IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

TRIUMPH FOODS, LLC, CHRISTENSEN FARMS MIDWEST, LLC, THE HANOR COMPANY OF WISCONSIN, LLC, NEW FASHION PORK, LLP, EICHELBERGER FARMS, INC. and ALLIED PRODUCERS' COOPERATIVE, individually and on behalf of its members,

Plaintiffs,

v.

ANDREA JOY CAMPBELL, in her official capacity as Attorney General of Massachusetts, and ASHLEY RANDLE, in her official capacity as Massachusetts Commissioner of Agriculture,

Defendants.

Case No. 1:23-cv-11671-WGY

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

"REQUEST FOR ORAL ARGUMENT"

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INTRODUCTION

Massachusetts' Question 3 Minimum Size Requirements for Farm Animal Containment ("Question 3" or the "Act") targets out-of-state farmers and processors who ensure the supply of pork into Massachusetts. Defendants have blocked a marketplace unless Plaintiffs adhere to an onerous regulatory scheme requiring massive facility overhauls at crippling expense. The Act dismantles generational industry practices for the political and moral views of a subset of Massachusetts voters who were intentionally misinformed and without knowledge of the Act's impact on Massachusetts and across the nation. The result is catastrophic for the Plaintiffs who steward a critical food staple for Massachusetts families and businesses, and by extension nationwide consumers.

LEGAL STANDARD

In granting a preliminary injunction, a district court must find these four elements satisfied: (1) a likelihood of success on the merits; (2) the likelihood of irreparable harm absent interim relief; (3) a balance of equities in the plaintiff's favor; and (4) service of the public interest. *Walters v. Bos. City Council*, No. CV 22-12048-PBS, 2023 WL 3300466, at *8 (D. Mass. May 8, 2023); *see also Maine Forest Prod. Council v. Cormier*, 51 F.4th 1, 5 (1st Cir. 2022) (same). Plaintiffs need to prove only that a single claim is likely to succeed on the merits for this Court to issue injunctive relief. *Cormier*, 51 F.4th at 5 (district court found that challenge was likely to succeed on two grounds, but found it was unnecessary to address both on appeal). "To demonstrate likelihood of success on the merits, plaintiff[] must show 'more than mere possibility' of success—rather, [it] must establish a 'strong likelihood' that they will ultimately prevail." *Sindicato Puertorriqueno de Trabajadores v. Fortuno*, 699 F.3d 1, 10 (1st Cir. 2012) (citing *Respect Maine*

PAC v. McKee, 622 F.3d 13, 15 (1st Cir.2010)).

ARGUMENT

I. Plaintiffs Are Likely to Succeed on the Merits of Their Claims.

Plaintiffs have challenged the constitutionality of the Act and its Regulations.[1] The Court need only find a likelihood of success on the merits of a *single claim* to grant injunctive relief. Challenges to laws like the Act are not new, as the United States Supreme Court recently affirmed dismissal of a challenge to California's version of the Act, Proposition 12, in *NPPC v. Ross*, 143 S. Ct. 1142 (2023). However, Plaintiffs' constitutional claims do not overlap with those in *NPPC*. Plaintiffs heard the Court's suggestions to pursue absent claims in *NPPC v. Ross* to ensure "free private trade in the national marketplace" may proceed as the Founders intended. The gravity of harm if the Act remains in effect is not only incomprehensible but invites a national trade war.

A. Plaintiffs Are Likely to Succeed on Their Commerce Clause Claim.

Individual states – like Massachusetts and California - are attempting to regulate conduct of other states based upon moral or policy reasons. Article I, § 8 of the Constitution provides that Congress shall have the power to regulate commerce among the several states. States cannot take actions that limit, discriminate, or burden interstate commerce, known as the dormant Commerce Clause. *See United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Management Authority*,

[1] Plaintiffs seek to enjoin the Regulations from enforcement given the unconstitutionality of the underlying Act and the Regulations themselves. *See* 330 CMR 35.00. "No matter how it is framed, the question a court faces when confronted with an agency's interpretation of a statute it administers is always, simply, whether the agency has stayed within the bounds of its statutory authority." *City of Arlington v. FCC*, 569 U.S. 290, 297 (2013). Defendant Campbell has exclusive authority to enforce any violations of the Act, yet the Regulations vest Defendant Randle with the authority to delegate enforcement means away from Campbell and vest compliance determinations within third-party validators' authority. 330 CMR 35.07. This unlawfully delegates authority in excess of statutory authority, is arbitrary or capricious, and otherwise not in accordance with law. *See Texas v. United States Env't Prot. Agency et al*, No. 3:23-CV-00017, 2023 WL 2574591, *8 (S.D. Tex. Mar. 19, 2023) (granting preliminary injunction enjoining enforcement of regulations because regulations disregarded the enabling act's central requirement).

550 U.S. 330 (2007); *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 206-07 (1994). A law violates the dormant Commerce Clause if: (1) it discriminates on its face, in its purpose or effects, against interstate commerce and favors in-state commerce; or (2) the law substantially burdens out-of-state commerce. *See generally Fam. Winemakers of California v. Jenkins*, 592 F.3d 1, 9 (1st Cir. 2010) ("Discrimination under the Commerce Clause 'means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter[.]'").[2] Discriminatory laws violate the core principle of Commerce Clause jurisprudence—the antidiscrimination principle. *NPPC*, 143 S. Ct. at 1152.

1. The Act discriminates against interstate commerce.

The Act discriminates against interstate commerce in favor of economic protectionism, rendering it *per se* invalid. The antidiscrimination principle has overturned laws "driven by ... 'economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.'" *Id.* (citing *Davis*, 553 U.S. at 337–338 (2008) (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273–274 (1988)).[3] Discrimination in this context means "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Id.* (quoting *Oregon Waste Systems, Inc. v. Department of Environmental Quality of Ore.*, 511 U.S. 93, 99 (1994)); *Jenkins*, 592 F.3d at 10.[4]

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[2] *See also NPPC*, 143 S. Ct. at 1153 ("In its 'modern' cases, this Court has said that the Commerce Clause prohibits the enforcement of state laws "driven by . . . 'economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.'") (citing *Department of Revenue of Ky. v. Davis*, 553 U. S. 328, 337-38 (2008)).

