The University of New Mexico

School of Law Library
MSC11 6080
1 University of New Mexico
Albuquerque, NM 87131-0001
Telephone (505) 277-0939
FAX (505) 277-0068

EXAM NO. _____

CONSTITUTIONAL LAW Section B

Final Examination 3 Hours
May 1, 2013 1:00 p.m.-4:00 p.m.

Instructions

This is an open book exam, with materials limited to the casebook and supplement for the course, personally prepared class notes, and personally prepared course outlines. You may not use any additional materials.

This exam tests skills of reading, legal analysis in the context of the United States Constitution, and writing. Accordingly, you should take time to read closely the new material provided in this exam packet. You should also take time to organize and frame the logic of your analysis. In addition, you should take time to write a clear and concise answer.

You should be aware that there is no reward for length. Please keep your paper focused and concise. Although there is not a page limit, an effective answer can be provided in 5 double-spaced pages or less.

This exam packet includes these instructions; a newspaper article titled "As the Competition Heats Up, So Does a Fight Over Homegrown Peppers"; the United States Supreme Court opinion in Hunt v. Washington State Apple Advertising Commission; and the Sixth Circuit Court of Appeals opinion in International Dairy Foods Association v. Boggs.

For purposes of this exam, you should assume that you are a legislative aid to a member of the New Mexico State Senate. The senator who you work for is considering whether to support legislation that would require all chile pepper products that are grown outside the State of New Mexico to display a label that states, "not grown in New Mexico." (The factual context for this proposal is provided in the newspaper article included in this exam packet.) The Senator would like to support New Mexico growers by voting in favor of the proposed law. However, she is vaguely aware of the Supreme Court's decision in Hunt v. Washington and she is concerned that the proposed law may be in violation of dormant commerce clause doctrine.

The Senator feels that she has as a duty not to support any legislative proposal that would violate the United States Constitution. Therefore, she has asked you to provide an analysis of this issue in a memorandum. You have worked with the Senator for more than two years. You know that she expects you to engage in detailed and rigorous cross-case reasoning. More specifically, she expects the memorandum to present and discuss all relevant case analogies and distinctions within the applicable legal framework. She also expects a clear conclusion on the issue presented.

In completing this assignment, you should consider and cite only the relevant case law that we have discussed in class sessions, along with the new material included in this exam packet.

Professor Herring

As the Competition Heats Up, So Does a Fight Over Homegrown Peppers

By FERNANDA SANTOS

SANTA FE, N.M. — Chile peppers are to New Mexico what oranges are to Florida, apples are to Washington and peanuts are to Virginia: a defining source of chest-thumping pride. It is also the state's official vegetable and, if there were such thing as a state question, in New Mexico it would be, "Red or green?"

Chile peppers are a crop under assault, though — from foreign competitors like Mexico, where harvesting could cost less than one-third of what it costs in New Mexico. Meanwhile, prolific growers in California surpassed the state years ago in the quantity of chile peppers harvested from its fields to become the nation's No. 1 producer, according to statistics from the federal Agriculture Department.

Farmers have also been facing a vexing challenge on the ground: keeping chile grown outside New Mexico from being sold as homegrown, a deceptive practice that is common and hard to detect.

Charlie Marquez, a lobbyist for the New Mexico Chile Association, described the situation as "disturbing." State Representative Rodolpho S. Martinez, a Democrat whose district encompasses the heart of chile country, stared ahead, rubbed his knuckles and called it an "outrage."

Last month, Mr. Martinez introduced a bill to add some teeth to a 2011 law that everyone had hoped would safeguard the status of New Mexico's chiles, but has fallen short. The new bill aims to force out-of-state chile peppers, in their natural and processed forms, to display on their package an unusual disclaimer: "not grown in New Mexico."

"It's to guard against impostors, to keep them honest," Representative Martinez said on a recent morning.

Protecting New Mexican chile peppers has been a tough battle, in part because not every legislator buys into the idea that the right way to do it is to create more rules. The state, hobbled by a sluggish economic recovery, has also found it difficult to find money to finance new programs.

Representative Martinez's bill passed unanimously in the House Agriculture and Water Resources Committee last month. Then, on Wednesday, it was shelved by an 8-to-7 vote in the House Judiciary Committee after a spirited debate over whether it might be too burdensome for small growers. On Thursday, though, there was already talk that the bill could be resurrected after the committee's chairwoman, Representative Gail Chasey, a Democrat, said, "It is not necessarily dead." An identical bill has already been introduced in the Senate. Washington State trademarked its apples in 1961 and Virginia trademarked its peanuts in 2006. In the late 1980s, under stiff competition from states like Texas and California, Georgia wrote into law exactly what type of seeds and soil would yield its sweet Vidalia onions. A year later, the federal government endorsed the same parameters and the brand was certified in 1990.

