

UNITED STATES DISTRICT COURT
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.

CIVIL ACTION
NO. 1:23-cv-11671-WGY

PARTIES' JOINT PRETRIAL MEMORANDUM

Pursuant to Local Rule 16.5(d) of the Local Rules of the United States District Court for the District of Massachusetts, and in accordance with the Court’s Order dated September 19, 2023 (ECF No. 48), Plaintiffs, 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 (collectively, “Plaintiffs”) and Defendants Andrea Joy Campbell, in her official capacity as Attorney General of Massachusetts, and Ashley Randle, in her official capacity as Commissioner of the Massachusetts Department of Agricultural Resources (collectively, “Defendants,” and collectively with Plaintiffs, the “Parties”) submit this Joint Pretrial Memorandum in advance of the Final Pretrial Conference.

I. Concise Summary of the Evidence

A. Plaintiffs’ Summary:

Introduction

The evidence at trial will demonstrate that the Question 3 Minimum Size Requirements for Farm Animal Containment (“Question 3” or the “Act”) unconstitutionally targets out-of-state farmers and pork processors who ensure the supply of pork into Massachusetts and is applied in a manner that violates several other core constitutional principles, while undeniably removing the power to regulate food safety away from the Federal Government. Plaintiffs are agreeable to proceed largely by stipulation, but Defendants have not agreed to any of the Plaintiffs’ proposed declarations or the vast majority of the Plaintiffs’ proposed Statement of Facts, and have further declined to waive their right to discovery or cross examination. Plaintiffs’ listed witnesses and exhibits remain only necessary if Defendants maintain this position.

Dormant Commerce Clause, Privileges & Immunities, Full Faith and Credit Clause and Import/Export Clause Claims

Evidence will be offered to prove the Act discriminates against interstate commerce in favor of economic protectionism, rendering it *per se* invalid. Largely, the evidence intended to be offered through written and/or direct testimony, with supporting documentation, will be the same for this set of constitutional claims. Specifically, Plaintiffs intend to offer evidence concerning the circumstances present within the Commonwealth both from breeding pig farms and in-state meat processing facilities, together with the ballot initiative background and information presented to the Commonwealth's voters at the time the Act was passed in 2016. This will demonstrate the economic protectionist impact of the Act. Plaintiffs will also offer evidence through direct testimony of its Plaintiffs and economic expert, Dr. Jayson Lusk, Ph.D., to show the disparate impact that is placed on out-of-state pig farmers and processors, and interstate commerce as a whole, as a result of the Act and its Regulations.

For example, 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, 156.¹ In comparison, Christensen Farms raises 140,000 breeding pigs, producing 3.6 million hogs each year and, to date, has only converted

¹ 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[.]”).

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, 35.² This inability to satisfy its own pork needs from in-state production, represents an economic 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.

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 ¶ 163.³ Nationwide, this is not a practice that Triumph can engage in for the distribution of their product, especially when outside the state.

Plaintiffs also intend to present additional evidence concerning the substantial burden that the Act and its Regulations imposes on out-of-state farmers and processors, in violation of the dormant Commerce Clause. The evidence will show that the burdens are far-reaching and are excessive in comparison to any local benefit. Specifically, Plaintiffs will present evidence to show the burdens on interstate commerce span the entire pork supply chain and also specifically to each individual Farmer Plaintiff who may be called to testify at trial. Plaintiffs’ expert analysis from

² In comparison, within the first quarter of 2023, Missouri and Iowa—the two states that Triumph primarily operates 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).

³ *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.”).

Dr. Janeen Salak-Johnson will demonstrate that the Act, marketed as an animal welfare law to this Court, actually *harms* the breeding pigs and their offspring by making aggressive behavior and injured pigs a reality. Dr. Salak-Johnson will also testify to the lack of scientific evidence that the Act – and other laws like it - protects consumers from the risk of foodborne illness and disease, and that the sow housing promoted by the Act actually *increases* such risks. Plaintiffs further intend to submit evidence from farmers themselves about the harms caused to animals by the Act, as well as the substantially increased risk to worker safety. Plaintiffs also intend to present evidence concerning the food safety and animal welfare precautions already in place, both at the Farmer Plaintiffs’ operations and at Triumph Foods’ processing facility. Plaintiffs will present evidence concerning the state and federal regulations that govern their operations to ensure animals are treated humanely and food safety risks are analyzed and incorporated into their day-to-day operations.