[3] S*ee also Tennessee Wine and Spirits Retailers Assn.* v. *Thomas*, 139 S. Ct. 2449, 2461 (2019) (observing this Court's cases operate principally to "safeguard against state protectionism.")

[4] In *Jenkins*, Massachusetts allowed "small" wineries to obtain a small winery shipping license to ship directly to consumers and through retail distribution, that "large" wineries could not obtain ("large winery shipping license" only allowed sales directly to Massachusetts consumers). *Id.* at 4. There were no "large" wineries within Massachusetts. *Id.* The statute "violate[d] the Commerce Clause because the effect of its particular gallonage cap [was] to change the competitive balance between in-state and out-of-state wineries in a way that benefits Massachusetts's wineries and significantly burden[] out-of-state competitors." *Id.* at 5. Specifically, "Massachusetts has used its 30,000 gallon grape wine cap to expand the distribution options available to 'small' wineries (all Massachusetts wineries), but not to

"Discriminatory laws motivated by simple economic protectionism are subject to a virtually *per se* rule of invalidity, which can only be overcome by a showing that the State has no other means to advance a legitimate local purpose." *Id.* at 338-39 (internal citations omitted). Here, the Act instills discriminatory advantages that unconstitutionally secure state protectionism.

The Act targets out-of-state entities by benefiting in-state interests and burdening out-of-state interests. *Haulers*, 550 U.S. at 338. The Act was drafted with a protectionist intent and cloaked agenda. [5] In 2021, Massachusetts had as little as 1,500 breeding sows; yet today, Missouri had 450,000 breeding sows and Iowa had 900,000. ECF 17 ¶¶ 63–64. Farmer Plaintiffs maintain operations in both states. *Id.* at ¶ 64. As of 2017, the total number of Massachusetts pig farms was 336, eight of which having a herd size of 200 or more. *Id.* at ¶ 63. As of 2016 when the Act was passed, no Massachusetts pig farmers used gestation crates, meaning that the Act *only* targeted out-of-state farmers who did. *Id.* at ¶¶ 66, 156. [6] In comparison, Christensen Farms raises 140,000 breeding pigs, producing 3.6 million hogs each year and, to date, has only converted 12.5% of its total inventory to be compliant at a significant cost. Ex. 4, Christensen Farms Decl. ¶¶ 5, 24. Massachusetts only produced a pig crop of 12,000 head in 2022 and thus, most of its supply comes from out of state. Ex. 8, Declaration of Dr. Jayson Lusk ¶ 8; Ex. 1, Declaration of Matt England ¶ 8, 35.[7] This inability to satisfy its own pork needs from in-state production, represents an economic

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similarly situated 'large' wineries, all of which are outside Massachusetts." *Id.*

[5] Question 3 is also explicitly discriminatory in its purpose. The Regulations acknowledge that the Act is intended to "reduc[e] potential fiscal" threats to Massachusetts consumers. 2022 MA REG TEXT 610066 (NS). This, combined with one singular stated purpose within the Act to avoid "negative fiscal impacts to the Commonwealth of Massachusetts," portrays the discriminatory purpose. S*ee e.g., Jenkins*, 592 F.3d at 5 ("Section 19F's statutory context, legislative history, and other factors also yield the unavoidable conclusion that this discrimination was purposeful.").

[6] Andrea Shea, *Containment Of Farm Animals: A Primer On Question 3 In Mass*., NPR, WBUR (September 20, 2016), https://www.wbur.org/morningedition/2016/09/20/farm-animal-containment-ballot-question ("And there are no farms here that use the other practices that would be banned by Question 3."); *see also*, Shira Schoenberg, At center of 2016 ballot dispute over cage-free eggs are 3,000 chickens in Western Mass. Town, MassLive (December 4, 2015), https://www.masslive.com/politics/2015/12/at_the_center_of_a_2016_ballot.html ("there are currently no Massachusetts farms using small cages for calves and pigs[.]").

[7] In comparison, within the first quarter of 2023, Missouri and Iowa—the two states that Triumph primarily operates

shelter for in-state farms at the expense of out-of-state farms providing capital cost increases between 18 to 94%. Ex. 8 ¶¶ 8, 18. Even if Farmer Plaintiffs converted all operations combined, it would not be enough to fulfill Triumph's Massachusetts' demand. Ex. 1 ¶ 32. Any out-of-state market representation will disappear when farms either must spend significant resources to comply with the Act or exit the marketplace. Ex. 5, Allied Producers' Cooperative Declaration, ¶ 23. It is conservatively estimated that the cost of providing compliant pork is 30% higher than the cost of current pork supplies to the state. Ex. 8 ¶ 19. Such favoritism runs afoul of the Constitution. *See e.g.*, *Jenkins*, 592 F.3d at 10. In addition to a protectionist intent, the voters were not informed of a hidden agenda targeting the elimination of factory farming all together.[8]

In addition, only three Massachusetts processors are United States Department of Agriculture ("USDA") certified, and Plaintiffs believe those processors ship primarily outside of the state. ECF No. 17, ¶¶ 161-62. The Act provides these processors a loophole for compliance, because when they sell intrastate, the facility is exempted from compliance if the sale occurs at the Federal Meat Inspection Act ("FMIA") facilities. *Id.* at ¶ 163.[9] Nationwide, this is not a practice that Triumph can engage in for the distribution of their product, especially when outside the state. Triumph ships directly to Massachusetts, and thus is arguably "engaged in the sale," which is not mirrored for in-state processors in effect.[10] This creates an unfair advantage for in-state processers

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out of or receives a large majority of its pig supply from —had 450,000 breeding sows and 900,000 breeding sows, respectively. USDA, National Agricultural Statistics Service, USDA Quarterly Hogs and Pigs (March 2023).

