IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

RICHARD BERGMANN, CHAD BERGMANN, KEITH BERGMANN, TROY BERGMANN, COUNTRY SUN FARM & GREENHOUSE, INC., a Minnesota corporation, ANDREW DANIELS, LYNN SMITH and DAN FITZGERALD,	)	
Plaintiffs,	)	No. 0:10-cv-02074-JNE-FLN
v.	)	Judge Joan N. Ericksen Mag. Judge Franklin L. Noel
CITY OF LAKE ELMO, A Municipal Corporation, DEAN JOHNSTON, STEVE DELAPP, BRETT EMMONS, NICOLE PARK, and ANNE SMITH, in their Official Capacities,	)	
Defendants.	)	

PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR A PRELIMINARY INJUNCTION

INTRODUCTION

"[E]very farmer . . . shall be encouraged to produce by the certainty that he will have free access to every market in the Nation." *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 539 (1949) (Jackson, J., concurring)). This principle—free trade among the States—is a founding ideal of our Constitution. The City of Lake Elmo, Minnesota, is violating it.

The City forbids the sale from agricultural land of agricultural products not grown in Lake Elmo. This violates the Commerce Clause of the U.S. Constitution. Plaintiffs will suffer irreparable harm if Defendant City and City Council members are allowed to

enforce this unconstitutional law for the pendency of this litigation. Specifically, Plaintiffs will suffer irreparable harm because they will be unable to sell out-of-state pumpkins and Christmas trees to the public from their land, something they have done for at least 25 years. If it were not for Defendants' actions, Plaintiffs would begin selling pumpkins in September 2010 and Christmas trees in November 2010. Plaintiffs therefore pray that this Court enter a preliminary injunction forbidding Defendants from enforcing a ban on the sale of out-of-state pumpkins and Christmas trees from the Plaintiffs' farm, Country Sun Farm, and allow Plaintiff Chad Bergmann to sell sweet corn he grows in Wisconsin from his Lake Elmo home.

FACTUAL BACKGROUND

The Plaintiffs.

Richard Bergmann and his wife own approximately 67 acres of farmland in Lake Elmo, Minnesota, known as "Country Sun Farm." (Ex. C., ¶ 3.) Their three sons, Chad, Keith, and Troy all work for their farm corporation, Country Sun Farm & Greenhouse, Inc. (Ex. C, ¶ 4.) The farm business derives over half of its revenue from sales of flowers and plants, along with incidental gardening supplies, which it grows in greenhouses at the farm. (Ex. B, ¶ 4.) Sales of these flowers and plants are made directly to customers who visit the farm. (Ex. B, ¶ 5.) (Richard, Chad, Keith, and Troy Bergmann, and Country Sun Farm & Greenhouse, Inc. are hereinafter referred to as the "Bergmann Plaintiffs.")

In addition to greenhouse sales, the Bergmann Plaintiffs seasonally sell pumpkins and Christmas trees during the fall and Christmas seasons, respectively. (Ex. B, ¶ 6.)

Most of the pumpkins and all of the Christmas trees sold at Country Sun Farm are grown in states other than Minnesota. (Ex. B, ¶ 7.) During the fall season, in addition to selling pumpkins, the Bergmann Plaintiffs offer activities such as hayrides, a corn maze, a petting zoo, and a haunted house, and also sell concessions such as hot dogs and popcorn. (Ex. B, ¶ 8.) Further, during the Christmas season the farm sells holiday items such as homemade wreaths in addition to Christmas trees. (Ex. B, ¶ 9.) Pumpkin sales generally begin in mid-September and Christmas tree sales in mid-November. (Ex. B, ¶ 10.)

The Bergmann Plaintiffs individually own land outside New Richmond, Wisconsin, approximately 35 miles away from Country Sun Farm. (Ex. B, ¶ 11.) The family grows pumpkins on much of this land and then sells the pumpkins from Country Sun Farm as part of their fall seasonal sales. (Ex. B, ¶ 12.)

Plaintiff Lynn Smith is a sole proprietor Christmas tree farmer in Banner Elk, North Carolina, in the Appalachian mountains. (Ex. E, ¶¶ 2-3.) Smith grows Christmas trees and sells them to various buyers all over the country. (Ex. E, ¶¶ 3-4.) In 2009 he sold over a thousand trees to the Bergmann Plaintiffs, comprising over 20% of his sales for the year. (Ex. E, ¶¶ 5-6.) Both the Bergmann Plaintiffs and Smith would like to enter into a similar contract in 2010 if the Bergmann Plaintiffs are legally able to sell the trees as they have in the past. (Ex. C, ¶ 38; Ex. E, ¶ 7.) Entering into such a contract is time sensitive as Smith generally requires a contract to be entered into by the end of July with a deposit of 25% of the contract. (Ex. E, ¶ 8.)

Plaintiff Andrew Daniels and his wife run Daniels Produce, a farm business outside of Columbus, Nebraska. (Ex. D, ¶¶ 2-3.) Among other products, Daniels grows

pumpkins. (Ex. D, ¶ 3.) He sells the pumpkins to buyers all over the country, including to farmers such as the Bergmann Plaintiffs. (Ex. D, ¶ 4.) The Bergmann Plaintiffs have purchased Daniels' pumpkins in the past, including in 2004 and 2008, when, due to weather, deer, or disease, their own crop did not produce as expected. (Ex. C, ¶¶ 17-18; Ex. D, ¶ 5.) Both the Bergmann Plaintiffs and Daniels would like to be able to enter into a similar contract in 2010 if the Bergmann Plaintiffs find that they need to purchase additional pumpkins. (Ex. C, ¶ 18; Ex. D, ¶ 6.) A prospective contract between the Bergmann Plaintiffs and Daniels is also time sensitive because Daniels generally contracts to sell his business's pumpkins in late August or early September. (Ex. D, ¶ 7.)