Preemption Claims – Federal Meat Inspection Act (“FMIA”); Packers & Stockyards Act (“PSA”)

Plaintiffs have asserted the Act violates both express and conflict preemption principles as implicated by the FMIA. 21 U.S.C. § 601 *et seq.* At trial, Defendants will likely attempt to escape any preemptive effect under the FMIA by relying upon the “sale” definition within the Act and Regulations. However, the evidence will show that focusing on where the sale occurs, and such definition, has no effect to the unconstitutional preemptive effect that the FMIA has when evaluating the effects of the Act on facilities and operations of meat processing facilities. Thus, Plaintiffs will offer evidence explaining the meat processing facility daily operations and how sales of Whole Pork Meat are handled by Triumph Foods and ultimately destined for the Commonwealth. The evidence will also show the detailed, mandatory federal requirements that

Triumph Foods administers each day to ensure that meat is safe, wholesome, unadulterated and overall fit for human consumption. In addition, the evidence will show the explicit federal laws that Triumph Foods is *required* to follow in order to maintain its registration with the United States Department of Agriculture. Finally, the evidence will show the detailed recordkeeping requirements and other segregation efforts that Triumph and the Farmer Plaintiffs have been required to incorporate into their operations, which are different and/or in addition to what is mandated by the FMIA.

With respect to the preemption claim under the PSA, the evidence will show the direct impact the Act has on the contractual relationships that Triumph maintains with its Farmer Plaintiffs. Specifically, Plaintiffs will present evidence concerning the Hog Procurement Agreements (“HPAs”) described within the Amended Complaint and Declarations submitted in Support of Plaintiffs’ Motion for Preliminary Injunction. Additional evidence will be offered concerning the effect the supply shortages for compliant Whole Pork Meat will have on rationing and obtaining compliant pigs for Triumph Foods. Finally, evidence will be offered that discusses the substantial capital improvements that are required for pig farmers to make in order to either construct or retrofit facilities in order to provide adequate sow housing to comply with the Act.

Due Process Clause

Plaintiffs have asserted that the Act and its Regulations should be declared void for vagueness, as its prohibitions are not clearly defined, does not give a person of ordinary intelligence a reasonable opportunity to know what is prohibited and encourages arbitrary enforcement by the Attorney General and any third-party validators who are authorized to conduct inspections. Plaintiffs’ expert testimony from Dr. Salak-Johnson will further support the different sizes of sows and sow housing confinement individual gestation and group housing pens. Plaintiffs

intend to offer evidence concerning the lack of understanding surrounding the vague terminology within the Act and Regulations concerning “engaged in” the sale and “turn around freely” and how the Defendants cannot objectively enforce the Act and Regulations. The vagueness is further complicated by the fact the Regulations, even today, are not final by Defendants own stipulation to further amend the ability to ship whole pork meat through Massachusetts and into neighboring states.

Irreparable Harm

Because the trial on October 10, 2023, is a consolidated preliminary injunction hearing and trial on the merits pursuant to Fed. R. Civ. Proc. 65(a), Plaintiffs remain prepared to submit evidence concerning the immediate risk of irreparable harm that will exist if injunctive relief is not granted. Plaintiffs largely have previewed the evidence for the Court through submission of their Declarations in Support of Motion for Preliminary Injunction, and will present written documentation and testimony to support such statements before the Court. Plaintiffs’ expert testimony concerning the irreparable harm that face the breeding pigs that are covered under the Act will be addressed through both Farmer Plaintiffs’ own experience in the industry and firsthand observations of aggressive sow behavior, as well as through Dr. Salak-Johnson’s testimony and supporting materials relied upon in formulating her opinions identified in her Declaration. *See generally*, ECF. No. 27-7. The evidence will also show irreparable economic harm facing both the Plaintiffs if the Act is enforced, as well as the Commonwealth and national pork market as a whole. This will be accomplished through testimony, written documentation in support and expert testimony by Dr. Jayson Lusk.

