiar source of the evil" and that the discrimination is narrowly tailored to accomplish the governmental entity's objective.

[13] U.S. CONST. amend. XIV, § 1, cl. 2.

[14] *Camden*, 465 U.S. at 214-15, 217.

[15] *Supreme Court of Virginia v. Friedman*, 487 U.S. 59, 64 (1988) (citing *Camden*, 465 U.S. at 216).

of two elements: (1) whether the right is fundamental and therefore protected by the Privileges and Immunities Clause,[16] and (2) whether there is a substantial reason for the discrimination related to the state's objective.[17]

A privilege is fundamental when it is "sufficiently basic to the livelihood of the Nation" so as to fall under the Privileges and Immunities Clause.[18] The right to a common calling is a fundamental right protected by the Privileges and Immunities Clause.[19] Courts have held that private employment[20] and employment on a public works contract[21] are fundamental rights under the Privileges and Immunities Clause. Employment on a public works contract is fundamental even though the project is funded by the city because employees of private contractors and subcontractors have a fundamental right to private employment.[22]

Whether public employment is a fundamental right under the Privileges and Immunities Clause is less clear. The court in *Camden* stated that "[p]ublic employment, however, is qualitatively different from employment in the private sector; it is a subspecies of the broader opportunity to pursue a common calling."[23] The *Camden* court did not specifically state whether

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[16] *The Slaughter-House Cases*, 83 U.S. 36, 76 (1873); *Camden*, 465 U.S. at 218 (citing *Baldwin v. Montana Fish & Game Comm'n*, 436 U.S. 371, 383 (1978)). *See also Connecticut ex rel. Blumenthal v. Crotty*, 346 F.3d 84, 94 (2d Cir. 2003); *Salem Blue Collar Workers Ass'n v. City of Salem*, 33 F.3d 265, 268 (3d Cir. 1994).

[17] *Toomer v. Witsell*, 334 U.S. 385, 296 (1948); *Camden*, 465 U.S. at 222; *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 284 (1985) (citing *Toomer*, 334 U.S. at 396; *Camden*, 465 U.S. at 222). *See also Silver v. Garcia*, 760 F.2d 33, 38 (1st Cir. 1985); *Blumenthal*, 346 F.3d at 94; *Salem Blue Collar Workers Ass'n v. City of Salem*, 33 F.3d at 268; *A.L. Blades & Sons, Inc. v. Yerusalim*, 121 F.3d 865, 871 (3d Cir. 1997); *Council of Ins. Agents & Brokers v. Molasky-Arman*, 522 F.3d 925, 934 (9th Cir. 2008).

[18] *Camden*, 465 U.S. at 221-22 (citing *Baldwin*, 436 U.S. at 388); *Friedman*, 487 U.S. at 64 (citing *Camden*, 465 U.S. at 221-22). *See also O'Reilly v. Bd. of Appeals of Montgomery Cnty., Md.*, 942 F.2d 281, 284 (4th Cir. 1991) (citing *Camden*, 465 U.S. at 221-22); *Metro. Washington Chapter v. D.C.*, 2014 WL 3400569 (D.D.C. July 14, 2014) (citing *Friedman*, 487 U.S. at 64).

[19] *Camden*, 465 U.S. at 219 (citing *Baldwin*, 436 U.S. at 387); *Hicklin v. Orbeck*, 437 U.S. 518, 524 (1978). *See also Salem*, 33 F.3d at 269 (citing *Camden*, 465 U.S. at 219); *O'Reilly*, 942 F.2d at 284; *Int'l Org. of Masters, Mates & Pilots*, 831 F.2d 843 (9th Cir. 1987) (citing *Hicklin*, 437 U.S. at 524); *Hudson Cnty. Bldg. & Constr. Trades Council*, 960 F. Supp. 823, 830 (D.N.J. 1996) (citing *Camden*, 465 U.S. at 219).

[20] *Camden*, 465 U.S. at 221-22 (citing *Baldwin*, 436 U.S. at 388).

[21] *Camden*, 465 U.S. at 221-23. *See also A.L. Blades*, 121 F.3d at 871 (citing *Camden*, 465 U.S. at 221); *Metro. Washington Chapter*, 2014 WL 3400569, at *9; *Utility Contractors Ass'n of New England, Inc. v. City of Fall River*, 2011 WL 4710875 (D. Mass. Oct. 4, 2011).

