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

PLAINTIFFS' MEMORANDUM OF REASONS IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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INTRODUCTION

There are two ways for a plaintiff to demonstrate a violation of the dormant Commerce Clause. First, a plaintiff can demonstrate that a statute *discriminates* against out-of-state economic interests for the benefit of in-state economic interests. Second, a plaintiff can demonstrate that the law violates the balancing test the Supreme Court announced in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), which asks whether the burdens on interstate commerce outweigh the putative local benefits of the statute. Here, the first basis—discrimination—is the sole focus of this partial motion for summary judgment.[1]

The Parties are currently engaged in discovery preparing for a consolidated trial on the merits and hearing on Plaintiffs' motion for preliminary injunction. But the discrimination component of this case requires no further factual development; the facts being gathered through discovery are focused on the *Pike* balancing test, which is not at issue for this motion.[2] The discrimination claim, on the other hand, can be decided by this Court without any fact finding. At

[1] By making this partial motion for summary judgment now, Plaintiffs reserve their rights to pursue any and all of their claims—including dormant Commerce Clause claims under theories of discrimination and/or *Pike*—further in this case in the event this Court denies this motion. And they reserve the right to do so through any procedural devices available, including summary judgment and trial.

[2] Defendants have propounded extensive discovery, including document production, depositions, and farm site inspections. Expert battles and pretrial litigation are anticipated. But, while Plaintiffs have already voluntarily agreed to voluminous discovery production and have undergone extensive efforts to facilitate Defendants' visits to Plaintiff farms, this is all entirely unnecessary because this case can be decided as a matter of law, conserving time and judicial resources, as well as the Parties' limited resources.

least two separate discrimination violations exist: (1) based on the statute itself, and, second, and separately, (2) as demonstrated by publicly available uncontroverted material.

Interstate discrimination is inherent in The Prevention of Farm Animal Cruelty Act (the "Act" or "Question 3"). *See* Mass. G.L. c. 129 App. §§ 1-1 *et seq.*; 330 Code Mass. Regs. §§ 35.00 *et seq*. And there are multiple forms in which it discriminates. Only one discriminatory impact is necessary for a state law to violate the dormant Commerce Clause. Through the Act, Massachusetts seeks to regulate the farming practices used *only* in other states, subjectively choosing to define as "cruel" the traditional methods of hog farming used for generations in other states. The Commonwealth crafted that definition in a way that would not prevent sales from any of its own hog farms, while preventing sales of massive amounts of the pork supply from out-of-state farms. Worse still, Massachusetts provides exemptions *only* available to in-state processors of pork meat to further economically advantage in-state Massachusetts processors. The Supreme Court remains united in recognizing that this type of invidious discrimination is exactly what the dormant Commerce Clause is intended to prevent. Because there is no genuine dispute as to any material fact with respect to the purpose and effect of the Act, this Court can decide the discrimination question now, rule that the Act violates the dormant Commerce Clause, and enjoin its enforcement.

STANDARD OF REVIEW

Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Lionbridge Techs., LLC v. Valley Forge Ins. Co.*, No. CV 20-10014-WGY, 2023 WL 5985288, at *3 (D. Mass. Sept. 14, 2023) (citing Fed. R. Civ. P. 56(a)). "[A] party seeking summary judgment must, at the outset, inform the court 'of the basis for [its] motion and identif[y] the portions of the pleadings, depositions, answers to interrogatories, admissions, and affidavits, if any, that demonstrate the absence of any genuine

issue of material fact.'" *Sec. & Exch. Comm'n v. Sargent*, 589 F. Supp. 3d 173, 202 (D. Mass. 2022) (citing *Irobe v. U.S. Dep't Agric.*, 890 F.3d 371, 377 (1st Cir. 2018)). The burden then shifts to the nonmoving party who must "with respect to each issue on which [it] would bear the burden of proof at trial, demonstrate that a trier of fact could reasonably resolve that issue in [its] favor." *Id.* (internal quotations omitted).

ARGUMENT

I. The Dormant Commerce Clause Prohibits States From Discrimination Against Out-of-State Economic Interests In Favor Of Their Own Economic Interests.