B. Defendants' Summary:

Defendants currently are not in a position to completely summarize what the evidence will show, because, as stated in their portion of the Joint Status Report [ECF No. 45], filed September 14, 2023, and on which the Court reserved issuing an order until the final pre-trial conference set for October 2, 2023, Defendants request a reasonable period of discovery to enable them to seek discovery into the core factual issues in this matter, including but not limited to those described below in Part III. Because Defendants have not yet had an opportunity to seek this discovery, the Defendants reserve the right to supplement their summary of the evidence following receipt and review of this discovery.

While Defendants continue to request a reasonable period of discovery, both to take discovery from the Plaintiffs and any relevant third parties and to develop their factual defense, Defendants have nevertheless diligently been working to prepare the evidence that they would put on at trial.

Currently, Defendants expect that the evidence will show that the alleged economic or other burden on the interstate pork market imposed by the Massachusetts law is *de minimis*. Defendants have retained an economic expert, Dr. Devrim Ikizler, who is anticipated to respond to the declaration of Jayson Lusk, as presented in Dr. Lusk's Declaration in Support of Plaintiffs' Motion for Preliminary Injunction [ECF No. 27-8]. Dr. Ikizler is also anticipated to testify that market forces (*i.e.*, economic incentives shaping supply and demand) will determine which operations choose to offer whole pork meat products that are compliant with Massachusetts law, and that operations will choose to do so if they conclude it is economically beneficial to their businesses. Dr. Ikizler is further anticipated to testify that shifts in consumer demand nationwide have driven an increasingly specialized pork supply chain. Dr. Ikizler is additionally anticipated

to testify that increased product differentiation is a healthy industry trend that facilitates competition and increases business and industry dynamism and will provide new market opportunities.

Defendants are in the process of considering the identification and/or retention of additional witnesses, including expert witnesses, to testify as to one or more of the following topics: (1) the natural behaviors of pigs, (2) the effects of various confinement practices on pigs, (3) animal husbandry practices related to pigs raised for pork meat, (4) tracking pigs and pork meat through the supply chain, and (5) public health effects related to various animal confinement practices. Although not yet formally retained, Defendants anticipate potentially calling as expert witnesses James Reynolds, D.V.M. to testify with respect to the effects of confinement methods on animal welfare and/or Leon (Sam) Barringer, D.V.M. to testify with respect to tracking and traceability within the swine industry.

Defendants note that the above-identified witnesses are not available to appear to testify the week of October 10th.

Defendants reserve the right to supplement these topics, and the witnesses who would testify with respect to these matters.

II. Fact Established by Pleadings, Stipulation, Or Admissions Of Counsel

The Plaintiffs

1. Plaintiff Triumph Foods, LLC (“Triumph”) is a member-owned company and produces pork products that are sold locally, nationally, and internationally. It was founded in 2003 by five of the largest independently owned pork producers in the country, including The Hanor Company of Wisconsin, LLC, New Fashion Pork, LLP, Eichelberger Farms, Inc., and Allied Producers Cooperative. Triumph is headquartered in St. Joseph, Missouri, and receives a large

portion of its supply of pigs from Christensen Farms Midwest, LLC, The Hanor Company of Wisconsin, LLC, New Fashion Pork, LLP, Eichelberger Farms, Inc. and Allied Producers' Cooperative.

2. Triumph processes approximately 5.2 million pigs annually.

3. Christensen Farms Midwest, LLC ("Christensen Farms") is a member-owner of Triumph. Its farms are located in Minnesota, Iowa, Nebraska, Illinois, and South Dakota.

4. The Hanor Company of Wisconsin, LLC ("Hanor") is a member-owner of Triumph. Its farms are located in Wisconsin, Oklahoma, North Carolina, Iowa and Illinois.

5. New Fashion Pork, LLP ("NFP") is a member-owner of Triumph. Its farms are located in Minnesota, Indiana, Iowa, Illinois, South Dakota, Wyoming, and Wisconsin.

6. Eichelberger Farms, Inc. ("Eichelberger") is a member-owner of Triumph. Its farms are located in southeast Iowa, Missouri, and Illinois.

7. Allied Producers Cooperative ("APC") is a member-owner of Triumph and is a cooperative. APC is headquartered in Iowa, but its members operate in various states throughout the Midwest.