In addition to his role as an employee of Country Sun Farm & Greenhouse, Inc., Plaintiff Chad Bergmann grows sweet corn on his land near New Richmond, Wisconsin and would like to sell it from a wayside stand on his land where he and his wife and children reside in Lake Elmo. (Ex. A, ¶¶ 3-6.) His Lake Elmo property is zoned "rural residential" which allows for sales of products grown in Lake Elmo, but not elsewhere. (Ex. A, ¶ 8; Lake Elmo Code § 154.036(A)(3); Lake Elmo Code § 11.01 (Definition of "Wayside Stand").[1])

The History of Sales of non-Lake Elmo Agricultural Products at Country Sun Farm.

The Bergmann family has long sold agricultural items from Country Sun Farm that were not grown in Lake Elmo. (Ex. C, ¶¶ 10-11.) Richard Bergmann and his wife founded a "U-Pick" business in 1972 on the property that is now Country Sun Farm,

[1] The current version of Lake Elmo's City Code is available at http://www.amlegal.com/library/mn/lakeelmo.shtml.

offering raspberries and strawberries that customers could come and pick themselves. (Ex. C, ¶ 7.) Two years later the family built their first greenhouse on the site and began selling flowers both retail and wholesale. (Ex. C, ¶ 8.) They have built several more greenhouses on the property over the years, expanding their operations. (Ex. C, ¶ 9.)

During the 1970s and 1980s, in addition to greenhouse and "U-Pick" operations, the business sold various agricultural products that were grown either on the farm, grown on farmland in nearby communities, or grown in other states. (Ex. C, ¶ 10.) Items grown outside Lake Elmo that were sold included seed potatoes, set onions, apples, and pumpkins. (Ex. C, ¶ 11.) Further, in 1985 they renamed the business "Country Sun Farm" and also began selling Christmas trees that they purchased mainly from out-of-state Christmas tree farmers. (Ex. C, ¶ 12.)

Over time the Bergmann Plaintiffs began to focus less on the sale of multiple forms of produce and instead concentrated on a few lines of products. (Ex. C, ¶ 13.) This included their on-site greenhouse business, of various plants and flowers, and seasonal sales of pumpkins and Christmas trees. (Ex. C, ¶ 14.) The pumpkins sold at Country Sun Farm during this time were grown at the farm, on land in surrounding communities, or in other states. (Ex. C, ¶ 15.) For example, in 1995 they purchased pumpkins from a grower in Oregon because their crop in Lake Elmo failed. (Ex. C, ¶ 16.) Later, in 2004 and 2008, the Bergmann Plaintiffs purchased pumpkins from co-Plaintiff Andrew Daniels. (Ex. C, ¶ 17.)

In the early 2000s, in the face of a continued problem of deer destroying their crop at Country Sun Farm, the Bergmann Plaintiffs began to grow most of their pumpkin crop

on their individually-owned land approximately 35 miles away in New Richmond, Wisconsin. (Ex. C, ¶ 19.) In 2009 close to 100% of the pumpkins they grew and sold were grown in Wisconsin. (Ex. C, ¶ 20.)

Since 1985 the Bergmann Plaintiffs have almost always purchased the Christmas trees they sell at Country Sun Farm from out-of-state growers. (Ex. C, ¶ 21.) For example, in 2005 through 2008 they purchased trees from co-Plaintiff Dan Fitzgerald who grew them on his family's land in Wisconsin. (Ex. C, ¶ 22.) In 2009 they purchased trees from co-Plaintiff Lynn Smith who grew them on his land in North Carolina. (Ex. C, ¶ 23.) The Bergmann Plaintiffs sold 1,022 trees in 2009, all of which were grown by out-of-state growers and over 800 of which were purchased from Smith. (Ex. B, ¶ 14.)

The Bergmann Plaintiffs' sales of Christmas trees and pumpkins from 2005 through 2009 were, depending on the year, between 15% and 23% of the business's annual revenue. (Ex. B, ¶ 15.) Between 5% and 9% of additional revenue, in each of those years, came from the Bergmann Plaintiffs' fall services, such as hayrides and the haunted house, and their fall concessions. (Ex. B, ¶ 16.) Fall services and concessions help drive pumpkin sales, but would not attract many customers without the accompanying pumpkin sales. (Ex. B, ¶ 17.) The Bergmann Plaintiffs may not even offer fall services and concessions if they are unable to sell pumpkins. (Ex. B, ¶ 17.)

Lake Elmo's Regulation of Agricultural Sales From Agricultural Land Over the Decades.

From 1972, when they opened their business, until 2008, there was no legal impediment to the Bergmann Plaintiffs selling interstate pumpkins or Christmas trees

from their farm. Despite a series of administrative schemes, the City Code had always allowed the Bergmann Plaintiffs to sell non-Lake Elmo goods from Country Sun Farm.[2] Further, the City has admitted that it never enforced any ban on the sale of goods grown off-site or outside Lake Elmo before December 2009. (Ex. B, ¶ 21.) The City recently adopted an ordinance explicitly excluding sales of agricultural products from agricultural or rural residential land unless the products are grown in Lake Elmo.

In 2008, with Ordinance 08-006, the City amended its code to deregulate the sales of agricultural products from land zoned agricultural and rural residential when the products were grown on-site or grown elsewhere in Lake Elmo. (Ex. I.) But, Ordinance 08-006 also added explicit language banning the sale of products that were *not* grown in Lake Elmo. (Ex. I., p 1-4.) The City therefore purposely added discriminatory language to its code.