The Constitution's Commerce Clause provides that "Congress shall have [the] [p]ower . . . [t]o regulate Commerce . . . among the several States." U.S. Const. Art. I, § 8, cl. 3. This affirmative endowment of power also carries "a negative, self-executing limitation on the power of the [s]tates to enact laws [that place] substantial burdens on [interstate] commerce." *Ne. Patients Grp. v. United Cannabis Patients & Caregivers of Maine*, 45 F.4th 542, 545 (1st Cir. 2022) (quotation omitted). Referred to as the "dormant Commerce Clause," it "protects interstate commerce from the evils of economic isolation and protectionism that state regulation otherwise could bring about." *Id.* at 546 (quotation omitted). Thus, "the very core of [the Supreme Court's] dormant Commerce Clause jurisprudence" is "antidiscrimination," and thus the Clause bars "state laws driven by economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 369 (2023) (cleaned up).

While the dormant Commerce Clause obviously prohibits state laws that blatantly and facially discriminate against out-of-state commerce, *see, e.g.*, *see Ne. Patients Grp. v. United Cannabis Patients & Caregivers of Maine*, 45 F.4th 542, 544 (1st Cir. 2022) (invalidating a state law requiring "officers and directors of a dispensary [to be] residents of Maine"), all that matters

is the "discriminatory *character* of [a] challenged state regulation[.]" *Ross*, 598 U.S. at 377 (emphasis added). To determine the true *character* of a state law, the Court examines not only the face of the statute, but also asks whether the law discriminates "in effect, or in purpose—against interstate commerce." *Anvar v. Dwyer*, No. 22-1843, 2023 WL 5765847, at *3 (1st Cir. Sept. 7, 2023). Discrimination in purpose or effect simply means "'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter,' as opposed to state laws that 'regulate[] evenhandedly with only incidental effects on interstate commerce[.]'" *Fam. Winemakers of Cal. v. Jenkins*, 592 F.3d 1, 9 (1st Cir. 2010) (quoting *Oregon Waste Systems, Inc. v. Department of Environmental Quality of Ore.*, 511 U.S. 93, 99 (1994)). This inquiry is holistic, and thus the Court may take into account "statutory context, legislative history, and other factors" in determining whether a statute is discriminatory in effect. *Id.* at 5.

Plaintiffs bear the initial burden of showing the discriminatory effects or purpose of the Act. *See, e.g., id.* at 9. When that burden is met, the state law "is virtually per se invalid . . . and will survive only if it advances a legitimate local purpose that cannot be adequately served by reasonable non-discriminatory alternatives." *Id.* (citing *Dep't of Revenue v. Davis*, 553 U.S. 328, 128 (2008)). The burden then shifts to the State to show the alleged legitimate purpose and the lack of non-discriminatory alternatives. *Id.* This "exacting standard" is "rarely satisfy[ied]" for state laws that are discriminatory in purpose or effect. *Id.*

II. The Act is Discriminatory.

There is no genuine issue of material fact that the Act "impos[es] disproportionate burdens on out-of-state interests and confer[s] advantages upon in-state interests,'" and that its purpose was "'motivated by an intent to discriminate against interstate commerce.'" *Anvar*, 2023 WL 5765847 at *6 (quoting *Jenkins*, 592 F.3d at 9, 13). Specifically, two elements of the Act are discriminatory.

First, Massachusetts chose to define the sales exclusion (and the farming practices prohibited) in a manner that applies to none of their own hog farmers, but only to out-of-state farms that drive the nation's pork supply. ***Second***, the Act provides an express exception to the sales exclusion, but it is one that applies only to the state's own in-state processors. Each is discriminatory, and each on its own violates the dormant Commerce Clause.

A. Massachusetts Chose to Prohibit Farming Practices In A Way That Burdens Only Out-of-State Farms And Permits In-State Farms To Continue Unabated.

The relevant portions of the Act begin by making it "unlawful for a farm owner or operator within the Commonwealth of Massachusetts to knowingly cause any covered animal to be confined in a cruel manner," which is defined 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 Ann. ch. 129 App., § 1-2. So far, so good. Massachusetts is free to regulate farming practices within its own borders; that does not raise constitutional concern under the dormant Commerce Clause.

But the Commonwealth didn't stop there. Instead, it chose to ***also*** include a sales ban, not just regulating confinement practices in-state, but also banning the sale of any pork product produced using such confinement practices, no matter where the farm is located:

> [I]t shall be unlawful for a business owner or operator to knowingly engage in the sale within the Commonwealth of Massachusetts of any . . . [w]hole pork meat that the business owner or operator knows or should know is the meat of a covered animal that was confined in a cruel manner, or is the meat of the immediate offspring of a [breeding pig] that was confined in a cruel manner.