8. Christensen Farms Midwest, LLC, The Hanor Company of Wisconsin, LLC, New Fashion Pork, LLP, Eichelberger Farms, Inc. and Allied Producers' Cooperative produce and farm pigs to supply Triumph's pork processing operations. Each Plaintiff, apart from Triumph, has breeding pigs, and after the breeding pigs give birth, Christensen Farms Midwest, LLC, The Hanor Company of Wisconsin, LLC, New Fashion Pork, LLP, Eichelberger Farms, Inc. and Allied Producers' Cooperative raise the pigs until they are ready for market, *i.e.*, slaughter.

9. The Christensen Farms Midwest, LLC, The Hanor Company of Wisconsin, LLC, New Fashion Pork, LLP, Eichelberger Farms, Inc. and Allied Producers' Cooperative are not

members of the National Pork Producers Council. Triumph Foods cannot be a member of the National Pork Producers Council.

The Defendants

10. Defendant Campbell is the Attorney General of the Commonwealth of Massachusetts.

11. Defendant Randle is the Commissioner of the Massachusetts Department of Agricultural Resources who oversees the Massachusetts Department of Agricultural Resources.

The Act and Regulations

12. A ballot committee called the Citizens for Farm Animal Protection (“CFAP”), was formed to support the passage of the 2016 ballot initiative, the “Prevention of Farm Animal Cruelty Act,” referred to as “Question 3.”

13. The national Humane Society of the United States (“HSUS”) was the primary author and a proponent of Question 3.

14. The HSUS was also the author and a primary supporter of California’s Proposition 12, a ballot initiative adopted by voters in 2018. Cal. Health & Saf. Code §§ 25990, 25993.

15. The Information for Voters, 2016 Ballot Questions (“2016 Ballot Question Booklet”), published by the Secretary of the Commonwealth, was mailed to all eligible voters prior to the 2016 election.

16. On November 8, 2016, 77% of participating Massachusetts voters approved Question 3, the “Prevention of Farm Animal Cruelty Act.” The Prevention of Farm Animal Cruelty Act was enacted by Chapter 333 of the Acts of 2016.

17. The Act, as amended, is codified at Mass. Gen. Laws Ch. 129 App., § 1-1 *et seq.*

18. In December 2021, the Massachusetts Legislature amended portions of the Act by

enacting Chapter 108 of the Acts of 2021.

19. No changes were made to the confinement standards regarding breeding pigs, apart from extending the date by which the sale of Whole Pork Meat not in compliance with the Act would be prohibited. The Act was amended in a manner that changed the effective date for the standards as applied to breeding pigs to August 15, 2022. ECF No. 35-1, pp. 67-74.

20. The Act originally mandated the Attorney General to promulgate regulations for the implementation of the Act by January 1, 2020. ECF No. 35-1, pp. 64-65.

21. The Attorney General did not promulgate regulations by January 1, 2020. Regulations were delayed and became effective on October 1, 2021. Mass. Register 1453 (Oct. 1, 2021) at 424-34.

22. Acts (2021) Chapter 108 amended the Act to defer the mandate to the Department of Agricultural Resources—instead of the Attorney General—to promulgate regulations for the implementation of the Act not more than six months after the effective date of Acts (2021) Chapter 108 (October 1, 2021). ECF No. 35-1, pp. 73.

23. Regulations to implement and address enforcement of the Act were promulgated by the Department of Agricultural Resources and went into effect on June 10, 2022 (the “Regulations”), with certain exceptions. The Regulations are included at 330 CMR 35.01-08.

24. The Regulations particular to the sale of Whole Pork Meat were stayed in August 2022, at the behest of the pork industry during litigation, ultimately staying enforcement of the Regulations until August 23, 2023. *See e.g., Massachusetts Restaurant Association et al. v. Healey*, Case No. 4:22-cv-11245-MLW, ECF Nos. 19, 20.

25. The MDAR Regulations supersede any such previously issued regulations imposed by the Attorney General’s office.

26. In the litigation cited above (*MA Rest. Assoc.*), which remains pending, Defendants agreed, at the behest of the pork industry, to stay enforcement of the regulations with respect to transshipment of Whole Pork Meat into and through the Commonwealth, while a proposed change to the current Regulations is considered to authorize the sale of Whole Pork Meat within the Commonwealth if it is destined for neighboring New England states.