[8] Stephanie Harris, the Campaign Director for Citizens for Farm Animal Protection (Yes on Question 3), has been a Senior Legislative Affairs Manager at the Animal Legal Defense Fund ("ALDF") since August 2019. *Stephanie Harris*, https://aldf.org/person/stephanie-harris/ (last visited Aug. 2, 2023). One legislative initiative ALDF supports is the Farm System Reform Act which, inter alia, seeks to "overhaul our broken food system by placing a moratorium on the largest factory farms – immediately prohibiting the creation or expansion of large factory farms and requiring the cessation of such operation by 2040." *Farm System Reform Act (Federal)*, https://aldf.org/project/farm-system-reform-act/ (last visited Aug. 2, 2023).

[9] *See also* 330 CMR 35.02 ("Sale: A commercial sale by a business that sells any item covered by St. 2021, c. 108, § 3, but does not include any sale undertaken at an establishment at which inspection is provided under the [FMIA]. [A] Sale occurs at the location where the buyer takes physical possession of an item covered by the Act.").

[10] *See* 330 CMR 35.02; Ex. 1 ¶ 46; 330 CMR 35.00 – FAQ, https://www.mass.gov/doc/330-cmr-3500-faq/download

and directly engages in what the dormant Commerce Clause was designed to prevent. Because the Act implicitly favors in-state business over out-of-state competition, it should be subjected to "rigorous scrutiny." *Haulers*, 550 U.S. 330 at 343 (citing *Wyoming v. Oklahoma*, 502 U.S. 437, 454 (1992)). Under such scrutiny, the Act violates the dormant Commerce Clause as discriminatory.

2. The Act burdens interstate commerce in a manner excessive to local benefits.

The Act imposes burdens on interstate commerce excessive in relation to the putative local benefits. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Courts have found the burden too high when "direct," "undue," "unreasonable," or "material."[11] Justice Gorsuch in *NPPC v. Ross* recalled the *Pike* line of cases' analysis, stating "a law's practical effects may also disclose the presence of a discriminatory purpose." 143 S. Ct. 1142 at 1157. Even if the Act regulates even-handedly, its excessive burden on interstate commerce can exceed the local benefits and violate the Commerce Clause. *See Jenkins*, 592 F.3d at 9.[12]

The conclusion under *Pike* is simple upon review of the purported local benefits from the start, as there is a dearth of evidence that the Act will accomplish *any* stated purpose. *See* Mass. Gen. Laws Ann. Ch. 129 App., § 1-1. Marketed as an animal welfare law protecting breeding pigs and Massachusetts' pork consumers from foodborne illness, a review of the facts, existing federal law and science renders the law misleading on its face. First, the ballot initiative materials have *no*

[11] *See, e.g., Hall v. De Cuir*, 95 U.S. 485 (1877); *Public Utilities Commission v. R.I. of Attleboro Steam & Elec. Co.*, 271 U.S. 83 (1927); *Dean Milk Co. v. City of Madison, Wis*., 340 U.S. 349 (1951); *International Mill. Co. v. Columbia Transportation Co.*, 292 U.S. 511 (1934); *Real Silk Hosiery Mills v. City of Portland*, 268 U.S. 325 (1925).

[12] *See also NPPC*, 143 S. Ct. at 1168 (Roberts, C.J, concurring and dissenting in part) ("[W]e generally leave the courtroom door open to plaintiffs invoking the rule in *Pike*, that even nondiscriminatory burdens on commerce may be struck down on a showing that those burdens clearly outweigh the benefits of a state or local practice.") (citing *Davis*, 553 U. S. at 353) (internal quotations omitted).

supporting scientific evidence that the Act protects breeding pigs.[13] The Minimum Size Requirements *harm* the breeding pigs and their offspring by making aggressive behavior and injured pigs a reality.[14] Ex. 7, Declaration of Dr. Salak-Johnson ¶ 34. Second, the record is devoid of proof that the Act prevents foodborne illness.[15] Indeed, the Act *allows* certain non-compliant, processed pork to be sold through an exemption to the definition of Whole Pork Meat.[16] The Act advances no health or safety benefit not already regulated by the USDA and the Food Safety and Inspection Service ("FSIS"), who ensure meat is not "adulterated"[17] and is "safe, wholesome, and properly labeled." 21 U.S.C. § 602.

The targeted effects not only "smoke out" the discrimination, but also demonstrate the burden. *NPPC*, 143 S.Ct. at 1158. The Act supports a "Massachusetts knows best" philosophy, despite its *de minimis* sow operations, recently analyzed with much skepticism. *See NPPC*, 143 S.Ct. at 1174 (Kavanaugh, J., dissenting and concurring in part) ("[California] has aggressively propounded a 'California knows best' economic philosophy—where California in effect seeks to regulate pig farming and pork production in *all* of the United States. California's approach undermines federalism and the authority of individual States by forcing individuals and businesses

[13] *Massachusetts Information for Voters, 2016 Ballot Questions* https://archives.lib.state.ma.us/bitstream/handle/2452/427044/ocn690703544-2016.pdf?sequence=1&isAllowed=y

[14] In addition, the Act prohibits the sale of *offspring* of breeding pigs confined in a cruel manner, but does not directly regulate the confinement requirement of the offspring themselves who are being sold into Massachusetts.

[15] In California, the California Department of Food and Agriculture even admit Proposition 12, which includes Question 3 requirements, has no scientific support that it will prevent foodborne illness. *Final Statement of Reasons*, www.cdfa.ca.gov/AHFSS/pdfs/FSOR_Final_8.30.22.pdf, at 7.