Ordinance 08-006 allows sales of agricultural products to be made from a "Wayside Stand" or an "Agricultural Sales Business." "Wayside Stand" was a

[2] In 1979 the City's code allowed owners of agriculturally-zoned land to run "open sales lots," which allowed for sales of agricultural products without regard as to where they came from. (1979 Municipal Code, §§ 301.040(105), 301.070(D)(1)(b)(5) (attached as Ex. F).) In 1986 the City passed a revision to its zoning code, Ordinance 7983, which could have been interpreted to restrict sales of agricultural products from agricultural land. (Ordinance 7983, amending § 301.070(D)(1)(a)(8) (attached as Ex. G).) However, the City thereafter continued to interpret the zoning code to allow sales of non-Lake Elmo products, issuing the Bergmanns the same permits as they had before. (Group Ex. 1 to Ex. C.) All of this time the Bergmanns were open about where they obtained their products (Ex. C, ¶ 24), with the City stating in an amendment to the Bergmann Plaintiffs' CUP in 2004 that "Their [the Bergmanns'] business is primarily growing and the sale of agricultural products grown on site." (Group Ex. 1-M to Ex. C.) Thus the City acknowledged that the Bergmanns' sales were not 100% Lake Elmo products.

preexisting definition in the city code. (Ex. H (1997 Code, last updated March 19, 2002).). "Wayside Stand" is now defined as:

> A temporary structure or vehicle used for the seasonal retail sale of agricultural goods produced by the operator of the wayside stand on-site or on other property *in Lake Elmo*.[3]

(Ex. I, p.1 (emphasis added).[4]

"Agricultural sales business" is a new definition which also restricts where agricultural products that are sold can be grown. It reads in full:

> The retail sale of fresh fruits, vegetables, flowers, herbs, trees, or other agricultural, floricultural, or horticultural products produced on the premises. The operation may be indoors or outdoors, include pick-your-own opportunities, and may involve accessory sales of unprocessed foodstuffs; home processed food products such as jams, jellies, pickles, sauces; or baked goods and homemade handicrafts. The floor area devoted to the sale of accessory items shall not exceed 25% of the total floor area. No commercially packaged handicrafts or commercially processed or packaged foodstuffs shall be sold as accessory items. *No activities other than the sale of goods as outlined above shall be allowed as part of the Agricultural Sales Business.*

(Ex. I, p.1 (emphasis added).)

Ordinance 08-006 also added a new form of CUP called an "Agricultural Entertainment Business" where agricultural landowners could obtain a permit to offer services the Bergmann Plaintiffs already offered, such as hayrides and corn mazes. (Ex. I, p. 1.)

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[3] Ordinance 08-006 amended the original definition of "Wayside Stand," but only by adding the words "temporary" and "or vehicle" to the language. (Ex. I., p 2.)

[4] The drafters of the Ordinance chose "Wayside Stand" as a definition even though another similar definition that lacks the Lake Elmo-exclusive language already exists in the Code: "Roadside Sales Stand." Lake Elmo Code, § 11.01. The definition of "Roadside Sales Stand" is simply: "A structure used only for the display and sale of products, with no space for customers within the structure, on a seasonal basis." Lake Elmo Code, § 11.01. This definition should have been familiar to the drafters of Ordinance 08-006 as it has been in the code since 1979. (Ex. F, § 301.040(123).)

The City Council's Imposition of the New Sales Policy.

In fall 2009, for various reasons, the Bergmann Plaintiffs applied to amend their existing CUP. (Ex. B, ¶ 19.) On December 1, 2009, at a public City Council meeting, Defendant City Council members granted the Bergmann Plaintiffs' request in part, and denied it in part. (Ex. B, ¶ 22.) The Council approved the Bergmann Plaintiffs' request to use Country Sun Farm as an Agricultural Entertainment Business and for sales of agricultural products that conformed to the above definitions of Agricultural Sales Business and Wayside Stand, meaning it allowed sales of pumpkins and Christmas trees, but only those grown in Lake Elmo. (Ex. B, ¶ 23; Ex. 1 to Ex. B.) It explicitly denied any right to sell products, including specifically mentioning pumpkins and Christmas trees, that did not conform to these definitions. (Ex. B, ¶ 24; Ex. 1, ¶ 10, to Ex. B.) The Council stayed the new policy for 30 days; as Defendant Mayor Johnston admitted, implementing it right away would be "punitive." (Ex. B, ¶ 25.) The Council stated, however, that "we will be enforcing our ordinance next year" and that it would apply to all farms in Lake Elmo, not just Country Sun Farm. (Ex. B, ¶ 26.) (This new policy is hereinafter called the "Sales Policy.")

The Market in Interstate Pumpkins and Christmas Trees in Lake Elmo.

Lake Elmo is a proudly agrarian community. In tandem with this character, much of its market in the sale of agricultural products relies upon farms. (Ex. C, ¶ 26.) Various farms operate in Lake Elmo that sell directly to the public from their farm properties, as Country Sun Farm does. (Ex. C, ¶ 27.) Two other farms sell pumpkins from their properties. (Ex. C, ¶ 28.) Plaintiffs believe that all of the pumpkins these farms sell are

grown in Lake Elmo. (Ex. C, ¶ 28.) Further, at least three other farms sell Christmas trees from their own properties. (Ex. C, ¶ 29.) Based on statements made in the St. Paul Pioneer Press by the operator of another farm, Plaintiffs believe that up to half of the sales of that farm are trees grown outside Lake Elmo. (Ex. B, ¶¶ 31-32; Ex. 2 to Ex. B.) Given the national scope of the Christmas tree market, many of these trees are likely from outside Minnesota. (Ex. B, ¶ 33.). Plaintiffs believe that a third farm that sells Christmas trees obtains all of its trees from outside of Lake Elmo. (Ex. C, ¶ 30.) Another farm grows and sells trees exclusively grown on-site. (Ex. C, ¶ 31.)

Under the new Sales Policy, Lake Elmo businesses operating on land zoned "general business" or "convenience business" *can* sell pumpkins and Christmas trees from outside Lake Elmo. Lake Elmo Code §154.051(A)(2) (general business); §154.056(A) (convenience business).[5] However, "general business" land is limited to Lake Elmo's downtown, and there is only one parcel, currently a gas station, zoned "convenience business." (Ex. B, ¶ 27; Ex. J (Zoning Map of Lake Elmo).) There are only two commercial businesses in Lake Elmo that currently sell produce. (Ex. C, ¶ 32.) Only one, a grocery store that combines as a gas station, sells any pumpkins. (Ex. C, ¶ 33.) The other business does not. (Ex. B, ¶ 27.) Plaintiffs believe the grocery store's pumpkins come from outside Lake Elmo, but elsewhere in Minnesota. (Ex. C, ¶ 34.) No

[5] Technically, pumpkins or Christmas trees could also be sold from a retail store in land zoned "R-3 Manufactured Home Park," Lake Elmo Code §154.045(B)(4), or "R-4 Multi-Unit Residential," §154.047(D)(5). Plaintiffs do not believe such a store even exists in Lake Elmo, and that no pumpkins or Christmas trees are sold from such a store. (Ex. C, ¶ 36.)

other businesses in Lake Elmo besides farms sell pumpkins or Christmas trees. (Ex. C, ¶ 35.)