27. Aside from the stays of enforcement ordered in *Massachusetts Restaurant Association et al. v. Healey*, the Act and the Regulations are currently enforceable and prohibit the sale in Massachusetts of non-compliant Whole Pork Meat.

Swine Production Operations

28. Breeding pigs are female pigs utilized for breeding and giving birth to the piglets that ultimately become pigs sent to market.

29. Breeding pigs are generally artificially inseminated, litters of piglets are born, and the piglets are raised for three to four weeks before they are weaned.

30. Christensen Farms Midwest, LLC, The Hanor Company of Wisconsin, LLC, New Fashion Pork, LLP, Eichelberger Farms, Inc. and Allied Producers' Cooperative' farrow-to-finish operations take approximately 24-26 weeks.

31. Once pigs reach harvest weight, Christensen Farms Midwest, LLC, The Hanor Company of Wisconsin, LLC, New Fashion Pork, LLP, Eichelberger Farms, Inc. and Allied Producers' Cooperative send them to packing and processing facilities, including but not limited to the Triumph Foods processing facility and the processing facility jointly owned by Triumph Foods and Seaboard known as Seaboard Triumph Foods.

Effort to Comply with the Act by Christensen Farms Midwest, LLC, The Hanor Company of Wisconsin, LLC, New Fashion Pork, LLP, Eichelberger Farms, Inc. and Allied Producers’

Cooperative

32. Christensen Farms Midwest, LLC, The Hanor Company of Wisconsin, LLC, New Fashion Pork, LLP, Eichelberger Farms, Inc. and Allied Producers’ Cooperative sell pigs to Triumph to be processed into pork and sold.

Triumph’s Pork Processing Facilities

33. Triumph receives a large portion of its pig supply from Christensen Farms Midwest, LLC, The Hanor Company of Wisconsin, LLC, New Fashion Pork, LLP, Eichelberger Farms, Inc. and Allied Producers’ Cooperative.

34. Pork processed by Triumph is packed and shipped to customers in the United States and is exported to at least 25 countries.

The Federal Meat Inspection Act (the “FMIA”) and Triumph’s Operations

35. Both of Triumph’s processing facilities are “inspected facilities” for purposes of the Federal Meat Inspection Act.

36. Pigs are transported by Christensen Farms Midwest, LLC, The Hanor Company of Wisconsin, LLC, New Fashion Pork, LLP, Eichelberger Farms, Inc. and Allied Producers’ Cooperative to Triumph’s processing facilities via truck or trailer. When the truck or trailer first arrives, Triumph’s workers unload the trucks.

III. Contested Issues of Fact

A. Plaintiffs' Contested Issues of Fact

Attached as Exhibit A is the Proposed Joint Statement of Facts initially proposed by Plaintiffs, which remain contested except as reflected in the above Stipulated Facts.

B. Defendants' Contested Issues of Fact

Defendants identify the key factual issues, which are not intended to be exhaustive, as follows:

1. The alleged economic or other burden on the interstate pork market imposed by the Massachusetts law, including the marginal additional burden posed by Massachusetts' law above and beyond California's similar law (Plaintiffs' dormant Commerce Clause claim);
2. The alleged cost of compliance of the Massachusetts law on the Plaintiffs, the harm to their business interests flowing from the law, and the share of their business that Massachusetts pork sales represent (Plaintiffs' dormant Commerce Clause claim);
3. The nature of the local benefit of the law and/or the justification for it, *i.e.*, the extent to which the law advances animal welfare and the extent to which there is any evidence of discriminatory purpose or effect (dormant Commerce Clause, Privileges & Immunities Clause).
4. The alleged burden, steps, and/or requirements that slaughterhouse facilities "must" allegedly undertake to track or segregate compliant pigs and/or pork, including whether it is "impossible" to prevent Plaintiffs' non-compliant pork from reaching Massachusetts (Plaintiffs' Federal Meat Inspection Act preemption and Full Faith & Credit Clause claims);

IV. Jurisdictional Questions

Plaintiffs state that this case presents a federal question and therefore this Court has subject matter jurisdiction. The Parties agree that venue is proper in the District of Massachusetts pursuant to 28 U.S.C. § 1391(b).

Defendants require Plaintiffs to prove at trial that the Court has jurisdiction under Article III as to all claims, should any survive Defendants' Motion to Dismiss.