Mass. Gen. Laws Ann. ch. 129 App., § 1-3.

It is with this sales ban that the Act runs into its first problem: it is uncontroverted that *not a single pig farmer in the state of Massachusetts* was using gestation crates—the type of housing proscribed by the Act and used by Farmer Plaintiffs (as well as other large farmers nationwide)—

at the time Question 3 was before the voters. SOF ¶¶19, 20, 32. In other words, Massachusetts chose to define as "cruel" farming methods not used by any farmer within the Commonwealth, instead targeting practices used only by out-of-state farms. And by doing so through a sales ban, it clearly burdens out-of-state economic interests in favor of in-state interests, as the farmers within the Commonwealth could continue business as usual to sell their pigs within Massachusetts, uninterrupted by any cost, delay, or burden associated with the Act. To be sure, this discriminatory impact would occur even if it impacted a significantly disproportionate number of out-of-state farmers (as compared to in-state farmers); here, the analysis is easy, because not a single Massachusetts farmer is impacted by the law.

Public data puts the magnitude of this discrimination in context. Consider, for example, the number of breeding sows and market hogs on Massachusetts farms: as of 2022, Massachusetts farms had as few as 1,500 breeding sows and approximately 6,000 total market hogs, and Massachusetts farmers produced a pig crop of 12,000 head in 2022—likely enough hogs for about 1.9 million pounds of retail pork. SOF ¶¶ 28, 30. By contrast, Missouri and Iowa in 2022 had 430,000 breeding sows and 930,000 breeding sows, respectively. SOF ¶ 29. Thus, not only are out-of-state farmers burdened significantly more by the sales ban because the farming operations are simply much larger than those in Massachusetts; Massachusetts farms are not burdened ***at all*** because Massachusetts chose to draft the Act in a way that didn't target the farming practices at their small in-state farms. The natural effect of the Act, then, is to target exclusively out-of-state commerce, giving in-state producers a newfound economic advantage.

Making in-state producers more competitive while forcing out-of-state producers from the market is the same type of invidious discrimination the First Circuit invalidated in *Fam. Winemakers of California v. Jenkins*, 592 F.3d 1, 4 (1st Cir. 2010). There, a Massachusetts law

only allowed "small wineries"—subjectively defined as those producing less than a certain number of gallons of grape wine per year—to obtain a "small winery shipping license." *Id.* at 4. This license allowed a "small winery" to sell wine to Massachusetts consumers in three different ways: shipping wine directly to consumers, using wholesale distribution, or using retail distribution. *Id.* In contrast, "large" wineries were required to choose between only *two* different methods of selling wine to Massachusetts consumers: engaging in wholesale distribution, or selling directly to Massachusetts consumers after obtaining a "large winery shipping license." *Id.* In other words, large wineries were afforded a single sale method—wholesale distribution or direct sales—while small wineries could use all three simultaneously. *Id.*

The First Circuit began by recognizing that the law was "neutral on its face; it does not, by its terms, allow only Massachusetts wineries to distribute their wines through a combination of direct shipping, wholesaler distribution, and retail sales." *Id.* at 5. Nonetheless, the First Circuit held it violated the dormant Commerce Clause because of a key fact: *All of Massachusetts' in-state wineries qualified as "small wineries"* under the definition chosen by the Commonwealth; thus, only out-of-state entities were impacted by the law. *Id.* at 4. Consequently, "the effect" of the law was to "cause local goods to constitute a larger share, and goods with an out-of-state source to constitute a smaller share, of the total sales in the market."). *Id.* at 10. "[B]ecause the effect of its particular gallonage cap is to change the competitive balance between in-state and out-of-state wineries in a way that benefits Massachusetts's wineries and significantly burdens out-of-state competitors," the law violated the dormant Commerce Clause. *Id.* at 5. The First Circuit concluded that a "state law is discriminatory in effect when, in practice, it affects similarly situated entities in a market by imposing disproportionate burdens on out-of-state interests and conferring advantages upon in-state interests." *Id.* at 10; *see also Trailer Marine Transp. Corp. v. Rivera*

Vazquez, 977 F.2d 1, 11 (1st Cir. 1992) (invalidating state law where out-of-state entities would pay five to six times higher for accidents than those in-state entities). That is precisely what is happening here, as Massachusetts chose to define the prohibited farming practices to impact only out-of-state farms, to the direct economic benefit of its own in-state farms. As the First Circuit put it, laws that "alter[] conditions of competition to favor in-state interests over out-of-state competitors in [a] market are state laws that have long been subject to invalidation." *Jenkins*, 592 F.3d at 10.