[22] *Camden*, 465 U.S. at 221-22 ("The opportunity to seek employment with such private employers is sufficiently basic to the livelihood of the Nation as to fall within the purview of the Privileges and Immunities Clause even though the contractors and subcontractors themselves are engaged in projects funded in whole or in part by the city.").

[23] *Camden*, 465 U.S. at 219. *See also Salem*, 33 F.3d at 269; *Metro. Washington Chapter*, 2014 WL 3400569, at *13.

direct public employment is a fundamental right protected by the Privileges and Immunities Clause.[24] The *Camden* court did mention that there is no fundamental right to government employment under the Equal Protection Clause[25] but also noted that different constitutional amendments and clauses have different aims and standards and thus different analyses.[26] Only the Third Circuit has made a definitive ruling on the subject, finding that direct public employment is not a fundamental right protected by the Privileges and Immunities Clause.[27] As noted above, however, the *Camden* decision makes it clear that the right to work for a private contractor performing public work is a fundamental right.

The Privileges and Immunities Clause is not an absolute bar even with respect to laws impacting fundamental rights.[28] If the right is fundamental and protected by the Privileges and Immunities Clause, states may still discriminate against nonresidents if they can prove that there is a substantial reason for the difference in treatment that bears a substantial relationship to the state's objective.[29] States have "considerable leeway in analyzing local evils and in prescribing appropriate cures."[30] For there to be a substantial reason for discrimination against nonresidents, nonresidents must constitute a "peculiar source of the evil at which the statute is aimed," not just contribute to the problem.[31] Further, to determine whether the discrimination bears a close relationship to the State's objective, the court must consider the availability of less restrictive means.[32]

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[24] *See Camden*, 465 U.S. at 219. *See also Salem*, 33 F.3d at 268 ("Up to this point, the Supreme Court has dealt only with prohibitions involving the practice of trades and businesses – private employment."); *Int'l Organization of Masters*, 831 F.2d at 846 (citing *Camden*, 465 U.S. at 219-20) ("However, whether public employment is a fundamental right within the Privileges and Immunities Clause remains unsettled.").

[25] *Camden*, 465 U.S. at 219 (citing *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976)).

[26] *Camden*, 465 U.S. at 220 (explaining that the Commerce Clause has different aims and different standards for state conduct than the Privileges and Immunities Clause and thus, analysis under the Commerce Clause is not dispositive in a Privileges and Immunities context).

[27] *Salem*, 33 F.3d at 270; *A.L. Blades*, 121 F.3d at 871 (citing *Salem*, 33 F.3d at 270). *See also Marilley v. Bonham*, 2013 WL 5745342, *11 (N.D. Cal. Oct. 16, 2013) (citing *Salem*, 33 F.3d at 270); *Jones v. City of Memphis, Tenn.*, 531 F. App'x 709, 709 n.1 (6th Cir. 2013) (citing *Salem*, 33 F.3d at 270).

[28] *Friedman*, 487 U.S. at 67 (citing *Piper*, 470 U.S. at 284; *Camden*, 465 U.S. at 222; *Toomer*, 334 U.S. at 396).

[29] *See supra note* 17.

[30] *Camden*, 465 U.S. at 223 (citing *Toomer*, 334 U.S. at 396).

[31] *Id. See also Silver*, 760 F.2d at 38 (citing *Toomer*, 334 U.S. at 398); *A.L. Blades*, 121 F.3d at 871 (citing *Toomer*, 334 U.S. at 298; *Hicklin*, 437 U.S. at 525-26); *W.C.M. Window Co., Inc. v. Bernardi*, 730 F.2d 486, 492 (7th Cir. 1984) (citing *Toomer*, 334 U.S. at 398); *Nelson v. Geringer*, 295 F.3d 1082, 1095 (10th Cir. 2002) (citing *Camden*, 465 U.S. at 222); *Metro. Washington Chapter*, 2014 WL 3400569, at *14. *Contra Blumenthal*, 346 F.3d at 94 (stating that the second prong of the analysis is "whether there is sufficient justification for the discrimination").

[32] *Piper*, 470 U.S. at 284. *See also O'Reilly*, 942 F.2d at 285 (quoting *Friedman*, 487 U.S. at 69) (asking if there are "equally or more effective means" for accomplishing the same objective).