[16] "Whole pork meat", any uncooked cut of pork, including bacon, ham, chop, ribs, riblet, loin, shank, leg, roast, brisket, steak, sirloin or cutlet, that is comprised entirely of pork meat, except for seasoning, curing agents, coloring, flavoring, preservatives and similar meat additives; provided, however, that "whole pork meat" shall not include combination food products, including soups, sandwiches, pizzas, hot dogs or other similar processed or prepared food products, that are comprised of more than pork meat, seasoning, curing agents, coloring, flavoring, preservatives and similar meat additives. Mass. Gen. Laws Ch. 129 App., § 1-5.

[17] "Adulterated" is defined as a product that "consists in whole or in part of any filthy, putrid, or decomposed substance or is for any other reason unsound, unhealthful, unwholesome, or otherwise unfit for human food"; it also is defined as products that have been "prepared, packed, or held under insanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered injurious to health." 21 U.S.C. § 601; *See infra*, pp. 9-13; Ex. 4 ¶ 10, 13-17.

in one State to conduct their farming, manufacturing, and production practices in a manner required by the laws of a different State."). One need only replace "California" for "Massachusetts." This philosophy also affects pork supply and pricing throughout Massachusetts, the New England regional area, and potentially the rest of the nation. Ex. 8 ¶¶ 14–15. The nationwide impacts to farmers, processors, and ultimately, consumers, constitute a burden on interstate commerce. *See e.g., Bibb v. Navajo Freight Lines, Inc*., 359 U.S. 520, 526 (1959).[18]

B. Plaintiffs are Likely to Succeed on Their Privileges & Immunities Claim.

The Act violates the intent and text of the Privileges and Immunities Clause of the United States Constitution, which states, "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const. art. IV, § 2, cl. 1.[19] The Supreme Court has utilized a two-part standard to analyze these challenges once the classification burdening out-of-staters is established: 1) courts must determine whether the classification strikes at the heart of an interest so "fundamental" that its derogation would "hinder the formation, the purpose, or the development of a single Union of [the] States" and; 2) if the classification burdens a fundamental right, the defendant must show a "substantial reason" for the difference in treatment. *Util. Contractors*, 236 F. Supp. 2d at 117-118.

Here, the Act burdens out-of-state farmers and processors in a manner that provides substantial hindrance to the successful operation of the nationwide pork industry. *See supra,* section 2-8. The Supreme Court revealed a state's self-interested burden and crippling effect laws like the Act have on the rest of the country. *NPPC,*143 S. Ct. at 1153, 1175 (Gorsuch, J.) (holding

[18] ("[c]ost taken into consideration with other factors[,]" like safety concerns, time constraints, and labor requirements imposed by the statute, may relate to interstate commerce); *see also, Pike*, 397 U.S. at 142 (finding both compliance costs and consequential market harms cognizable in determining whether the law impermissibly burdened interstate commerce); *NPPC*, 143 S. Ct. at 1170-71 (Roberts, C.J., concurring and dissenting in part).

[19] "[T]he Privileges and Immunities Clause was intended to create a national economic union." *Silver v. Garcia*, 760 F.2d 33, 36 (1st Cir. 1985) (citing *Supreme Ct. of New Hampshire v. Piper*, 470 U.S. 274, 279-280 (1985)).

that the Privileges & Immunities Clause may house a better argument for disparate treatment of in-state and out-of-state entities). Plaintiffs' ability to participate in this nationwide industry must be considered a fundamental right protected by the Privileges and Immunities Clause. Ex. 1 ¶ 20. Thus, Massachusetts must prove a "substantial reason" for the difference in treatment for the burden imposed on out-of-state farmers and processors, and that no "less restrictive means" exist. *City of Worcester,* 236 F. Supp. 2d at 118 n. 4. Defendants cannot do so. *Supra*, section 1(A)(2). As the Act unconstitutionally interferes with the fundamental interest, Plaintiffs are likely to succeed.

C. Plaintiffs are Likely to Succeed on Their Preemption Claim Under the Federal Meat Inspection Act.

The Act violates both express and conflict preemption principles as implicated by the FMIA. 21 U.S.C. § 601 *et seq*. The Supremacy Clause provides that the laws of Congress are the "supreme Law of the Land," which "overwhelms 'any Thing in the Constitution or Laws of any State to the Contrary.'" *Cormier*, 51 F.4th at 6 (citing U.S. Const. art. VI, cl. 2). Preemption has three branches: "express," "implied," and "conflict." *Id.*[20] Congress enacts a law that imposes restrictions or confers rights on private actors, followed by a state law that confers rights or imposes restrictions in conflict. The federal law takes precedence, and the state law is preempted. *Id.* (citing *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1480 (2018)). "[T]he focus of the Court's preemption analysis must be on the effects of the challenged regulation rather than its purpose." *Ophir v. City of Bos*., 647 F. Supp. 2d 86, 89 (D. Mass. 2009).[21]

[20] An offshoot of "conflict preemption" is "obstacle preemption," implicated when the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* (citing *Arizona v. United States*, 567 U.S. 387, 399 (2012) (internal quotations omitted).

[21] In *Ophir*, the presumption against preemption was not triggered, as the City of Boston failed to show that in passing the Energy Policy and Conservation Act of 1975, "Congress legislated in a field traditionally occupied by the states." *Id.* at 91-92 (*citing United States v. Locke*, 529 U.S. 89, 108 (2000)).