Further, jurisdiction is lacking on Count X of the Amended Complaint, pursuant to the Eleventh Amendment, as argued in the Defendants' Motion to Dismiss, filed September 28, 2023 [ECF Nos. 53, 54].

Defendants object to proceeding to trial without the opportunity to seek discovery as to each of the Plaintiffs' standing to bring this suit.

Defendants further object to proceeding to trial without the opportunity to seek discovery into whether Plaintiffs' claims should be subject to preclusion given the relationship between Plaintiffs in this case and the associational plaintiffs in last year's challenge to Massachusetts' law, *Massachusetts Restaurant Association & National Pork Producers Council v. Healey*, C.A. No. 22-cv-11245, which Plaintiffs in the current action did not join; as well as the relationship between Plaintiffs and the associational plaintiffs in challenges to California's near-identical Proposition 12, *National Pork Producers Council v. Ross*, 143 S. Ct. 1142 (2023) and *Iowa Pork Producers Association v. Bonta*, C.A. No. 21-cv-01663 (E. D. Cal.), *appeal docketed 22-55336* (9th Cir.) which Plaintiffs likewise did not join. Upon information and belief, Plaintiffs' interests already were represented in these prior cases, particularly in *Massachusetts Restaurant Association v. Healey*. Because Plaintiffs failed to join, intervene, and/or object in those cases if their interests were not adequately represented by the associations of which they, upon

information and belief, are members, Plaintiffs should be precluded from raising the claims in this action. *See Chicago-Midwest Meat Ass'n v. City of Evanston*, 589 F.2d 278, 281 n.3 (1978) (stating, in dormant commerce clause challenge brought by association of meat processors, “[t]he defendants argue that the association should not be accorded standing because a judgment against it might not be binding upon its members. We see little likelihood that the defendants will suffer the burden of relitigating the claims raised in this case. The Stare decisis effect of our decision provides the defendants with substantial protection against further litigation. In addition, the defendants would have the opportunity in any case brought by members of the association to argue that the members are bound by the Res judicata effect of our decision in this case”) (citing *Aluminum Co. of America v. Admiral Merchants Motor Freight, Inc.*, 486 F.2d 717, 720-21, (7th Cir. 1973), *cert. denied*, 414 U.S. 1113) (other citations omitted).

V. Questions Raised by Pending Motions

A. Plaintiffs’ Pending Motions:

Plaintiffs have a pending Motion for Preliminary Injunction before the Court for consideration, which has been ordered consolidated with a trial on the merits currently set for October 10, 2023. *See generally* ECF Nos. 26-27; 34, 38. Plaintiffs are reserving the right to file one or more motion(s) *in limine* concerning Defendants’ witnesses.

B. Defendants’ Pending Motions:

At the time of filing, Defendants’ Motion to Dismiss is pending (ECF No. 53).

Further, as set forth below in IV(B), Defendants also anticipate filing one or more motion(s) *in limine* to exclude anticipated testimony by certain of Plaintiffs’ fact witnesses.

Defendants request that the Court set a deadline for the filing of any motions *in limine*.

VI. Issues of Law, Including Evidentiary Questions

A. Plaintiffs' Issues of Law and Evidentiary Issues

Plaintiffs assert Massachusetts' Question 3 Minimum Size Requirements for Farm Animal Containment ("Question 3" or the "Act") unconstitutionally targets out-of-state farmers and processors who ensure the supply of pork into Massachusetts. Specifically, Plaintiffs have requested declaratory, temporary and permanent injunctive relief to enjoin enforcement of the Act and its regulations. Substantial issues of law are at issue before the Court concerning the constitutionality of the Act and the regulations under the dormant Commerce Clause, the Privileges & Immunities Clause, the Due Process Clause, the Import and Export Clause and the Full Faith and Credit Clause. In addition, Plaintiffs have presented issues of law pursuant to the Supremacy Clause concerning whether the Act and its regulations are preempted by the Federal Meat Inspection Act and the Packers & Stockyards Act. Finally, Plaintiffs have asserted that the Regulations are also unconstitutional for the same reasons and, accordingly, should be declared invalid under Massachusetts state law. For a more thorough discussion of Plaintiffs' statement of the legal issues for consideration before this Court, Plaintiffs refer the Court to its Memorandum of Points and Authorities in Support of a Motion for Preliminary Injunction and Reply Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction, with supporting Declarations. *See generally* ECF Nos. 26-27; 34, 38.