The Department pilot program and its proposed rule both ignore the two-step process in determining whether a geographic hiring preference violates the Privileges and Immunities Clause.[33] The pilot program requires several things, but not this kind of analysis. The Proposed Rule would broadly authorize the use of geographic hiring preferences in "contracts that are awarded by recipients and sub-recipients with Federal financial assistance."[34] Even though these contracts are federally funded, under *Camden*, employees of the recipients and subrecipients of the contracts have a fundamental right to private employment under the Privileges and Immunities Clause.[35] In order for states to discriminate on the basis of residency, those nonresidents would have to be a peculiar source of evil that the residency requirement addresses[36] and there cannot be less restrictive means to accomplish the same goal.[37] Promulgating a broad rule that allows the use of local hiring preferences on public works contracts without explaining that the reason for the preference must be substantiated and closely related to the individual state's objective may lead states to unknowingly violate the Privileges and Immunities Clause.

ANALYSIS OF CASE LAW AFTER *CAMDEN*

As indicated in the footnotes, the Supreme Court has not changed the law since its decision in *Camden*, but has merely clarified, through *Piper*, that courts must consider the availability of less restrictive means in determining whether the discrimination bears a close relationship to the state's objective.[38] The following circuit court and federal district court cases after the Supreme Court's decisions in *Camden* and *Piper* have further clarified this precedent regarding geographic hiring preferences.

SUPREME COURT TREATMENT

Supreme Court of New Hampshire v. Piper, 470 U.S. 274 (1985).

A bar examinee living in Vermont applied to take the bar examination in New Hampshire and submitted a statement of intent to become a New Hampshire resident.[39] After passing the bar examination, the bar examinee requested special dispensation from the residency requirement, which was subsequently denied by the Supreme Court of New Hampshire.[40] The

[33] *See* 80 Fed. Reg. 12092.

[34] *Id.*

[35] *Camden*, 465 U.S. at 221-23.

[36] *See supra note* 31.

[37] *See supra note* 32.

[38] *Piper*, 470 U.S. at 284.

[39] 470 U.S. at 275.

[40] *Id.* at 276.

bar examinee filed suit, arguing that the residency requirement violated the Privileges and Immunities Clause.[41] The Supreme Court of New Hampshire justified its residency requirement and stated that nonresident members of the bar would be less likely to be familiar with local rules, to behave ethically, to be available for court proceedings, and to do pro bono work in the state.[42]

The Court stated that the right to practice law is protected by the Privileges and Immunities Clause and that the Supreme Court of New Hampshire's justifications for its residency requirements were insufficient to meet the test of "substantiality."[43] The Supreme Court of New Hampshire provided no evidence that nonresidents would be less abreast of local rules and issues, that they would behave less ethically, or that they would not endeavor to perform pro bono services.[44] Further, the Court held that the discrimination did not bear a close relation to the state's objectives because they were not the least restrictive means to achieve its goals.[45] The Court suggested that there were other means to achieve the Supreme Court of New Hampshire's goals, such as mandatory attendance at seminars on state practice or a requirement that any out-of-state attorney retain a local attorney for unscheduled meetings and hearings.[46]

Piper is significant because it clarified that when deciding whether discrimination bears a close relation to the state's objective, the court must look to whether the state can protect its interest with less restrictive means.

Supreme Court of Virginia v. Friedman, 487 U.S. 59 (1988).

A Maryland resident barred in Illinois and the District of Columbia who maintained a place of business in Virginia applied for admission to the Virginia Bar by motion, seeking admission by reciprocity.[47] The Maryland resident's application was subsequently denied by the Supreme Court of Virginia for failing to satisfy the residency requirement.[48] The Maryland resident filed suit against the Supreme Court of Virginia, alleging that the residency requirement violated the Privileges and Immunities Clause.[49] The Supreme Court of Virginia argued that the residency requirement was justified because nonresidents are not as committed or familiar with

[41] *Id.* at 277.

[42] *Id.* at 285.

[43] *Id.* at 283-84.

[44] *Id.* at 285-86.

[45] *Id.* at 284.

[46] *Id.* at 285, 287.

[47] 487 U.S. at 62.

[48] *Id.* at 62-63.

[49] *Id.* at 63.