1. The Act is expressly preempted by the FMIA.

The FMIA has an express preemption clause. "Requirements within the scope of this chapter with respect to premises, facilities and operations of any establishment at which inspection is provided under subchapter I of this chapter, which are in addition to, or different than those made under this chapter may not be imposed by any State or Territory or the District of Columbia …" 21 U.S.C. § 678 (emphasis added). The FMIA controls inspection processes on site. *See* 21 U.S.C. §§ 603, 621. *See also* Ex. 1 ¶ 43. Food safety is a field that the federal government has *heavily* occupied for over a century.[22] This field has been expanded by creation of the USDA and its agency, FSIS, which ensures food safety through the FMIA.[23] Therefore, no presumption against preemption can be claimed. *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 579 U.S. 115, 125 (2016) (stating that where "statute contains an express pre-emption clause, [courts] do not invoke any presumption against preemption." (internal quotation marks omitted)).

Given the FMIA's extensive regulatory scheme, the Act is expressly preempted. First, the Act's purpose is "to prevent animal cruelty by phasing out extreme methods of farm animal confinement, which also threaten the health and safety of Massachusetts consumers, *increase the risk of foodborne illness*, and have negative fiscal impacts on the Commonwealth of Massachusetts." Mass. Gen. Laws Ann. ch. 129 App., § 1-1 (emphasis added). The FMIA's purpose is to ensure that meat products are "wholesome, not adulterated," and to carry out the "effective regulation of meat and meat food products in interstate [] commerce," and to "protect the health and welfare of consumers." 21 U.S.C. § 602. The FMIA inspection processes ensure "that meat and meat food products distributed to [interstate consumers] are wholesome, not

[22] The USDA was created in 1862 by President Abraham Lincoln and the FSIS (and its predecessor) was created in 1977. *See* Our History, https://www.fsis.usda.gov/about-fsis/history (last visited July 30, 2023).
[23] *See* About FSIS | Food Safety and Inspection Service (usda.gov) (last visited July 22, 2023).

adulterated" and "prevent[s] and eliminate[s] burdens on commerce by assuring that meat and poultry products are wholesome and properly labeled." *Animal Legal Def. Fund Bos., Inc. v. Provimi Veal Corp.*, 626 F. Supp. 278 (D. Mass.), *aff'd*, 802 F.2d 440 (1st Cir. 1986) (cleaned up). Yet, the Act predetermines what product is wholesome or safe for human consumption, directly preempting the USDA's determination, and supplanting its definition of adulteration.

Second, the Act creates additional or different requirements that conflict with FMIA inspection processes by creating additional requirements on how pigs are to be handled. Triumph must adapt its premises, lines, and operations. Ex. 1 ¶¶ 49-50. At the very least, Triumph must segregate pigs away from those that would otherwise pass USDA inspection. *Id.* at 49. This creates additional and/or different requirements for processors and must be preempted.[24]

2. The Act is preempted because it conflicts with the FMIA.

The Act's also implicates conflict preemption.[25] The Act targets interstate commerce, rather than reflecting Massachusetts' interests in ensuring the health and safety of solely its own citizens. *Supra*, section 1(A)(1)-(2). Conflict preemption is triggered "when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Weaver's Cove Energy, LLC v. Rhode Island Coastal Res. Mgmt. Council*, 589 F.3d 458, 472–73 (1st Cir. 2009). And "[w]hat is a sufficient obstacle is a matter of judgment, to be informed by

[24] In *Ophir*, this Court recognized the importance of local laws and regulations staying far from those areas in which the federal government has an important interest in regulating because "if one State or political subdivision may enact such rules, then so may any other; and the end result would undo Congress's carefully calibrated regulatory scheme." 647 F. Supp. at 94 (*citing Engine Manufacturers Association v. South Coast Air Quality Management District*, 124 S.Ct. 1756, 1762 (2004)).

[25] The presumption against preemption does not apply here either, as it only applies in cases where "Congress has legislated in a field which the States have traditionally occupied[.]" *Cormier*, 51 F.4th at 6 (quotation omitted). And while the health and welfare of state citizens is generally a prime example of an area of traditional state interest, it cannot be used as a carte blanche by a state government to regulate interstate commerce. *Pabst Brewing Co. v. Crenshaw*, 198 U.S. 17, 27 (1905); *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429, 441 n.15 (1978) ("many cases have distinguished between regulations that are an exercise of the State's police powers, and those that are regulations of commerce.").

examining the federal statute as a whole and identifying its purpose and intended effects." *Cormier*, 51 F.4th at 6 (cleaned up). The USDA has a critical interest in overseeing the safety of meat; hence the FMIA was enacted, and detailed inspection processes were mandated. *See* 9 C.F.R. Part 306; *see also* FSIS Directive 6100.1 & FSIS Directive 6600.1.

The FMIA does not require Minimum Size Requirements in the raising of breeding pigs or within the definition of what should constitute an "adulterated" product unfit for human consumption. By banning sales downstream and pre-determining all other pork as adulterated, the Act preempts the inspection processes at FMIA-inspected facilities. This infringes on USDA's authority and therefore conflicts with the FMIA. *See supra* section I(A)(1)(b); *see also Algonquin Gas Transmission, LLC v. Town of Weymouth*, 365 F. Supp. 3d 147, 157-158 (D. Mass. 2019).

Defendants' attempt to escape preemption by focusing on the "sale" of pork is clever, but not dispositive of the Act's constitutionality. In *Nat'l Meat Ass'n v. Harris*, 565 U.S. 452 (2012), the Supreme Court held that a state regulation prohibiting a slaughterhouse from "holding" an animal that became injured after delivery and requiring the facility to slaughter quickly, preempted FMIA requirements. Although nothing in the FMIA required what the state regulation banned, it did not matter, given the FMIA's broad preemption clause covering not only conflicting, but additional, requirements. *Id.* at 132 S.Ct. 965 (the preemption clause "precludes States from imposing requirements that are 'within the scope' of the FMIA, relate to 'premises, facilities and operations,' and are 'in addition to, or different than those made under' the FMIA.").