Even if that analysis—*grounded in binding First Circuit authority*—is not enough, the legislative underpinnings for the Act plainly indicate that its discriminatory effect on out-of-state producers was a central goal of the Act's passage. *See, e.g.*, *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 352 (1977) (evidence of discrimination in legislative history is a relevant factor in determining discriminatory impact or purpose); *see also Minnesota v. Clover Leaf Creamery Co*., 449 U.S. 456, 465–68, (1981) (looking to a senator's and representatives' statements during floor debates as probative evidence of purpose). Here, statements from legislators and the public indicate the Act wholly attempts to govern and dictate out-of-state hog-farming practices in an effort to enforce a nationwide policy and benefit in-state farmers. For one, during the committee hearing on Question 3 before the Massachusetts Legislature, public commentators, including Representative Anne Gobi, openly recognized that "we do not use gestation crates in Massachusetts." SOF ¶ 20. Nonetheless, one commentator recognized the need for the sales ban because "Massachusetts uses a lot of meat that is produced out of state in farms that use these cruel tactics." SOF ¶ 18. Another testified that "[t]his bill protects animals outside of Massachusetts that are sold and brought into the state." *Id.*

Statements of a Massachusetts legislator expressed a similar sentiment and even a concern that Question 3 (or H.3930 when it was before the Legislature) violated the Commerce Clause. Specifically, now-former Rep. Gobi made comments during and after the Joint Committee hearing that "Massachusetts does not use gestation crates." SOF ¶ 20. During the hearing, Rep. Gobi questioned why Massachusetts needed to pass Question 3 when its farmers did not engage in the prohibited activities, and stated, "[t]here were also lots of farms and organizations who did not endorse this bill[]. When you know there is a [gestation] problem in other states, why isn't there more emphasis on fixing that problem in other states?" SOF ¶ 21. Finally, on February 11, 2016—the date of the Joint Committee hearing—Rep. Gobi made statements reflecting her concerns about Question 3's constitutionality under the Commerce Clause. "Now we're treading on interstate commerce and there are some constitutional issues that I think are rather large and could be a hurdle to get over." SOF ¶ 22.

Further, Massachusetts own state courts recognize that in-state farmers' economic benefit is central to the Act. In *Dunn v. Attorney General*, in which the certification process for the Act was challenged in state court, the Massachusetts Supreme Judicial Court reasoned that the sales ban "protects ***Massachusetts farmers*** who comply with the law by preventing Massachusetts businesses from selling . . . pork obtained from ***out-of-State farmers*** who confine their animals in a cruel manner and who, by doing so, ***may be able to underprice their Massachusetts competitors***." *Dunn v. Attorney General*, 54 N.E.3d 1, 7 (Mass. 2016). The Court continued, explaining that the Act "protects hens, calves, and pigs in other States (and other nations) by providing non-Massachusetts farmers with an economic incentive not to confine their animals in a cruel manner if they wish to sell their eggs, veal, and pork in the Massachusetts market." 54 N.E.3d at 7. This type of obvious and improper economic discrimination and market manipulation

is exactly what the Act intends to accomplish; it is also what the dormant Commerce Clause prevents.

In prior briefing, Defendants attempted to use *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978) to work their way out of the Act's discriminatory purpose and effect, and Plaintiffs anticipate Defendants will try to do so again in the context of this motion. Unfortunately for the Commonwealth, *Exxon* does not cure the Act's discrimination on interstate commerce. In *Exxon*, the Court evaluated a Maryland statute providing that a producer or refiner of petroleum products (1) could not operate any retail service station within the state and (2) must extend all "voluntary allowances" uniformly to all service stations to which the producers supply. 437 U.S. 117, 119-20 (1978). The Court held that the Maryland statute did not discriminate under the circumstances there, but that holding is easily distinguishable from the situation present here. First, in *Exxon*, ***all*** gasoline sold in Maryland came from out-of-state refineries; it was therefore impossible for the Maryland law to discriminate against interstate commerce because no in-state producers existed to be benefitted by the law. *Id.* at 121-22. As discussed, that is not the case here. Massachusetts has its own hog farms and pork-production facilities. And it is that local market that directly benefits from the Act's implementation at the expense of out-of-state operators. Second, the *Exxon* Court reasoned that the Maryland law did not discriminate against interstate commerce because it: created no barrier against interstate independent dealers; did not prohibit the flow of interstate goods; that it did not place added costs upon the challengers; and did not distinguish between in-state and out-of-state companies in the retail market. *Id.* at 117-18. But here, as discussed throughout this brief, those are precisely the types of barriers and discrimination that do exist as a result of the Act. *See* Sections I(A) & I(B) herein. *Exxon* simply does not apply here.