In contrast, Country Sun Farm often sells more than 30,000 pumpkins and approximately 1,000 Christmas trees each year. (Ex. B, ¶ 28.) Between 2005–2009 it annually sold between approximately 27,300 and 36,700 pumpkins and 934 and 1,033 Christmas trees. (Ex. B, ¶ 28.) All of these Christmas trees and over 90% of these pumpkins were grown in states other than Minnesota. (Ex. B, ¶ 29.) Although Plaintiffs do not have personal knowledge of how many pumpkins are sold per year by the other farms that sell pumpkins, the farms are much smaller in size, each with only a few acres of land. (Ex. B, ¶ 30.) Therefore, it is highly likely that the Bergmann Plaintiffs are the biggest sellers of pumpkins in the City, and that over half of all pumpkins sold in Lake Elmo are grown outside Lake Elmo—indeed, are grown outside the State of Minnesota. Further, although Plaintiffs do not know how many Christmas trees are sold per year by the other farms, they believe that Country Sun Farm and one other farm are the biggest sellers in the City. (Ex. B, ¶ 31.) Therefore, it is also highly likely that over half of the Christmas trees sold in Lake Elmo are grown outside Lake Elmo, and even outside Minnesota.

Most importantly for Plaintiffs' claims, as described below, all or almost all of the interstate pumpkins and interstate Christmas trees sold in Lake Elmo—that is, pumpkins and Christmas trees grown outside of Minnesota—are sold from farms, something not permissible under the new Sales Policy.

ARGUMENT

Plaintiffs request that this Court issue a preliminary injunction to prevent Defendants from enforcing the Sales Policy against them. As argued in detail below, Plaintiffs satisfy all four requirements for the issuance of a preliminary injunction. First, Plaintiffs are likely to prevail on the merits because the City's Sales Policy forbidding the sale of non-Lake Elmo agricultural items discriminates against interstate commerce.

Second, Plaintiffs are likely to suffer irreparable harm in the absence of a preliminary injunction. Plaintiffs will suffer irreparable harm if they are not able to engage in interstate commerce in 2010 in time for the fall and Christmas seasons. The Bergmann Plaintiffs will be unable to sell pumpkins and Christmas trees, items that have constituted between 15% and 23% of their annual revenue over the last five years. Plaintiff Lynn Smith will be unable to sell Christmas trees to the Bergmann Plaintiffs, a contract both parties want to enter into for the 2010 season. In 2009, Smith's sales to the Bergmann Plaintiffs constituted over 20% of his sales for the year. In addition, depending on how the Bergmann Plaintiffs' pumpkin crop turns out, the Bergmann Plaintiffs may need to enter into a contract with Plaintiff Andrew Daniels to buy pumpkins for the fall 2010 season, and would need to purchase the pumpkins by mid-September. Further, depending on how his sweet corn produces, Chad Bergmann may have sweet corn grown on his Wisconsin land that he will want to sell by August 2010.

Third, the harm Plaintiffs will likely suffer outweighs any harm, if any exists at all, that Defendants will suffer from not enforcing the Sales Policy. The policy has only existed since December 2009, and the public was not harmed during the prior non-

discriminatory policy that existed for 30 years. Fourth, the issuance of a preliminary injunction is in the public interest. Because the Sales Policy, including the underlying City Code provisions, is unconstitutional the public interest is not served in denying Plaintiffs' Motion.

This case is unlikely to reach a final judgment before July 2010, when Lynn Smith hopes to contract with the Bergmann Plaintiffs; or by the fall or Christmas seasons of 2010 when the Bergmann Plaintiffs hope to sell their Wisconsin pumpkins and North Carolina Christmas trees from Country Sun Farm and may need to contract with Andrew Daniels to purchase Nebraska pumpkins. Plaintiffs therefore request that this Court immediately issue a preliminary injunction.

I. THIS COURT SHOULD ISSUE A PRELIMINARY INJUNCTION TO ALLOW PLAINTIFFS TO CONTINUE TO SELL PUMPKINS AND CHRISTMAS TREES IN INTERSTATE COMMERCE.

In reviewing a motion for a preliminary injunction this Court considers: (A) the movant's likelihood of success on the merits; (B) the threat of irreparable harm to the movant in the absence of preliminary relief; (C) the balance between that harm and the harm that relief would cause to other litigants; and (D) the public interest. *Winter v. NRDC, Inc.*, 129 S. Ct. 365, 376 (2008); *Dataphase Sys., Inc. v. CL Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981) (the Eight Circuit's "*Dataphase* test"). The first factor is a threshold finding in a motion to enjoin government action. *Planned Parenthood v. Rounds*, 530 F.3d 724, 732-33 (8th Cir. 2008).

A. Plaintiffs Will Succeed on the Merits Because Defendants Violate the Commerce Clause by Discriminating Against Interstate Commerce Facially, in Purpose, and in Effect.

Plaintiffs present ample evidence that Defendants have likely violated the Commerce Clause of Article I, Section 8 of the United States Constitution. A movant, however, need only establish that he "is *likely* to prevail on the merits" in order to prevail under this prong of the *Dataphase* test. *Planned Parenthood*, 530 F.3d at 732 (emphasis added). Because of the motion's preliminary nature the moving party "need not show that he is certain to win." *Woida v. United States*, 446 F. Supp. 1377, 1383 n.1 (D. Minn. 1978).