> New Mexico is seeking ways to protect its chile industry from outsiders.

Wendy Brannen, executive director of the Vidalia Onion Committee, which handles marketing and research on behalf of growers and packers of Vidalia onions, said that more than protecting the crop, "the State of Georgia worked hard to build the Vidalia brand."

New Mexico has opted for a modest and incremental approach. Its 2011 law gave inspectors from the state's Agriculture Department the ability to seek court injunctions against companies that falsely advertise their chile peppers as being from New Mexico by allowing them to inspect stores and audit companies' sales books. Last July, the department began requiring a certificate of authenticity to accompany chile peppers from the field to the point of sale or processing plant. Katie Goetz, the department's spokeswoman, said the most obvious violations found so far have been in red chile pods sold in plastic bags that feature the words "New Mexico chile," as well as "Hecho en Mexico" or "Made in Mexico."

Under the same bill, Mr. Martinez proposed going after out-of-state chile peppers sold under brands bearing names of cities, counties and other New Mexico localities known for their chile production, like "Hatch chile," named after the southern village that hosts a huge chile festival every year. Its main targets, however, are big chain stores, which he said may not be as diligent as roadside vegetable stands about checking the origin of the products they offer.

"Maintaining our brand is important," Representative Martinez said, even if for a declining industry. In 2011, chile peppers were harvested along 9,500 acres of land. Nearly a decade earlier in 1992, harvested fields covered more than 34,000 acres, according to the New Mexico Chile Association.

Mr. Marquez said a chile pepper harvester makes about $90 a day in New Mexico and about $20 in Mexico, which results in a big discrepancy in their sale prices. Still, he went on, "We're so proud of it, we're willing to pay a premium for New Mexico chile."

The question, however, is whether the average customer can taste the difference in chile peppers that come from this place or that.

Yes, Mr. Marquez said, "if you're comparing chile from New Mexico and chile from Colorado." But, he conceded, "30 miles south of the border, in Mexico, they're growing chile that is very similar to ours and the vast majority of people probably couldn't tell them apart."

PHOTOGRAPHS BY MARK HOLM FOR THE NEW YORK TIMES

From left, chile peppers on display in an Albuquerque shop. Brian Hall, a state inspector, checks labels that must reflect the origin of the chiles used. Red chile pods from Hatch, N.M., on sale.

1 of 1 DOCUMENT

HUNT, GOVERNOR OF NORTH CAROLINA, ET AL. *v.* WASHINGTON STATE APPLE ADVERTISING COMMISSION

No. 76-63

SUPREME COURT OF THE UNITED STATES

432 U.S. 333*; *97 S. Ct. 2434*; *53 L. Ed. 2d 383*; *1977 U.S. LEXIS 123

Argued February 22, 1977
June 20, 1977; as amended

PRIOR HISTORY: APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

DISPOSITION: The Court affirmed. It held that appellee had standing to challenge the statute, that the jurisdictional amount in controversy requirement was met, and that the challenged statute burdened and discriminated against interstate sales of apples from appellee; appellant failed to sustain its burden of showing substantial local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellee state apple advertising commission brought an action challenging the constitutionality under the *Commerce Clause* of appellant state's statute prohibiting closed containers of apples shipped into the state from bearing any grade other than the applicable United States grade. The United States District Court for the Eastern District of North Carolina invalidated the statute and granted injunctive relief. Appellant sought review.

OVERVIEW: Appellant state enacted *N.C. Gen. Stat. ß 106-189.1*, prohibiting closed containers of apples shipped into the state from displaying state grades or classifications. Appellee sued, asserting that the statute violated the *Commerce Clause* and seeking injunctive relief from its enforcement. The district court granted the requested relief. On review, the Court affirmed. It held that appellee had standing to sue because it performed the functions of a traditional trade association representing the state apple industry. The Court also held that the jurisdictional amount in controversy of *28 U.S.C.S. ß 1331* was met, because appellee's substantial volume of sales and the continuing nature of the statute's impact on sales precluded a finding to a legal certainty that its losses and expenses would not total the requisite $ 10,000. The Court finally held that the statute both burdened and discriminated against the interstate sale of apples and that appellant did not meet the burden of demonstrating substantial local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve local interests.