In sum, Massachusetts crafted this Act in a way that burdens exclusively out-of-state

farmers (including Plaintiffs) to the direct benefit of in-state farms. This squarely falls within the dormant Commerce Clause's "core" antidiscrimination principles, *NPPC*, 598 U.S. at 377, and thus the Act is subject to the *per se* rule of invalidity on this basis alone.[3]

B. The Act Provides a Sale Exception Directly Advantaging Only In-State Processors.

In addition to discriminating against farmers, the Act also discriminates against out-of-state pork producers at the benefit of in-state producers. Specifically, the Act includes an exception that allows in-state processors the ability to circumvent the sales ban without affording the same opportunity to out-of-state processors.

The Act defines a "sale" as follows:

> a commercial sale by a business that sells any [covered item]; provided, however, that "sale" shall not include any sale undertaken at an establishment at which inspection is provided under the Federal Meat Inspection Act . . . ; provided further, that for purposes of this section, a "sale" shall be deemed to occur at the location where the buyer takes physical possession of a [covered] item[.]

Mass. Gen. Laws Ann. Ch. 129 App., § 1-5.

While Defendants may try to argue that the exception for sales at a Federal Meat Inspection Act ("FMIA") facility applies to all processors nationwide, the exception must be read in context of what constitutes a "sale." While the Act regulates anyone "engaged in the sale" of pork products no matter where they sit in the supply chain, the "sales" prohibited by the Act are ones in which the buyer takes physical possession of the product ***in Massachusetts***. Mass. Gen. Laws Ann. Ch. 129 App., § 1-5; *see also* 330 CMR 35.02 ("a Sale occurs at the location where the buyer takes physical possession" of a covered item). Thus, by definition, the only processors that can benefit from the exception to the sales ban are processors within Massachusetts. Out-of-state processors

[3] The Supreme Court in *NPPC* did not review the constitutionality of California Proposition 12 based upon these core antidiscrimination principles within dormant Commerce Clause jurisprudence, as those claims were not pursued.

like Triumph cannot complete their sales, because they cannot deliver into the state for customers to take physical possession. In other words, the Act blocks the supply chain that out-of-state processors have used to sell (now) non-compliant pork in Massachusetts and opens up a new one that can be enjoyed only by its own in-state processors.

This exception discriminates because it permits in-state processors to simply sell non-compliant pork straight to the consuming Massachusetts public, directly from their FMIA-inspected facility. Out-of-state processors, of course, can't do so. Any empty offer that Massachusetts customers can travel halfway across the country to take physical possession of pork at Triumph or other out-of-state FMIA-inspected facilities is of no solace when the Act provides an express exception to the Act for processors that are within Massachusetts for the exact same product. And of course, the farther away from Massachusetts the facility, the more unlikely—and thus discriminatory in effect—it becomes. Consider, for example, a large end-user of pork in Massachusetts—a hospital system, the state prison system, a large school district, etc.—who has for decades been buying and taking shipment of millions of dollars of pork each year. That's all now non-compliant and can't be done—***unless*** the buyer decides to buy it from a local processor. That is textbook discrimination against out-of-state processors.

Further, the FMIA exception burdens out-of-state processors like Triumph and gives in-state processors the distinct competitive advantage given their ability to process and sell pork *regardless* of whether the pork is the product of a sow confined in violation of the Minimum Size Requirements. *See* Mass. Gen. Laws Ann. Ch. 129 App., § 1-5. Any suggestion of requiring out-of-state processors (like Triumph Foods) to open its own brick-and-mortar processing facility within Massachusetts also cannot avoid the constitutional violation. *See e.g., Granholm v. Heald*, 544 U.S. 460, 475 (2005) (holding that the New York scheme granted in-state wineries access to

the State's consumers on preferential terms and further stating that the requirement of having an in-state presence is "prohibitive."). The FMIA sales exception is a benefit that only in-state processors may take advantage of. ECF No. 78, p. 10 ("So because Triumph is outside of Massachusetts, it would not – you know sale at that location is not within Massachusetts, for a processor within Massachusetts exempted through this other provision.").