"Though phrased as a grant of regulatory power to Congress, the [Commerce] Clause has long been understood to have a 'negative' aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Oregon Waste Sys. v. Dept. of Envtl. Quality*, 511 U.S. 93, 98 (1994). Further, this "dormant Commerce Clause" applies just as strongly to local governments, such as the City of Lake Elmo, as to the States themselves. *Associated Indus. v. Lohman*, 511 U.S. 641, 650 (1994); *Fort Gratiot v. Michigan*, 504 U.S. 353, 361 (1992) ("[O]ur prior cases teach that a State (or one of its political subdivisions) may not avoid the strictures of the Commerce Clause by curtailing the movement of articles of commerce through subdivisions of the State, rather than through the State itself.").

The dormant Commerce Clause forbids discrimination against out-of-state goods. *See SDDS, Inc. v. South Dakota*, 47 F.3d 263, 267 (8th Cir. 1995). "Discrimination" is defined as "'differential treatment of in-state and out-of-state economic interests that

benefits the former and burdens the latter.'" *South Dakota Farm Bureau v. Hazeltine*, 340 F.3d 583, 593 (8th Cir. 2003) (quoting *Oregon Waste Sys.*, 511 U.S. at 99). Discrimination can manifest itself in three forms: (1) a law that "facially discriminates against out-of-state articles"; (2) a law that does not discriminate on its face but nevertheless is born of a discriminatory purpose; and (3) a law that does not necessarily spring from discriminatory motives but nevertheless has an effect that discriminates against interstate commerce. *SDDS*, 47 F.3d at 267; *Hazeltine*, 340 F.3d at 593.

Further, the burden is on the government to justify a discriminatory law: "Our commerce clause cases demand more than mere speculation to support discrimination against out-of-state goods. The burden is on the State to show that the *discrimination* is demonstrably justified." *Granholm v. Heald*, 544 U.S. 460, 492 (2005) (citations and quotations omitted) (emphasis in original). The standard against interstate discrimination is so high that the Supreme Court has repeatedly said a discriminatory law is a "virtually *per se* rule of invalidity." *Oregon Waste Sys.*, 511 U.S. at 100; *see also Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979) (describing standard as the "strictest scrutiny").

The dormant Commerce Clause has particular force in the area of agriculture, and thus there are many Supreme Court cases striking down discriminatory agricultural restrictions. *See, e.g.*, *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 354 (1977) (discrimination against non-North Carolina apples), and *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 356 (1951) (discrimination against non-Madison, Wisconsin milk). The Eighth Circuit has also struck down discriminatory agricultural laws. *See, e.g.*, *Jones v. Gale*, 470 F.3d 1261, 1270 (8th Cir. 2006) (discrimination

against out-of-state corporations owning farms); *Hazeltine*, 340 F.3d at 593 (same). The law at issue in this case is thus the latest in a long line of unconstitutional localism seeking to benefit local agricultural interests at the expense of out-of-state growers and products.

Plaintiffs demonstrate below that Defendants' Sales Policy impermissibly discriminates against interstate commerce because it (1) facially discriminates against interstate commerce by forbidding sales of non-Lake Elmo products; (2) purposely discriminates against interstate commerce because the legislative history evidences a protectionist intent; (3) has an effect that discriminates against interstate commerce because it eviscerates Lake Elmo's markets in interstate pumpkins and Christmas trees; and (4) cannot withstand the strict scrutiny applied to discriminatory laws because non-Lake Elmo pumpkins and Christmas trees are not dangerous. A finding that the Sales Policy is discriminatory on any of the three possible grounds, i.e., facial, in purpose, or in effect, is sufficient for this Court to conclude that the law is subject to strict scrutiny. *See Hazeltine*, 340 F.3d at 593 ("[W]e rest our conclusion on the evidence in the record of a discriminatory purpose underlying Amendment E. As a result, we do not consider the other two tests."). Therefore, if this Court finds that discrimination exists under one of those three tests, and that the finding provides Plaintiffs with complete preliminary relief, it need not address the remaining two.

1. Lake Elmo's law is facially discriminatory because it explicitly forbids sales of non-Lake Elmo products.

Lake Elmo's Sales Policy facially discriminates against non-Lake Elmo products. The City Code explicitly discriminates against interstate products by allowing agricultural products to be sold only if they are grown in Lake Elmo. Lake Elmo Code § 11.01 (definitions of "Agricultural Sales Business" and "Wayside Stand"). The Bergmann Plaintiffs' CUP approved December 1, 2009, incorporates this facially discriminatory language and uses both definitions to discriminate against interstate pumpkins and Christmas trees. (Ex. 1, ¶ 10 to Ex. B.)

If a pumpkin is grown in the approximately 22 square miles encompassing Lake Elmo[6] then it can legally be sold at Country Sun Farm. If it is grown on the Bergmann Plaintiffs' land in Wisconsin, 35 miles away, or by Plaintiff Andrew Daniels in Nebraska, its sale renders the Bergmanns criminals, with a sentence of a fine of up to $1,000 and up to 90 days in jail. Lake Elmo Code §§ 154.99, 10.99(A). The same, of course, goes for the sale of Christmas trees, including those Plaintiff Lynn Smith grows in North Carolina.

Almost no justification can support a law that discriminates against interstate commerce, no matter the size or scope. "[A]ctual discrimination, wherever it is found, is impermissible, and the magnitude and scope of the discrimination have no bearing on the determinative question whether discrimination has occurred." *Assoc. Indus.*, 511 U.S at 650. Simply put, there is no "de minimis" defense under the dormant Commerce Clause.

[6] According to the United States Census. *See* U.S. Census, Geographic Comparison Table, Minnesota – Place & County Subdivision, *available at* http://factfinder.census.gov/servlet/GCTTable?_bm=y&-geo_id=04000US27&-_box_head_nbr=GCT-PH1&-ds_name=DEC_2000_SF1_U&-format=ST-7.

See Fulton v. Faulkner, 516 U.S. 325, 333 (1996). Because the Bergmann Plaintiffs are limited in where they can sell interstate products, but are not similarly limited in where they can sell Lake Elmo products, and because the other Plaintiffs are prevented from selling their goods into Lake Elmo, Defendants are facially discriminating against interstate commerce.