Similar here, the plaintiffs in *Harris* argued the state regulation only covered sales, and that the FMIA was not "concerned with whether or how [the meat] is ever actually sold," and thus was only properly "motivat[ing] an operational choice without running afoul of the FMIA's preemption provision." *Id.* at 463. The Court rejected that argument. "The idea—and the inevitable effect—of

the provision is to make sure that slaughterhouses remove nonambulatory pigs from the production process (or keep them out of the process from the beginning) by criminalizing the sale of their meat." *Id.* at 464. Further, "if the sales ban were to avoid the FMIA's preemption clause, then any State could impose any regulation on slaughterhouses just by framing it as a ban on the sale of meat produced in whatever way the State disapproved." *Id.* Here, the Act predetermines what pigs are adulterated, removing conventional pigs by preventing the sale of their meat. Such predetermination presents an obstacle to the accomplishment and execution of the FMIA.

D. Plaintiffs are Likely to Succeed on Their Claim of Preemption by the Packers & Stockyards Act.

The Act is also preempted by the Packers & Stockyards Act, 7 U.S.C. § 192 ("P&S Act"). The P&S Act prohibits any meat packer/producer from providing any preference to a particular person or locality, from subjecting any locality to a "disadvantage" in the sale of meat and from engaging in any unfair or unjustly discriminatory practice. 7 U.S.C. § 192(a-b). The purpose of the P&S Act is "to assure fair competition and fair-trade practices in livestock marketing and in the meatpacking industry." *London v. Fieldale Farms Corp*., 410 F.3d 1295, 1302 (11th Cir. 2005).

The Act creates an obstacle to this purpose in at least three ways. First, Triumph must source pigs compliant with the Act to gain access to the Massachusetts marketplace and must pay a premium to farmers who meet the demand. Ex. 1 ¶ 53.[26] This encourages preference and unfair competition. The Act also creates an unfair advantage among processers through its "sale" exemption. *Supra*, section I(A)(1)(b)(1). Finally, additional capital investments or contributions for equipment changes and facility conversions presents an obstacle for compliance with the P&S

[26] This has been recognized nationwide, too, many reporting that The Act and Proposition 12 – compliant pork will be treated as a "specialty item" and carry a premium depending on supply and demand of the local market. *See* Keefe, Lisa M., Prop 12 and pork pricing: a DLR analysis, meatingplace.com, last visited June 5, 2023, https://www.meatingplace.com/Industry/News/Details/109993

Act. *See* 9 C.F.R. § 201.216(g), (h). Congress enacted the P&S Act to restrict unfair, deceptive, and discriminatory trade practices in the meat packing industry. The Act obstructs those goals.

E. Plaintiffs are Likely to Succeed on Their Full Faith and Credit Claim.

The Full Faith and Credit Clause states that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." U.S. Const. art. IV, § 1. This Clause preserves rights acquired or confirmed under the public acts and judicial proceedings of one state by requiring recognition of their validity in other states. *Pac. Emps. Ins. Co. v. Indus. Accident Comm'n of State of California*, 306 U.S. 493 (1939).

The Act regulates farming in states where Farmer Plaintiffs operate. *NPPC*, 143 S. Ct. at 1176 (Kavanaugh, J., concurring and dissenting in part) (citing M. Rosen, State Extraterritorial Powers Reconsidered, 85 Notre Dame L. Rev. 1133, 1153 (2010) ("[T]he Full Faith and Credit Clause is the more natural source for limitations on state extraterritorial powers because that clause at its core is concerned with extraterritoriality"). States in which the Farmer Plaintiffs operate do not impose Minimum Size Requirements. ECF No. 17, ¶¶ 129. For example, Missouri's Constitution protects the "Right to Farm," bestowing "the right of farmers and ranchers to engage in farming and ranching practices" that are "forever guaranteed in this state[.]" Mo. Const. art. I § 35.[27] Accordingly, Missouri confers a constitutional *right* for farmers to house breeding sows under their own industry practices, which are contrary to the Act. *Id.*

The clause "does not require one state to substitute for its own statute…the conflicting statute of another state, even though that statute is of controlling force in the courts of the state of

[27] There are other states that govern Farmer Plaintiffs' conduct which also confer a right to farm. *See e.g.*, W.S. § 11-29-115, Wyoming Protection of Livestock statute ("nothing in this chapter prohibits: [t]he use of Wyoming industry accepted agricultural or livestock management practices or any other commonly practiced animal husbandry procedure used on livestock animals[.]"); *See e.g.*, Wyo. Stat. § 11-44-104 ("the right of farmers and ranchers … shall be forever guaranteed in this state."); 345 Ind. Admin. Code 14-2-3 through 14-2-4 (regulations establishing standards of care for livestock). *see also* 345 Ind. Admin. Code 14-2 (1-5).

its enactment with respect to the same persons and events." *Pac. Emps. Ins*, 306 U.S. at 502; *See also supra* section I(A)(2).[28] The Act fails to give full faith and credit to the state laws bestowed upon Farmer Plaintiffs, blatantly disregarding those laws.

F. Plaintiffs are Likely to Succeed on Their Due Process Claim.

The Fourteenth Amendment to the United States Constitution provides that "no person shall . . . be deprived of life, liberty, or property, without due process of law." "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford,* 408 U.S. 104, 108 (1972). A statute is vague if it fails to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Id.*

As an initial matter, the Act is a quasi-criminal statute—meaning, the penalties purport to be civil and yet they function like criminal penalties.[29] Each violation is punishable by a civil fine up to $1,000 and the Attorney General may seek injunctive relief to prevent any further violations of the Act. Mass Gen. Laws App. Ch. 129, § 1-6. Also, the injunctive relief available to the Attorney General can act like debarment or loss of license to sell pork to state or federal entities within Massachusetts—another criminal penalty—if the Attorney enjoins a business owner from selling compliant pork following violation for non-compliance. *See One Lot Emerald Cut Stones v. United States,* 409 U.S. 232, 237 (1972) (holding debarment is a criminal penalty when "unreasonable or excessive").[30] Other federal circuits have found that significant civil penalties warrant quasi-criminal treatment. *See Women's Med. Ctr. of Nw. Houston v. Bell,* 248 F.3d 411,

[28] *See also* Ex. 2 ¶ 9; Ex. 3, Declaration of Mauricio Diaz ¶ 16; Ex. 5 ¶ 7; and Ex. 6, Eichelberger Farms Declaration¶ 8.