OUTCOME: The Court affirmed. It held that appellee had standing to challenge the statute, that the jurisdictional amount in controversy requirement was met, and that the challenged statute burdened and discriminated against interstate sales of apples from appellee; appellant failed to sustain its burden of showing substantial local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives.

CORE TERMS: apple, grade, growers, dealers, closed containers, container, shipped, marketing, deception, display, challenged statute, inspection, membership, commerce, advertising, consumer, grading, producer, standing to bring, interstate commerce, constituents, counterparts, interstate, mandatory, shipment, state agency, own right, preprinted, requisite, graded

LexisNexis(R) Headnotes

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Amount in Controversy
[HN1] See *28 U.S.C.S. ß 1331(a)*.

Governments > Agriculture & Food > Product Quality
[HN2] See *N.C. Gen. Stat. ß 106-189.1* (1973).

Civil Procedure > Justiciability > Standing > General Overview
Constitutional Law > The Judiciary > Case or Controversy > Standing > General Overview
[HN3] An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests it seeks to protect are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Amount in Controversy
[HN4] In actions seeking declaratory or injunctive relief, the amount in controversy is measured by the value of the object of the litigation.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > Interstate Commerce > General Overview
Governments > State & Territorial Governments > Police Power
Transportation Law > Interstate Commerce > State Powers
[HN5] In the absence of conflicting legislation by Congress, there is a residuum of power in the states to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it. That residuum is particularly strong when a state acts to protect its citizenry in matters pertaining to the sale of foodstuffs. However, a finding that state legislation furthers matters of legitimate local concern, even in the health and consumer protection areas, does not end the inquiry. Rather, when such state legislation comes into conflict with the *Commerce Clause*'s overriding requirement of a national "common market," a court is confronted with the task of effecting an accommodation of the competing national and local interests.

Evidence > Procedural Considerations > Burdens of Proof > General Overview
Transportation Law > Interstate Commerce > Balancing Tests
Transportation Law > Interstate Commerce > State Powers
[HN6] When discrimination against interstate commerce by a state statute is demonstrated, the burden falls on the state to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake.

SUMMARY:

A Washington state agency, created by statute for the promotion and protection of the Washington state apple industry and composed of several state apple growers and dealers chosen from electoral districts by their fellow growers and dealers, all of whom by mandatory assessments finance the agency's operations, brought an action for declaratory and injunctive relief in the United States District Court for the Eastern District of North Carolina, challenging the constitutionality of a North Carolina statute requiring that all closed containers of apples sold in the state or shipped into the state bear no grade for apples other than the applicable federal grade or the designation "unclassified," "not graded," or "grade not determined." The three-judge District Court issued a permanent injunction against enforcement of the North Carolina statute, holding that (1) the Washington agency had standing to challenge the statute both in its own right and on behalf of its constituents, (2) the $ 10,000 amount in controversy requirement of *28 USCS 1331* had been satisfied, and (3) the statute unconstitutionally discriminated against commerce, insofar as it affected the interstate shipment of Washington apples (*408 F Supp 857*).

On direct appeal, the United States Supreme Court affirmed. In an opinion by Burger, Ch. J., expressing the unanimous view of the eight participating members of the court, it was held that (1) the Washington statutory agency had standing to bring the action in a representational capacity on behalf of its constituents, notwithstanding the agency's lack of status as a traditional voluntary membership trade association, where (a) the injuries suffered by the agency's constituents as a result of the North Carolina statute--such statute having caused some Washington apple growers and dealers to obliterate Washington grades from the large volume of containers sent to North Carolina at a cost of from five to fifteen cents per carton, to abandon the use of preprinted containers, diminishing the efficiency of their marketing operations, and to lose accounts in North Carolina--were direct and sufficient to establish the requisite case or

controversy between the agency's constituents and the defendants, (b) the agency's attempt to remedy such injuries and to secure the Washington apple industry's right to publicize its grading system was central to the agency's purpose of protecting and enhancing the market for Washington apples, and (c) neither the interstate commerce claim nor the declaratory and injunctive relief requested in the action required individualized proofs, (2) the $ 10,000 jurisdictional amount in controversy requirement of *28 USCS 1331* was met, since, in view of the substantial volume of apple sales in North Carolina and the continuing nature of the statute's interference with the business affairs of the agency's constituents, it could not be said to a legal certainty that such losses and expenses would not, over time if they had not already done so, amount to the requisite $ 10,000 for at least some of the individual growers and dealers represented by the agency, and (3) the North Carolina statute constituted an unconstitutional burden on interstate commerce under the *commerce clause of the Constitution* (Art I, 8, cl 3), since it had the practical effect of not only burdening the interstate sales of Washington apples, but also discriminating against such sales, and North Carolina had failed to sustain its burden of justifying the discrimination against commerce in terms of local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve local interests.