In addition, although Plaintiffs also contend Defendants have a discriminatory purpose in enacting their law and policy, *see infra*, even if Defendants did not mean to discriminate but had completely honorable motives, the law is still facially discriminatory. *See Philadelphia v. New Jersey*, 437 U.S. 617, at 626-27 (1978) ("But whatever New Jersey's ultimate purpose, it may not be accompanied by discriminating against articles of commerce coming from outside the State"). But, again, if this Court concludes that the law is discriminatory on its face, it may simply conclude that the law is subject to strict scrutiny and not engage in a purpose or effect analysis if it provides Plaintiffs with complete preliminary relief. *See Hazeltine*, 340 F.3d at 593.

2. Defendants purposely discriminate against interstate commerce by amending the zoning code to be more permissive of Lake Elmo sales and less permissive of non-Lake Elmo sales, and by denying the Bergmann Plaintiffs' request to sell non-Lake Elmo pumpkins and Christmas trees while allowing them to increase traffic to Country Sun Farm.

If this Court does address whether the Sales Policy purposely discriminates against interstate commerce, Plaintiffs have produced evidence demonstrating Defendants purposely discriminated against the sale of interstate pumpkins and Christmas trees. This

includes (a) the City's redrafting of the City Code in 2008 and (b) its treatment of the Bergmann Plaintiffs in granting and denying their request for a CUP in 2009.

A court "look[s] to direct and indirect evidence to determine whether a state adopted a statute with a discriminatory purpose." *Smithfield Foods, Inc. v. Miller*, 367 F.3d 1061, 1065 (8th Cir. 2004). The use of facially-discriminatory language in a law is itself evidence of discriminatory intent. *SDDS, Inc.*, 47 F.3d at 267 ("[F]acial discrimination is merely one of the ways in which a state may 'artlessly disclose an avowed purpose to discriminate.'" (citing *Dean Milk Co.*, 340 U.S. at 354)).

State and local governments cannot discriminate against interstate commerce simply to preserve the status quo or to keep the outside world from intruding into local affairs. For example, in *Jones* the Eighth Circuit warned that simply proclaiming that the law helped protect "the social and economic culture of rural Nebraska" was not good enough to constitute a legitimate governmental interest. *Jones*, 470 F.3d at 1270. "Indeed," continued the court, "it is that kind of xenophobia that the dormant commerce clause sets its face against." *Id.* Forbidding non-Lake Elmo pumpkins and Christmas trees springs from the same feudal interests.

Lake Elmo's Code was redrafted in 2008 to change the prior policy regarding sales of products not grown on-site. (Ex. I.). The new language changed the law dramatically. It simultaneously made sales from farms of products grown in Lake Elmo easier and completely outlawed sales from farms of products grown outside Lake Elmo. The following chart illustrates the changes:

Sales of products grown *in* Lake Elmo	**Sales of products from agricultural land grown *outside* Lake Elmo**
• Explicitly allowed sales of products from inside a building. (Lake Elmo Code, § 11.01 (definition of "Agricultural Sales Business"); § 154.033(A)(9); § 154.036(A)(4).)	• Explicitly banned sales of products grown outside of Lake Elmo. (Lake Elmo Code, § 11.01 (definitions of "Agricultural Sales Business" and "Wayside Stand");
• Explicitly allowed sales of products grown off-site but within Lake Elmo city limits. (Lake Elmo Code, § 11.01 (definition of "Wayside Stand"); § 154.033(A)(8); § 154.036(A)(3).)	• Used facially-discriminatory language in banning non-Lake Elmo product sales. (Lake Elmo Code, § 11.01 (definition of "Wayside Stand".)
• Expanded the sales of products grown in Lake Elmo from Agriculturally-zoned land to land zoned Rural Residential. (Lake Elmo Code, § 154.036(A)(3)-(4).)	

The City therefore made sales of City products easier and non-City products outright forbidden from agricultural land in one fell swoop.

In addition to the 2008 code amendments, the City's specific actions toward the Bergmann Plaintiffs demonstrate a discriminatory intent. In *Hazeltine* the Eighth Circuit concluded that the state of South Dakota acted with a discriminatory intent in passing an anti-corporate farming law. The court inquired into whether protecting family farmers from poverty was truly a motivation for the law that the voters of South Dakota had enacted. *Hazeltine*, 340 F.3d at 593-94. The court concluded that the lack of a study or forecast on whether the law actually would advance that interest was evidence that poverty alleviation was not the actual motivation. *Id.* at 595.

Just as the State in *Hazeltine* claimed a legitimate-sounding purpose, here the City of Lake Elmo claims to be protecting rural character and preventing traffic congestion. (Ex. B, ¶ 34.) However, also just as in *Hazeltine*, City officials made no inquiry into relevant facts such as how sales of non-Lake Elmo products from Country Sun Farm affect rural character or traffic, or even how many sales there are of non-Lake Elmo products from Country Sun Farm or how many visitors to the farm purchase non-Lake Elmo products. (Ex. B, ¶ 35.) At the same time the City denied the Bergmann Plaintiffs the right to sell non-Lake Elmo pumpkins and Christmas trees, the City allowed them to expand their parking lot, adding 39,900 square feet and more than doubling Country Sun Farm's parking space. (Ex. B, ¶ 36; Ex. 1, ¶ 3 to Ex. B.) The City also granted a permit for various fall activities, such as hayrides, a petting zoo, and a haunted house. (Ex. 1, ¶ 5, to Ex. B.)