The Act's constitutional hurdle with respect to the exception can also be viewed this way: it shields in-state processors from competition with out-of-state processors that have developed well-honed and efficient interstate supply chains over long periods of time at great expense. Indeed, any out-of-state farmers who wish to sell non-compliant pork in Massachusetts will be forced to only use in-state processors. Defendants again conceded this at oral argument for the motion to dismiss: "So if there's an establishment *within Massachusetts*, that's where that exemption applies[.]" ECF No. 78, p. 6 (emphasis added).

This is particularly egregious because Massachusetts does not produce enough product to meet its own demands; it only produced 12,000 pigs in 2022 and thus, the vast majority of its supply comes from out of state. SOF ¶¶ 30–31. Massachusetts' inability to satisfy its own pork needs from in-state production, coupled with the reality that in order to sell non-compliant pork, a farmer will need to use an in-state processing facility, means that in-state processing facilities have a stranglehold on non-compliant pork sales, and any out-of-state market representation for processing entities will disappear.

This is materially the same discriminatory impact discussed in *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333 (1977). There, out-of-state apple growers sued North Carolina when it passed a law banning apples from bearing a source-specific grade marking. 432 U.S. 333, 339 (1977). The Supreme Court held that the law violated the dormant Commerce

Clause. There, the "discrimination t[ook] various forms." *Id.* at 350. First and foremost, it was an "obvious . . . consequence" that the law "rais[ed] the costs of doing business in the North Carolina market for Washington apple growers and dealers, while leaving those of their North Carolina counterparts unaffected." *Id.* at 351. And this was because the

> North Carolina apple producers, unlike their Washington competitors, were not forced to alter their marketing practices in order to comply with the statute. They were still free to market their wares under the USDA grade or none at all as they had done prior to the statute's enactment. Obviously, the increased costs imposed by the statute would tend to shield the local apple industry from the competition of Washington apple growers and dealers who are already at a competitive disadvantage because of their great distance from the North Carolina market.

Id. The Court went on to analyze other forms of discrimination, namely, that "the statute has the effect of stripping away from the Washington apple industry the competitive and economic advantages it has earned for itself through its expensive inspection and grading system." *Id.* And "[o]nce again, the statute had no similar impact on the North Carolina apple industry and thus operated to its benefit." *Id.* And lastly the Court recognized that

> by prohibiting Washington growers and dealers from marketing apples under their State's grades, the statute has a leveling effect which insidiously operates to the advantage of local apple producers. As noted earlier, the Washington State grades are equal or superior to the USDA grades in all corresponding categories. Hence, with free market forces at work, Washington sellers would normally enjoy a distinct market advantage vis-a-vis local producers in those categories where the Washington grade is superior. However, because of the statute's operation, Washington apples which would otherwise qualify for and be sold under the superior Washington grades will now have to be marketed under their inferior USDA counterparts. Such "downgrading" offers the North Carolina apple industry the very sort of protection against competing out-of-state products that the Commerce Clause was designed to prohibit. At worst, it will have the effect of an embargo against those Washington apples in the superior grades as Washington dealers withhold them from the North Carolina market. At best, it will deprive Washington sellers of the market premium that such apples would otherwise command.

Id. at 351–52.

That is exactly the case here. Massachusetts may enact as many laws as it desires against

its own pork industry, but it cannot regulate the interstate industry in a way that provides protections to in-state commerce that are unavailable to out-of-state operators.

As conceded by Defendants in this case before the Court, this exception was created in an effort to escape preemption under the FMIA. ECF No. 78, pp. 6-7. ("[The exemption was] done for the purposes of ensuring that there was no question of preemption under the Federal Meat Inspection Act."). Indeed, the FMIA contains 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.[4] *See* 21 U.S.C. §§ 603, 621. And this field has been expanded by creation of the USDA and its agency, FSIS, which ensures food safety through the FMIA. *See* About FSIS | Food Safety and Inspection Service, https://www.fsis.usda.gov/about-fsis (last visited October 26, 2023). Thus, the Commonwealth knew that it had a preemption problem if it regulated conduct at an FSIS-regulated facility itself, either directly or indirectly, thus, the sales exception.