[29] The Due Process Clause requires less clarity in purely civil statutes, but laws imposing criminal penalties are subject to a stricter standard. *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982).

[30] *See also Women's Medical Center of Northwest Houston v. Bell,* 248 F.3d 411, 422 (5th Cir. 2001) (finding loss of medical license to warrant quasi-criminal treatment).

422 (5th Cir. 2001). And the Act itself was directly mirrored off of a criminal statute, Proposition 12. The stricter, quasi-criminal standard should apply.

The Act both facially violates due process and as applied to Plaintiffs. If a statute is "impermissibly vague in all its applications" such that "no standard of conduct is specified at all" then the statute is vague on its face. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 495 & n.7 (1982). For as-applied challenges, the Court must determine whether the statute defines the offense "with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson,* 461 U.S. 352, 357 (1983).

The Act is vague as applied because it fails to define "engage in" the sale within Massachusetts with sufficient definiteness.[31] Due Process requires "that a person of average intelligence must have constitutionally adequate notice that his conduct was forbidden by the statute." *Butler v. O'Brien*, 663 F.3d 514, 519 (1st Cir. 2011) (citing *Kolender,* 461 U.S. at 357-58); s*ee also Rhode Island Med. Soc. v. Whitehouse*, 66 F. Supp. 2d 288, 311 (D.R.I. 1999), *aff'd,* 239 F.3d 104 (1st Cir. 2001) (finding a term "indispensable" when it defines what the Act proscribes and when that term is vague, the statute is unconstitutionally vague). Farmer Plaintiffs' have knowledge their pigs are sold into Massachusetts. Ex. 2, New Fashion Pork Declaration ¶ 15; Ex. 4 ¶ 19. Triumph ships directly to Massachusetts. Ex. 1 ¶ 51. Vagueness in "engaged in" leaves the entire pork supply chain to guess at its meaning and so, no business owner or operator is on notice of what conduct is proscribed. *See Connally v. Gen. Const. Co.*, 269 U.S. 385, 391 (1926). The Act also fails to clearly define "confined in a cruel manner."[32] The requirement for breeding

[31] Ex. 2 ¶ 20; Ex. 3 ¶ 20.

[32] The Act defines it as confining "a breeding pig in a manner that prevents the animal from lying down, standing up, fully extending the animal's limbs or turning around freely." Mass. Gen. Laws Ch. 129 App., § 1-5.

pigs to turn around *freely* has caused persons of common intelligence to differ as to its application, as the ability of a sow to turn around expressly depends on the sow's size, which is not "one size fits all," creating confusion on compliance.[33] *See City of Chicago v. Morales*, 527 U.S. 41, 60 (1999) (finding definition of forbidden conduct unclear and thus constitutionally vague). Because the Act fails to clearly define prohibited conduct, Plaintiffs cannot discern whether they violate the Act. Without definiteness, the Act "cannot validly be applied to any conduct," making the Act vague on its face. *See Bangor Baptist Church v. State of Me., Dept. of Educ. and Cultural Servs.*, 549 F. Supp. 1208, 1226 (D. Me. 1982).

Also, the Act fails to provide "minimal guidelines" to govern enforcement. *Kolender*, 461 U.S. at 358. Third-party validators and Defendants are no better able than those in the pork industry to discern the meanings of "engage in sale" or "turn around freely." Without standards, Defendants and inspectors have "virtually unrestrained power" to arbitrarily enforce against Plaintiffs. *See id.* at 360. The Act is vague as applied to Plaintiffs and on its face.

G. Plaintiffs are Likely to Succeed on Their Import-Export Clause Claim.

The Import-Export Clause provides, "[n]o State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection laws[.]" U.S. Const. art. I, § 10, cl. 2. [34] The Supreme Court has recently read the Clause as potentially preventing states "'from imposing certain especially burdensome' taxes and duties on imports from other States—*not just on imports from foreign countries*." *NPPC*,

[33] Ex. 5 ¶ 19; Ex. 4 ¶ 22; *see also Prop 12 Sow Housing Guide*, www.cdfa.ca.gov/AHFSS/AnimalCare/docs/sow_housing_guide.pdf.

[34] The Clause has been used to strike down taxes and duties imposed on goods in interstate commerce before. *Almy v. People of State of Cal.*, the Court struck down a stamp duty imposed by the California Legislature upon bills of lading for gold or silver transported from California to any port or place out of state. 65 U.S. 169, 172 (1860). The Court held that the stamp duty was a tax on exports and that had the duty been imposed on the goods themselves, it would clearly offend the Constitution. *Id.* However, this specific duty applied to the *bills of lading*, which, in substance, was the same as taxing the goods exchanged in interstate commerce, as every shipment comes with a bill of lading. *Id.* at 174.

143 S. Ct. 1142, (Kavanaugh, J., concurring and dissenting in part) (citing *Comptroller of Treasury of Md. v. Wynne*, 575 U.S. 542, 573 (2015)) (Scalia, J., dissenting); *Camps*, 520 U.S. at 621–637 (Thomas, J., dissenting); *Brown v. Maryland*, 25 U.S. 419, 438−439, 449, 6 L.Ed. 678 (1827) (emphasis added)). Justice Thomas in *Camps* reasoned, as the Court here should, that the Framers did not limit this Clause only to goods from foreign countries, as if it did, they could have said as such. *Camps*, 520 U.S. at 624. Here, the Act conditions the sale of goods on a preferred method of farming, imposing a duty on these out-of-state goods. By conditioning every sale on a specific method of production, Massachusetts is imposing a tax or duty on the sale of meat within its borders. Justice Thomas and Scalia's interpretations should be extended here to find Plaintiffs likely to succeed on their claim under the Constitution's Import-Export Clause.