Lake Elmo's actions are not consistent with a purpose of promoting rural character or diminishing traffic. A hayride and pumpkin purchase does not create less traffic if the pumpkin was grown in Lake Elmo instead of Wisconsin. To the contrary, Lake Elmo approved the expansion of the parking lot and also approved a host of activities for families and children at Country Sun Farm. The City puts no restrictions on visitors coming to the farm, in fact it encourages them. It also places no limits on the *volume* of products that can be sold from the farm. But the City *does* mandate that the pumpkins and Christmas trees sold at the farm are Lake Elmo pumpkins and Christmas trees. In other words, the City if fine with the size and scope of the Bergmann Plaintiffs' business activities, but wants to promote sales of local products and prevent those from out-of-

state. Thus, this is not a case of the Bergmann Plaintiffs attempting to evade zoning restrictions. The City's behavior is consistent only with the illegitimate purpose of discrimination against interstate commerce and not any other motivation. This xenophobia toward out-of-state pumpkins and Christmas trees is forbidden in the Eighth Circuit. *See Jones*, 470 F.3d at 1270.

3. Defendants discriminate against interstate commerce in effect because the Sales Policy eviscerates the Lake Elmo market in interstate pumpkins and Christmas trees.

Lake Elmo has had a thriving market in interstate pumpkins and Christmas trees, virtually all of which are sold from farms. This includes the more than 30,000 interstate pumpkins and approximately 1,000 interstate Christmas trees sold from Country Sun Farm every year, not to mention the interstate Christmas trees sold from other Lake Elmo farms. (Ex. B, ¶¶ 14, 31-33; Ex. C, ¶¶ 29-30.) The new Sales Policy will eliminate this market entirely.

When a law eliminates an interstate market, it is discriminatory in effect. The Eighth Circuit has ruled a law that has the effect of destroying an interstate market in a product, while not having that effect on an *intra*state market in the same product, discriminates against interstate commerce. *SDDS, Inc.*, 47 F.3d at 270-271 (interstate garbage market). This is true even if there is no purpose to discriminate. "[E]ven if a state law responds to legitimate local concerns and is not discriminatory either in its purpose or on its face, the law could discriminate arbitrarily against interstate commerce, that is, it could have a discriminatory effect." *Hazeltine*, 340 F.3d at 593 (citing *Maine v. Taylor*, 477 U.S. 131, 148 n.19 (1986)).

When inquiring whether a law has a discriminatory effect, actual facts, not theoretical possibilities, matter. *See SDDS, Inc.*, 47 F.3d at 270-271 & 271 N.12 (providing detailed analysis of actual market). For example, in *Hunt* the Supreme Court addressed North Carolina's apple-grading regulation which forbade Washington apple growers from using their own quality stamp instead of that of the United States Department of Agriculture. The Court noted several actual effects flowing from that policy. First, the Washington Apple growers would have to change their grading system while North Carolina Apple growers would not. *Hunt*, 432 U.S. at 351. Second, the court noted the factual record's detailed evidence of "apple brokers and dealers located both inside and outside of North Carolina who state their preference, and that of their customers, for apples graded under the Washington, as opposed to the USDA system, because of the former's greater consistency, its emphasis on color, and its supporting mandatory inspections." *Id.* Third, the Court recognized that Washington apples are of a higher quality than North Carolina apples, and that the lack of the ability to grade them as such would cause Washington apple growers to lose their competitive advantage. *Id.* at 351-52.

As the Eighth Circuit recognized in *SDDS*, the facts in *Hunt* meant that out-of-staters were singled-out to bear the burden of the apple-grading law. Citing *Hunt*, the *SDDS* court took a similarly detailed look at the market for solid waste in South Dakota and the effect on that market that the denial of a permit for a waste dump would have. The court did not merely speculate but stated:

> The structure of the "garbage market" in South Dakota is such that the referendum has a discriminatory effect. South Dakota generates 600,000 to 700,000 tons of [waste] each year. In addition to this in-state waste, three facilities accept out-of-state waste (they accepted 60,000 tons in 1992). As a result of the low rate of domestic waste generation and the costs of regulation, the existing disposal facilities in South Dakota are fairly small; the largest facility disposes of 125,000 tons per year. New facilities must be large scale in order to recover the costs imposed by environmental regulations. The Lonetree facility was designed to accept 1.5 million tons of [waste] per year. According to the literature accompanying the referendum, 95% of this waste would originate outside South Dakota.

SDDS, Inc., 47 F.3d at 270-71. Because the effect of the denial of the new facility was that the vast majority of the 1.5 million projected tons of waste could not be imported into South Dakota, the law was held to be discriminatory in effect. *Id.* at 271. The court further explained "[t]he fact that only 90% rather than 100% of the costs of excluding the waste fall on out-of-staters does not eliminate the discriminatory effect. This fact merely reduces the scope of the discrimination." *Id.* at 271 n.12.

The case here has a very similar set of effects to those in *Hunt* and *SDDS* in terms of their impact on out-of-staters. In Lake Elmo, the market for pumpkins and for Christmas trees is *almost exclusively* reliant on farms selling those products, and Plaintiffs believe that the market in *interstate* pumpkins and Christmas trees is likely *exclusively* reliant on farms selling those products. (Ex. C, ¶¶ 33-35.) Plaintiffs believe that a few non-Lake Elmo pumpkins are sold from one Lake Elmo grocery store, but that even those pumpkins are grown in Minnesota. (Ex. C, ¶¶ 33-35.) Of the farms that sell these products, some sell pumpkins or Christmas trees grown on-site or in Lake Elmo, and thus are in compliance with the Sales Policy. And some sell pumpkins or Christmas trees grown elsewhere, and thus are illegal. The effect of the Sales Policy, therefore, is to

destroy Lake Elmo's market in non-Lake Elmo pumpkins and Christmas trees, including interstate pumpkins and Christmas trees.