Rehnquist, J., did not participate.

LAWYERS' EDITION HEADNOTES:

[***LEdHN1]

COURTS ß236.5

PARTIES ß23

standing -- state statutory agency representing constituency --

Headnote:[1A][1B]

In a federal court action challenging, as unconstitutional under the *commerce clause of the Constitution* (Art I, 8, cl 3), a state statute requiring that all closed containers of apples sold in or shipped into the legislating state bear no grade for apples other than the applicable federal grade or a designation that the apples are ungraded, which action is brought by an apple producing state's agency, created by statute to promote and protect that state's apple industry and composed of a number of state apple growers and dealers chosen from electoral districts by their fellow growers and dealers, all of whom by mandatory assessment finance the agency's operations, such agency has standing to bring the action in a representational capacity on behalf of its constituents, notwithstanding the agency's lack of status as a traditional voluntary membership trade association, where (1) the injuries suffered by the state agency's constituent apple producers as a result of the challenged statute--such statute having caused some constituent growers and dealers to obliterate their own state's grades from the large volume of containers sent into the legislating state at a cost of from five to fifteen cents per carton, to abandon the use of preprinted containers, diminishing the efficiency of their marketing operations, and to lose accounts in the legislating state--are direct and sufficient to establish the requisite "case or controversy" between the agency's constituents and the defendants in the action, (2) the state agency's attempt to remedy such injuries and to secure the right of its state's apple industry to publicize its grading system is central to the agency's purpose of protecting and enhancing the market for the apples of its constituents, and (3) neither the interstate commerce claim nor the declaratory and injunctive relief requested in the action requires individualized proofs.

[***LEdHN2]

COURTS ß427

jurisdictional amount in controversy requirement -- declaratory and injunctive relief -- statute governing carton markings --

Headnote:[2A][2B]

In a federal court action seeking declaratory and injunctive relief with respect to an alleged unconstitutional state statute requiring that all closed containers of apples sold in or shipped into the legislating state bear no grade for apples other than the applicable federal grade or a designation that the apples are ungraded, which action is brought by an apple producing state's statutory agency as representative of apple growers and dealers in the state forming the agency's constituency, the $ 10,000 jurisdictional amount in controversy requirement of *28 USCS 1331* is met, since, in view of the substantial volume of sales in the legislating state, amounting to an excess of $ 2 million in one year alone, and the continuing nature of the statute's interference with the business affairs of the agency's constituents, it cannot be said to a legal certainty that such losses and expenses would not, over time if they had not already done so, amount to the requisite $ 10,000 for at least some of the individual growers and dealers represented by the agency.

[***LEdHN3]

COMMERCE ß200

grade labeling on apple containers -- state statute -- discrimination -- justification --

Headnote:[3A][3B]

A state statute requiring that all closed containers of apples sold in or shipped into the legislating state bear no grade for apples other than the applicable federal grade, or a designation that the apples are not graded, constitutes an unconstitutional burden on interstate commerce under the *commerce clause of the United States Constitution* (Art I, 8, cl 3), since the statute has the practical effect of not only burdening interstate sales of the apples of another state having strict requirements for grading apples produced in such other state and shipped in interstate commerce, but also discriminates against sales of such other state's apples, and the discrimination against commerce is not justifiable in terms of local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve local interests.

[***LEdHN4]

PARTIES ß23

standing of association -- action on behalf of members --

Headnote:[4]

An association has standing to bring suit on behalf of its members when: (1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose, and (3) neither the claim asserted, nor the relief requested, requires the participation of individual members in the lawsuit.

[***LEdHN5]

COURTS ß427

jurisdictional amount -- suit by state agency -- reliance upon constituents --

Headnote:[5]

A state's agency created by statute for the promotion and protection of the state's apple industry, which agency is composed of a number of state growers and dealers chosen from electoral districts by their fellow growers and dealers, all of whom by mandatory assessment finance the agency's operations, may rely upon its constituents to meet the $ 10,000 amount in controversy requirement of *28 USCS 1331* in its federal court action brought to obtain declaratory and injunctive relief with respect to another state's alleged unconstitutional statute governing apple grade markings on closed containers of apples.