Virginia law and that the residency requirement facilitated enforcement of the full-time practice requirement.[50]

Following the precedent set in *Piper*, the Court held that the right to practice law is protected by the Privileges and Immunities Clause.[51] Further, in similar analysis to *Piper*, the Court held that there was no evidence that nonresidents would be less committed or less familiar with Virginia law and that there were less restrictive alternatives to ensure that attorneys were abreast of legal developments and followed the full-time practice requirement.[52]

CIRCUIT COURT TREATMENT

Salem Blue Collar Workers Ass'n v. City of Salem, 33 F.3d 265 (3d Cir. 1994).

A laborer directly employed by the city was notified, after moving out of the city, that he was in violation of the city's ordinance, which stated that all city employees were required to live in the city.[53] The laborer filed suit, arguing that the city's ordinance was a violation of the Privileges and Immunities Clause.[54] The court disagreed and relied on the *Camden* court's distinction between public and private employment to hold that direct public employment is not a fundamental right protected by the Privileges and Immunities Clause.[55] The court explained that the *Camden* court held that private employment was a fundamental right protected by the Privileges and Immunities Clause but recognized a clear distinction between private and public employment.[56]

The court distinguished the case from the facts in *Camden*, where contractors and subcontractors were under contract with the city, but their employees were under private contracts, with the facts in this case, where the laborer was a direct employee of the city.[57] Because there was no intervening private employment in this case, the court held that no fundamental right was implicated and found it unnecessary to discuss the second issue of substantial relatedness.[58]

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[50] *Id.* at 67-68.

[51] *Id.* at 65.

[52] *Id.* at 69-70.

[53] 33 F.3d at 266.

[54] *Id.* at 267.

[55] *Id.* at 270.

[56] *Id.*

[57] *Id.*

[58] *Id.*

The Third Circuit is the only circuit that has specifically stated that direct public employment is not a fundamental right protected by the Privileges and Immunities Clause. However, the decision in *Salem* has been cited for that proposition by the Sixth Circuit in a footnote[59] as well as by the Northern District of California.[60]

A.L. Blades & Sons, Inc. v. Yerusalim, 121 F.3d 865 (3d Cir. 1997).

A contractor and its nonresident employees on a public works contract brought action against a state DOT, alleging that an act requiring contractors to employ residents on state-funded public works projects was in violation of the Privileges and Immunities Clause.[61] Following the precedent in *Camden*, the court found that the fundamental right to private employment was implicated in this case because the case concerned a public works project.[62]

The state argued that there were two substantial justifications for the residency requirement: "alleviating high unemployment in the [state]'s construction industry and avoiding the loss of economic benefits resulting from the expenditure of [state] funds on nonresident workers."[63] The court rejected the unemployment justification because the state did not proffer any evidence to prove that the nonresident employees were a "peculiar source" of the high unemployment in the state's construction industry or that there was any difference between nonresident and resident construction workers.[64] Moreover, while the court conceded that legislative history proved that the state act was aimed to prevent the migration of economic benefits, the court rejected the justification because the state did not proffer any evidence that nonresident construction workers derived a larger amount of their income from the state than nonresident workers in other industries.[65] The state also did not provide any evidence that the migration of economic benefits in the construction industry was damaging the state's economy in any significant way so as to justify the act.[66] Because neither justification was valid, the court found that the act was unconstitutional.[67]

W.C.M. Window Co., Inc. v. Bernardi, 730 F.2d 486 (7th Cir. 1984).

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[59] *Jones*, 531 F. App'x at 709 n.1.

[60] *Marilley*, 2013 WL 5745342, at *11.

[61] 121 F.3d at 867.

[62] *Id.* (citing *Camden*, 465 U.S. at 221).

[63] *Id.* at 871.

[64] *Id.* at 872.

[65] *Id.* at 874.

[66] *Id.* at 875.

[67] *Id.* at 876.

A contractor and its nonresident subcontractor sought to enjoin the state from enforcing a state act which provided that contractors on public works projects were required to employ only resident laborers unless resident laborers were unavailable or incapable of performing the work.[68] The court found that the fundamental right of private employment was implicated because the case concerned a public works project.[69] The state did not present any information "statistical or otherwise, evidentiary or subject to judicial notice, at trial or on appeal – concerning the benefits of the preference law."[70] Therefore, the court held that the state act was unconstitutional.[71]

FEDERAL DISTRICT COURT TREATMENT

Metro. Washington Chapter v. D.C., 2014 WL 3400569 (D.D.C. July 14, 2014).