4. Defendants cannot defeat the "strictest scrutiny" applied to their discriminatory Sales Policy.

Having demonstrated that the Sales Policy discriminates against interstate commerce, Defendants bear an almost impossible burden of demonstrating that the policy, nevertheless, does not violate the dormant Commerce Clause. Again, discriminatory laws are subject to the "strictest scrutiny." *Hughes*, 441 U.S. at 337. In fact, "The only way that discriminatory state action can withstand this level of scrutiny is if the state demonstrates that the out-of-state articles are more dangerous than are in-state articles." *SDDS, Inc.*, 47 F.3d at 268 n.8. The *only* case where the Supreme Court has *ever* found the government to overcome this scrutiny was *Maine v. Taylor*, 477 U.S. 131, 140-51 (1986), where the Court examined extensive expert testimony substantiating the State of Maine's argument that it had to forbid the importation of out-of-state bait fish because the imported fish would carry parasites, or be invasive species, that would damage the State's ecology. But, unlike in *Maine v. Taylor*, there has never been any suggestion here that Wisconsin and Nebraska pumpkins and North Carolina Christmas trees are dangerous. Therefore, this case is not at all similar to *Maine v. Taylor* and Defendants fail strict scrutiny.

B. Plaintiffs are Likely to Suffer Irreparable Harm as (1) Defendants Have Violated the Dormant Commerce Clause, and (2) Plaintiffs Will Lose Business .

To prevail under the irreparable harm factor of the test for a preliminary injunction, Plaintiffs need only demonstrate that they are *likely* to suffer irreparable harm if a preliminary injunction is not issued. *Winter*, 129 S. Ct. at 376. Plaintiffs meet this standard.

The curtailment of business activities through a violation of the dormant Commerce Clause *necessitates* a finding that Plaintiffs are likely to suffer irreparable harm. *Paul's Indus. Garage, LLC v. City of Red Wing*, 2006 WL 3804243, at *8 (D. Minn. 2006) ("Because the Court concludes that Plaintiffs are likely to succeed on the merits [of their dormant Commerce Clause claim], it may presume that Plaintiffs will suffer irreparable harm in the absence of injunctive relief."); *Am. Library Assoc. v. Pataki*, 969 F. Supp. 160, 168 (S.D.N.Y. 1997) ("Deprivation of the rights guaranteed under the Commerce Clause constitutes irreparable injury."). Because Plaintiffs have borne their burden of demonstrating a likelihood of success on the merits, a finding of a likelihood of irreparable harm must follow.

Furthermore, Plaintiffs will lose a substantial amount of business if the Sales Policy is allowed to stand. Based on the last five years of business, 15% to 23% of the Bergmann Plaintiffs' annual revenue comes from the sale of interstate pumpkins and Christmas trees, with another 5% to 9% being fall activities heavily tied to the interstate pumpkin sales, such as hayrides and their haunted house. (Ex. B, ¶¶ 15-16.) Combined this equals 20% to 32% of annual revenue. Although some visitors come for just the

activities, approximately two thirds of on-site fall revenue is from pumpkin sales. (Ex. B, ¶ 18.) Indeed, the Bergmann Plaintiffs may not even offer fall activities if they are unable to sell their pumpkins. (Ex. B, ¶ 17.)

Lynn Smith will also suffer irreparable harm is the Sales Policy is allowed to remain in force. Over 20% of his 2009 sales were tied to the Lake Elmo interstate Christmas tree market. (Ex. E, ¶ 6.) He and the Bergmann Plaintiffs intend to contract for Christmas trees, if able to do so, in July 2010, for November 2010 delivery. (Ex. E, ¶ 8.) Further, Andrew Daniels may sell pumpkins into the Lake Elmo market, via the Bergmann Plaintiffs, in 2010, as he did in 2008 and 2004. (Ex. D, ¶¶ 5-7.) Finally, if he is able to produce enough sweet corn on his Wisconsin land this year, Chad Bergmann will also suffer irreparable harm as he will not be able to sell that sweet corn from a wayside stand outside his Lake Elmo home, beginning in August 2010. (Ex. A, ¶ 6-7.)

C. The Balance of Harm Weighs in Favor of the Plaintiffs as the Bergmann Plaintiffs Operated Without the Sales Policy for 30 Years Without a Threat to Public Health and Safety.

Under this factor this Court "should consider 'the injury that granting the injunction will inflict on other parties litigant.'" *GMC v. Harry Brown's, LLC*, 563 F.3d 312, 320 (8th Cir. 2009) (quoting *Dataphase*, 640 F.2d at 113). Not only does the balance of harm weigh heavily in favor of Plaintiffs, but Defendants will suffer *no* harm if this Court grants a preliminary injunction. Since the purpose of a preliminary injunction is to preserve the status quo until the court has the full opportunity to rule on the merits, this factor counsels heavily in favor of Plaintiffs. *Devose v. Herrington*, 42 F.3d 470, 471 (8th Cir. 1994).

The City issued permits to the Bergmann Plaintiffs for 30 years without forbidding them from selling interstate pumpkins or Christmas trees from their land. No harm will be incurred by the City itself or the public from Defendants being unable to prevent such sales during the pendency of this litigation, and in any case any harm incurred by the City is vastly outweighed by the harm borne by Plaintiffs, as explained above.

D. It is in the Public Interest for this Court to Prevent Defendants from Enforcing the Unconstitutional Sales Policy.

Because this Motion asks this Court to rule a law unconstitutional, a finding that Plaintiffs have a likelihood of success on the merits necessitates a finding that a preliminary injunction is in the public interest. *Bank One v. Guttau*, 190 F.3d 844, 848 (8th Cir. 1999) (stating "the public interest will perforce be served by enjoining the enforcement of the invalid provisions of state law" found to be invalid under dormant Commerce Clause); *Hyde Park Partners, L.P. v. Connolly*, 839 F.2d 837, 854 (1st Cir. 1988) ("[O]bviously, should the statute be unconstitutional [under the dormant Commerce Clause], the public interest would be adversely affected by denial of [a preliminary] injunction."). The Sales Policy is not protecting the health and safety of the public but is instead violating a centuries-old constitutional principle. The interest of the public thus requires a preliminary injunction.

CONCLUSION

This Court should enter a preliminary injunction forbidding Defendants from enforcing any restriction on the Bergmann Plaintiffs selling interstate pumpkins or Christmas trees from their land at Country Sun Farm in Lake Elmo, Minnesota, and from

enforcing any restriction on Chad Bergmann selling agricultural products he grows in Wisconsin from a "Wayside Stand" outside his Lake Elmo home.

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Respectfully submitted,

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