II. Plaintiffs—and the Nation's Pork Production Sector as a Whole—Risk Suffering Immediate and Irreparable Harm Absent a Preliminary Injunction.

To establish irreparable harm, it is enough if plaintiffs show that their legal remedies are inadequate. *Ross-Simons of Warwick, Inc. v. Baccarat, Inc.*, 102 F.3d 12, 18 (1st Cir. 1996). Several situations demonstrate irreparable harm will occur if this Court denies the requested preliminary injunction.

First, sovereign immunity bars suits for damages in federal court against State officials in their official capacity unless the State waives its immunity or Congress abrogates it. *See e.g.*, *Kentucky v. Graham*, 473 U.S. 159, 165–67 (1985). Here, Massachusetts has not waived sovereign immunity and Congress has not abrogated it. Second, the inability to supply pork into Massachusetts creates an emergency and imposes additional harm to the contractual relationship between Plaintiffs. Ex. 1 ¶¶ 13-14, 20-23.[35] The First Circuit has recognized that the "inability to

[35] These are unavoidable risks for Plaintiffs. Seaboard controls the sales for Triumph, who demands pigs from its Farmer Plaintiffs and other independent pig farmers if necessary. Triumph and the Farmer Plaintiffs have no control or voice over where – or to whom – Seaboard markets Triumph (and Farmer Plaintiffs') pork. Ex. 1 ¶ 38; Ex. 5 ¶ 9;

supply a full line of products may irreparably harm a merchant by shifting purchasers to other suppliers." *Vaqueria Tres Monjitas, Inc. v. Irizarry*, 587 F.3d 464, 485 (1st Cir. 2009) (citing *Automatic Radio Mfg. Co. v. Ford Motor Co*., 390 F.2d 113, 116–17 (1st Cir.1968)). Third, Plaintiffs face immediate harm of civil enforcement and blocking their entry into the Massachusetts market. The Act will become enforceable upon the expiration of the Stay Period in effect. *See supra,* p. 1. Fourth, breeding pigs also face irreparable harm in the face of enforcement. *See supra*, 7; Ex. 7 ¶ 29. Finally, Plaintiffs stand to permanently lose business they cannot recover from Defendants through monetary relief. *See e.g.,* Ex. 1 ¶¶ 20-23. The threat of unrecoverable economic loss qualifies as irreparable harm. *See Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.*, 22 F.3d 546, 552 (4th Cir. 1994) (holding that permanent loss of customers satisfies the irreparable injury prong) (abrogated on other grounds). Harm will also trickle to the Massachusetts and nationwide pork consumer. Ex. 8 ¶¶ 32–36.[36] These market, consumer, and compliance costs demonstrate irreparable harm. *See generally* Ex. 1 ¶ 55; Ex. 8 ¶¶ 15–31.

III. The Balance of the Equities Tips in Favor of Plaintiffs and a Preliminary Injunction is in the Public's Interest.

"The third and fourth factors, harm to the opposing party and the public interest, merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418 (2009); *see also Savino,*, 459 F. Supp. 3d at 331. To determine the balance of the equities, the court must weigh the possible harm caused by the requested injunctive relief. *Vaqueria*, 587 F.3d at 486. Because the

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Ex. 6 ¶ 11. Accordingly, as it stands now, Plaintiffs must come into compliance with the Act and Regulations, even if they have no intent to sell into Massachusetts. *Id.*

[36] Keefe, Lisa M., *Prop 12 and pork pricing: a DLR analysis*, meatingplace.com, last visited June 5, 2023, https://www.meatingplace.com/Industry/News/Details/109993; The Daily Livestock Report recently reviewed the effects laws like the Act have on federal pricing programs, stating "Hogs and pork that meet the state laws' requirements by definition become a specialty item and will be treated as such by the Mandatory Price Reporting system, carrying a premium that will depend both on supply availability and demand in the local market[.]"

only "harm" Massachusetts will face is its inability to enforce an unconstitutional law that would wreak economic harm across the national supply chain, the balance of harms supports Plaintiffs. Massachusetts' interests are not impeded by an injunction, as laws exist to protect the health and safety of human consumption of pork meat. *Supra*, sections I(G) & I(H). *See also Savino*, 459 F. Supp. 3d at 332 (holding that government's interests would not be hampered if preliminary injunction was issued). The Act harms Massachusetts agencies, businesses, and communities, and will force an immediate pork shortage within Massachusetts. Ex. 8 ¶ 6. Maintaining the status quo is a central justification for granting preliminary injunctive relief. *See Puerto Rico Conservation Found. v. Larson,* 797 F. Supp. 1066, 1073 (D.P.R. 1992). Because the Act will *harm* Massachusetts' consumers, no prejudice to Massachusetts exists and an injunction should issue until the constitutionality of the Act is evaluated.

CONCLUSION

The motion for preliminary injunction should be granted as set forth herein.

Dated: August 7, 2023.

TRIUMPH FOODS, LLC, CHRISTENSEN FARMS MIDWEST LLC, THE HANOR COMPANY OF WISCONSIN, LLC, NEW FASHION PORK, LLP, EICHELBERGER FARMS, INC., and ALLIED PRODUCERS' COOPERATIVE, Plaintiffs.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 7th day of August 2023, the foregoing document was electronically filed with Clerk of the Court using the CM/ECF system which sent electronic notification of such filing to all CM/ECF Participants.

/s/ Ryann A. Glenn