Plaintiffs reserve the right to object and/or move *in limine* regarding Defendants' witnesses and/or to exclude certain exhibits proposed by Defendants.

B. Defendants' Issues of Law and Evidentiary Issues

Defendants take the position that Plaintiffs have not yet demonstrated the Court has Article III jurisdiction, and that even if they can make that demonstration at trial, no relief is due

as a matter of law. Defendants have identified the relevant issues of law in their Opposition to Plaintiffs' Motion for a Preliminary Injunction and Motion to Dismiss papers [ECF Nos. 35, 35-1, 53, 54, 54-1].

Further, Defendants anticipate filing a motion *in limine* to exclude anticipated testimony by certain of Plaintiffs' fact witnesses, including that the declarations of those witnesses previously submitted in this matter [ECF Nos. 27-1, 27-2, 27-3, 27-4, 27-5, 27-6, 34, 36-2] (which Plaintiffs have asserted reflects the testimony those witnesses would offer at trial) (1) impermissibly contain expert opinion testimony that should be excluded under Federal Rule of Evidence 701, (2) impermissibly contain opinions that exceed those witnesses' personal knowledge that should be excluded under Federal Rule of Evidence 602, (3) impermissibly contain speculative opinions that should be excluded under Federal Rules of Evidence 602 and 701(a); and (4) impermissibly contain legal conclusions that usurp the role of this Court as fact-finder and likewise should be excluded.

Defendants also anticipate filing a motion *in limine* to exclude certain anticipated testimony by the Plaintiffs' expert witnesses, as reflected in the declarations submitted previously in this case [ECF Nos. 27-7, 27-8] (which Plaintiffs have asserted reflects the testimony those witnesses would offer at trial), including on the ground that portions of those opinions exceed the scope of the proffered expert's expertise and should be excluded under Federal Rules of Evidence 702 and 703, and *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (U.S. 1993).

Defendants also reserve the right to object to and/or move *in limine* to exclude certain of Plaintiffs' proposed exhibits, which, given the expedited nature of the schedule, Defendants have not yet had an opportunity to review.

VII. Requested Amendments to the Pleadings

Neither party currently seeks to amend the pleadings.

In the event Defendants' Motion to Dismiss is denied in whole or in part, Defendants request clarification from the Court as to the due date of their Answer to the Amended Complaint, given that this matter has been expedited for trial. It is Defendants' intention to deny that any relief is due.

VIII. Additional Matters to Aid in Disposition of the Action

A. Witnesses

Pursuant to Local Rule 43.1(b)(2), the Parties will identify the witnesses they expect to testify live or by deposition, and the anticipated order in which they will testify, no later than seven days before the trial day on which the testimony is expected. For example, Plaintiffs will identify on October 3, 2023 the witness(es) it expects to call on Tuesday, October 10, 2023.

To facilitate Defendants' identification of their witnesses for the first day of Defendants' case, Plaintiffs will endeavor to identify the date on which it anticipates resting seven days before the trial day on which Plaintiffs anticipates resting. The day after Plaintiffs provides such notice of the date it anticipates resting, Defendant will begin providing notice regarding its anticipated witnesses in accordance with the above procedures. Similarly, if either party determines that it will not make an opening statement, that party will identify that to the other party by October 3, 2023.

Should unforeseen circumstances arise that change the witnesses anticipated to be called, the anticipated witness order, or the anticipated date of resting identified above, the Parties agree to promptly inform the other party.

B. Demonstratives/Chalks

Plaintiffs' demonstratives/chalks, if any, will be identified with PD numbers, starting with PD001. Defendants' demonstratives/chalks, if any, will be identified with DD numbers, starting with DD001.

The Parties agree to provide a copy of its intended demonstratives/chalks to the other party no later than the day before the party intends to use the demonstrative/chalk, so that the other party may have sufficient time to raise any objections with the Court prior to the use of the at-issue demonstrative/chalk. The party seeking to use a demonstrative/chalk will provide a color representation of the demonstrative/chalk to the other party in both electronic and paper forms.