But in attempting to avoid one constitutional violation, the Commonwealth runs headlong into another—it created an exception that violates the dormant Commerce Clause. If, on the one hand, the Commonwealth eliminated that exception (and one of the Commerce Clause violations), it has already admitted that such an amendment to the law would violate the express preemptive effect of the FMIA under *Nat'l Meat Ass'n v. Harris*, 565 U.S. 452, 461 (2012). *See* ECF No. 78, pp. 6-7. On the other hand, if the Commonwealth purportedly attempts to dodge a preemption violation through the sales exception, it violates the dormant Commerce Clause. This is because

[4] Entities that are subject to the FMIA include meat brokers, processors, renderers, salvagers, transporters, distributors, and warehouses. SOF ¶ 36.

what the Commonwealth attempted with this Act is inherently unconstitutional; either way it turns, the Commonwealth smacks into a Constitutional violation.

This constitutional Catch-22 is of the Commonwealth's own making. And it leads to the only reasonable conclusion in this case: what Massachusetts is trying to do here is a ***federal*** issue. If the Commonwealth wants to regulate its own hog farmers, so be it. But the Constitution prohibits the regulation of out-of-state farmers in the discriminatory ways the Act targets.

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In sum, the Act, both in its sales ban and in its sale exception, discriminates directly against out-of-state commerce in an effort to bring economic advantages to in-state farmers and processors. If allowed to proceed, the Commonwealth farmers and processors will be awarded a benefit at the expense of out-of-state commerce—and, if allowed to prevail, in turn, it incentivizes States across the country to do the same against the Commonwealth and other sister States. Fortunately, the dormant Commerce Clause prohibits this behavior to protect states from one another and works to disincentivize trade wars between states based on whatever products happen to be prominent in their local economies. Just as the States of Iowa and Missouri would have no business regulating the size of lobster traps used in Massachusetts, the Commonwealth cannot discriminate against out-of-state farmers by regulating the housing of breeding hogs. For these reasons, the Court should find the Act discriminates and thus subject to the *per se* rule of invalidation.

III. Defendants Cannot Meet Their Burden To Establish A Legitimate Local Purpose, Much Less That No Nondiscriminatory Alternatives Are Available.

Now that Plaintiffs have established the Act's discriminatory impact, it "is virtually per se invalid . . . and will survive only if it advances a legitimate local purpose that cannot be adequately served by reasonable non-discriminatory alternatives." *Jenkins*, 592 F.3d at 5. (citing *Dep't of*

Revenue v. Davis, 553 U.S. 328, 128 (2008)). This "exacting standard" is "rarely satisf[ied]" for state laws that are discriminatory in purpose or effect. *Id.* And the burden to prove this is on the Commonwealth, not Plaintiffs. To prove this, the Commonwealth may not rely on either "mere speculation" or "unsupported assertions" but, rather, must proffer "concrete evidence" demonstrating that the main effect of the law is the advancement of valid local interests, not economic protectionism. *Id*; *see also New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 280 (1988) (holding that "health and commerce justifications amount to no more than implausible speculation, which does not suffice to validate this plain discrimination against products of out-of-state manufacture.").

Of course, because it is the Commonwealth's burden to establish this, Defendants' opposition would need to identify what they believe the "legitimate local purpose" actually was at the time of the ballot initiative. Here we know, as the ballot stated that the purpose was to prevent alleged 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. SOF ¶ 25. Defendants appear to have abandoned all but two of these: (1) alleged animal cruelty to pigs sold and consumed in Massachusetts; and (2) alleged increased risk of foodborne illness to Massachusetts consumers. Then, under normal circumstances, Defendants would need to establish evidence that existed at the time of the ballot initiative to establish it. There was none. But for purposes of Plaintiffs' constitutional challenge here, no factual review is necessary; any purported evidence to establish a legitimate local purpose is not relevant because of inherent flaws ***in the Act itself***. Specifically, the Act on its face regulates the housing requirements *only* for the "breeding pigs," that is, the

mother pigs that give birth to the pigs that are ultimately processed to become "Whole Pork Meat"[5] products and subject to the sales ban. Mass. Gen. Laws Ch. 129 App., §§ 1-3, 1-5. ***The Act does not regulate—in any way—the actual pigs (or the pork processed from those pigs) sold into Massachusetts.*** Different pigs. Different meat. The pigs processed for sales in Massachusetts are not the subject of the regulation. The Act *only* regulates the pigs outside of Massachusetts which are not subject to the Act.