Nonresident contractors brought suit against the District of Columbia,[72] alleging that the D.C. resident preference statute for the construction industry violated the Privileges and Immunities Clause.[73] Because the issue concerned a public works project, the court found that the fundamental right of private employment was implicated.[74] D.C. argued that the statute was "necessary to counteract the grave economic disparity that it faces as a result of its inability to levy a commuter tax on nonresidents, who hold 70 percent of jobs in the District."[75] While the court stated that it could be persuaded that this inability to levy a commuter tax was a peculiar evil that the statute was enacted to address, D.C. did not provide sufficient substantive evidence that the resident hiring preference statute was narrowly tailored to address this evil.[76]

Utility Contractors Ass'n of New England, Inc. v. City of Fall River, 2011 WL 4710875 (D. Mass. Oct. 4. 2011).

Contractors brought an action against the city, alleging that the city ordinance, which required that residents be given preference in hiring on a one-of-every-two ratio on public works

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[68] 730 F.2d at 489.

[69] *Id.* at 497.

[70] *Id.* at 497-98.

[71] *See id.*

[72] While it is unclear whether the Privileges and Immunities Clause applies to the District of Columbia, 2014 WL 3400569, at *12 (citing *Banner v. United States*, 303 F. Supp. 2d 1 (D.D.C. 2004), for the purposes of this case, the court found it unnecessary to reach the question. 2014 WL 3400569, at *13.

[73] *Id.*, at *8.

[74] *Id.*, at *13.

[75] *Id.*

[76] *Id.*, at *16.

projects, violated the Privileges and Immunities Clause.[77] Following *Camden*, the court found that the ordinance implicated the fundamental right to private employment.[78] However, since the city did not offer any justifications for the discrimination, the court found that the ordinance was invalid.[79]

Hudson Cnty. Building & Constr. Trades Council v. City of Jersey City, 960 F. Supp. 823 (D.N.J. 1996).

Contractors brought suit against the city, alleging that the city ordinance, which mandates that recipients of economic incentives from the city make a good faith effort to hire 51% of city residents for construction jobs.[80] Because the ordinance restricted the ability of nonresidents to seek private employment, the court found that it violated a fundamental right protected by the Privileges and Immunities Clause.[81] The city argued that high rates of poverty and unemployment were a substantial reason for discrimination against nonresidents.[82] However, because the city was unable to show that the nonresidents were a source of unemployment and poverty, the court found that the city did not meet its burden to prove that there was a substantial reason for the discrimination.[83]

STATE COURT TREATMENT

See the NCHRP Legal Research Digest paper referenced above, and the cases cited therein, for a survey of state court decisions applying *Camden*. Numerous state court decisions have held local residents hiring preferences to violate the U.S. Constitution's Privileges and Immunities Clause, both before and after the *Camden* decision. It is logical to conclude from a review of this state court case authority that very few, if any, state and local governments are capable of satisfying the very stringent evidentiary requirements imposed by the rule of law established by *Camden*. In fact, the ***only*** state court decision we have found which actually held a local residents hiring preference constitutional in the aftermath of *Camden* is *Wyoming v. Antonich*, 694 P.2d 60 (Wyo. 1985). This decision appears to be an anomaly and the exception which proves the rule. The decision has been sharply criticized and is in direct conflict with the overwhelming weight of authority.[84]

CONCLUSION

[77] 2011 WL 4710875, at *3.
[78] *Id.*, at *13.

[79] *Id.*

[80] 960 F. Supp. at 826-27, 829.

[81] *Id.* at 830.

[82] *Id.*

[83] *Id.*
[84] *See, e.g.*, Werner Z. Hirsch, *The Constitutionality of State Preference (Residency) Laws Under the Privileges and Immunity Clause*, 22 SW. U. L. REV. 1, 1-2 (1992).

For the reasons summarized above, the Department's pilot program and proposed rule are ill-advised because they invite recipients and subrecipients to discriminate against nonresident employees by enacting contracting requirements granting a preference to local residents which almost certainly will violate the Privileges and Immunities Clause of the U.S. Constitution and the rule of law established by the U.S. Supreme Court in *Camden*.