Blow-ups or highlights of exhibits or parts of exhibits or testimony are not required to be provided to the other party in advance of their use, as long as the exhibit itself has been properly disclosed pursuant to the requirements set by the Court. These provisions likewise do not apply to demonstratives/chalks created during testimony or demonstratives/chalks to be used for impeachment only, neither of which need be provided to the other party in advance of their use.

C. Admission of Legal Briefs, Declarations, and Attachments to Declarations

Plaintiffs contend all pre-trial briefs, declarations, and evidence attached thereto should be admitted of record for purposes of trial pursuant to Fed. R. Civ. Proc. 65(a).

Defendants object to the admissibility of Plaintiffs' legal memoranda as evidence; object to the admissibility of certain anticipated testimony reflected in Plaintiffs' declarations.

Defendants note that the only attachments to either the memoranda or the declarations are the *curriculum vitae* of Plaintiffs' experts, which are not relevant evidence but instead reflect whether each expert might be qualified to opine on the subject matter for which they have been identified.

D. Other Requested Submissions

The Parties request that the Court clarify whether it would like the Parties to submit a trial brief, and/or to propose findings of fact and conclusions of law, and if so, on what schedule.

E. View

Defendants request that Defendants' expert veterinarian be permitted to take a view of one or more of the Plaintiffs' operations.

IX. Probable Length of Trial

Plaintiffs estimate that their entire case will be presented through 4-7 witnesses, taking approximately one (1) to two (2) days for direct testimony or a total of (3)-(4) days to include Defendants' cross-examination. Defendants estimate that their entire case will be presented in (1) to (2) trial days for direct testimony or a total of (3)-(4) days to include Plaintiffs' cross-examination. The Parties state that the trial will be a nonjury trial.

As stated above, in the event Defendants' motion to dismiss is denied in whole or in part, Defendants continue to reserve their right to seek a reasonable period of discovery prior to the first day of trial. In the event that Defendants' request for a reasonable period of discovery is denied, Defendants seek continuance of the October 10, 2023 setting in order to allow Defendants an adequate opportunity to prepare their defense in advance of the first day of trial. Subject to these reservations of rights and without knowing the scope of the claim(s) that may survive Defendants' motion to dismiss, the Defendants anticipate calling 3-5 witnesses.

The Parties anticipate that trial will last approximately (6) trial days.

X. Names And Addresses of Witnesses

A. Plaintiffs' Witness Lists

Plaintiffs' Witness List is attached hereto as **Exhibit B1**.

Defendants' Witness List is attached hereto as **Exhibit B**.

B. Testimony by Deposition

The Parties have not designated any depositions for use in their respective case-in-chief, because no depositions have been taken. Defendants object to proceeding to trial without the opportunity to depose the Plaintiffs' corporate designees or experts.

XI. List Of Proposed Exhibits

Plaintiffs' exhibit list, subject to amendment, is attached hereto as **Exhibit C**.

Defendant's exhibit list is attached hereto as **Exhibit D**. Defendants expressly reserve the right to supplement their proposed exhibit list, and object to proceeding to trial prior to being able to take discovery to identify potential evidence.

The Parties have not yet had an opportunity to review and object to one another's exhibits. The Parties will endeavor to arrive at a stipulated list of exhibits expeditiously.

Each party reserves the right to use documents not set forth in its exhibit list for purposes of cross-examination and/or impeachment.

XII. Remaining Objections to Pretrial Disclosures

Due to the expedited nature of this case, the Parties did not exchange pre-trial disclosures under Federal Rule of Civil Procedure 26(a)(3) and so have no respective positions on objections to the evidence identified therein.

If the Court sets a pre-trial schedule that includes pre-trial disclosures under Federal Rule of Civil Procedure 26(a)(3), the Defendants reserve the right to object to any evidence in Plaintiffs' pre-trial disclosures.

Respectfully submitted,

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

ANDREA JOY CAMPBELL, in her official capacity as Attorney General of Massachusetts, and ASHLEY RANDLE, in her official capacity as Commissioner of the Massachusetts Department of Agricultural Resources,

By their attorneys,

By: /s/ Ryann A. Glenn

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Dated: October 2, 2023

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF), and paper copies will be sent to those indicated as non-registered participants.

/s/ Ryann A. Glenn

Dated: October 2, 2023