Worse yet, the Act doubles down and affirmatively *exempts* all of the pork product made from the breeding pigs in which the housing requirements apply. Breeding pigs, or sows (the pigs actually regulated by the Act), are not processed for "Whole Pork Meat" which is the subject of the sales ban, but only for sausage. SOF ¶ 37. The Act expressly exempts all sausage products entirely. The nonsensical nature of the Act—on its face regulating pigs that are not a part of the sales ban—directly demonstrates that there cannot be evidence to support a plausible legitimate local purpose to prevent alleged animal cruelty or injury as represented to the voters in the ballot initiative itself. The Act doesn't concern itself with any housing conditions—or anything else for that matter—for any pigs processed for pork coming into Massachusetts. The pigs and pork sold in Massachusetts can be housed and treated in any manner according to the Act and are certainly not protected from any alleged injury through the Act. Thus, based on the statute alone, the Commonwealth's representation to the voters—or any purported local purpose—now does not hold water.

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[5] "Whole pork meat" is defined as 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.

Separately, even if that weren't the case, protecting pigs from alleged cruelty cannot be a "legitimate ***local*** purpose." As discussed above, no local pigs anywhere in Massachusetts are housed in a manner impacted by the Act. So any "benefit" in this respect *is not local*. Massachusetts may wish to regulate the ***national*** pork market, but that is not their prerogative in our federal system. That justification therefore also fails. Similarly, any assertion of preventing "foodborne illness" also fails as a matter of law. Exempting the breeding pigs in which the alleged foodborne illness risk exists (and those specifically subject to the housing conditions) nullifies any further argument entirely. If "foodborne illness" was any actual concern, the pork from the breeding sows sold into the state would be the subject of the regulation, and certainly not expressly exempt.[6]

In short, if animal welfare were the concern, the actual *pigs* would be regulated. If foodborne illness were the concern, requirements would apply to the actual *pork* from pigs entering the state. But neither of those is true—on the face of the Act alone. This conclusively demonstrates the impossibility of these purported justifications and eliminates the prospect that any evidence could possibly demonstrate a legitimate local purpose. Again, it is not Plaintiffs' burden to identify what the "legitimate local purpose" is, much less to substantiate it. But here, the Commonwealth already identified its purported local purposes at the time they marketed it to the Massachusetts voters and made representations within the ballot itself, and both purported local purposes fail as a matter of law under any standard, much less the onerous standard set to overcome discriminatory regulation under the Commerce Clause. Finally, even if the Commonwealth were able to establish

[6] As yet another example proving the invalidity of the purported justifications and any claim that there is a legitimate local purpose associated with foodborne illness, the Act allows an exception to allow the sale of non-compliant product if seasonings, salts, additives are added to the whole pork meat. Mass. Gen. Laws Ch. 129 App., § 1-5. Adding seasoning, salts and additives, of course, would not magically prevent foodborne illness if the meat was actually at risk.

a legitimate local purpose, that *still* is not sufficient. Even if that were possible, the Commonwealth must still also show that there were not nondiscriminatory means available to achieve that purpose. Most fundamentally, the Commonwealth has the ability to spend money and dedicate resources to whatever ends it deems appropriate. Massachusetts could certainly provide tax incentives, or even directly subsidize, certain types of pork production that it deems beneficial. It has not attempted to do so, nor is there a plausible explanation for why such nondiscriminatory approaches could not be used.

Further, as discussed above, with respect to at least the FSIS facility exception available to benefit in-state producers, the Commonwealth simply could have eliminated the exception and that portion of the Act's discrimination. That such a move may have created a preemption problem for the Act doesn't make the exception any more constitutional for purposes of the dormant Commerce Clause. To be clear, identifying these alternatives is not Plaintiffs' burden either, but clearly available nondiscriminatory alternatives illustrate why summary judgment is proper now.

CONCLUSION

Massachusetts is absolutely entitled to regulate farming practices at farms within its borders. But it cannot do so in other states, which is precisely what the Act does. In doing so, it discriminates against out-of-state economic interests to the benefit of its own economic interests. In its attempt to navigate around one constitutional problem—FMIA preemption—it created a dormant Commerce Clause violation. The predicament in which Defendants find themselves demonstrates the intrinsic unconstitutionality of the Act. This Court should apply the core tenants of the Commerce Clause and find that the Act's sales ban, including the exception therein, impermissibly discriminate against out-of-state commerce in violation of the Constitution.

Respectfully submitted,

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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/ Michael T. Raupp

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