[***LEdHN6]

COURTS ß427

jurisdictional amount -- declaratory or injunctive relief action --

Headnote:[6]

In actions seeking declaratory or injunctive relief, the amount in controversy is measured by the value of the object of the litigation.

[***LEdHN7]

COURTS ß427

injunctive and declaratory relief -- jurisdictional amount -- measurement --

Headnote:[7]

Whether the $ 10,000 amount in controversy requirement of *28 USCS 1331* is met in a federal court action brought by a state statutory agency representing the state's apple growers and dealers--which action is brought to obtain declaratory and injunctive relief with regard to another state's alleged unconstitutional law governing the apple grade markings on closed containers of apples sold in or shipped into the legislating state--is determined by the value of the right of individual apple growers and dealers represented by the agency to conduct their business affairs in the legislating state free from the interference of the challenged statute; the value of such growers' and dealers' right is measured by the losses that will follow from enforcement of the legislating state's statute, and, in such regard, a proper matter for consideration is the cost incurred by the growers and dealers in complying with the statute.

[***LEdHN8]

COMMERCE ß100

commerce clause -- exercise of state authority -- state powers -- sale of food --

Headnote:[8]

Not every exercise of state authority imposing some burden on the free flow of commerce is invalid; although the *commerce clause of the United States Constitution* (Art I, 8, cl 3) acts as a limitation upon state power even without congressional implementation, in the absence of conflicting legislation by Congress, there is a residium of powers in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it, such residium being particularly strong when the state acts to protect its citizenry in matters pertaining to the sale of foodstuffs.

[***LEdHN9]

COMMERCE ß148

validity of state regulation -- test --

Headnote:[9]

When state legislation furthering matters of legitimate local concern comes into conflict with the overriding requirement, under the *commerce clause of the United States Constitution* (Art I, 8, cl 3), of a national common market, an accomodation of the competing national and local interests must be effected.

[***LEdHN10]

COMMERCE ß152

discrimination -- interstate sales -- state justification --

Headnote:[10]

When it is demonstrated that a state statute discriminates against interstate sales, the burden falls on the state to justify such discrimination against commerce both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives, adequate to preserve the local interests at stake.

SYLLABUS

Appellee, a statutory agency for the promotion and protection of the Washington State apple industry and composed of 13 state growers and dealers chosen from electoral districts by their fellow growers and dealers, all of whom by mandatory assessments finance appellee's operations, brought this suit challenging the constitutionality of a North Carolina statute requiring that all apples sold or shipped into North Carolina in closed containers be identified by no grade on the containers other than the applicable federal grade or a designation that the apples are not graded. A three-judge District Court granted the requested injunctive and declaratory relief, holding that appellee had standing to challenge the statute, that the $ 10,000 jurisdictional amount of *28 U.S.C. ß 1331* was satisfied, and that the challenged statute unconstitutionally discriminated against commerce insofar as it affected the interstate shipment of Washington apples. *Held:*

1. Appellee has standing to bring this action in a representational capacity. Pp. 341-345.

(a) An association has standing to bring suit on behalf of its members when (1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation in the lawsuit of each of the individual members. *Warth v. Seldin, 422 U.S. 490*. Pp. 342-343.

(b) The prerequisites to associational standing described in *Warth* are clearly present here: (1) At the risk of otherwise losing North Carolina accounts, some Washington apple growers and dealers had (at a per-container cost of 5 cents to 15 cents) obliterated Washington State grades from the large volume of North Carolina-bound containers; and they had stopped using preprinted containers, thus diminishing the efficiency of their marketing operations; (2) appellee's attempt to remedy these injuries is central to its purpose of protecting and enhancing the Washington apple market; and (3) neither appellee's constitutional claim nor the relief requested requires individualized proof. Pp. 343-344.

(c) Though appellee is a state agency, it is not on that account precluded from asserting the claims of the State's apple growers and dealers since for all practical purposes appellee performs the functions of a traditional trade association. While the apple growers are not "members" of appellee in the traditional trade association sense, they possess all the indicia of organization membership *(viz.,* electing the members, being the only ones to serve on the Commission, and financing its activities), and it is of no consequence that membership assessments are mandatory. Pp. 344-345.

(d) Appellee's own interests may be adversely affected by the outcome of this litigation, since the annual assessments that are used to support its activities and which are tied to the production of Washington apples could be reduced if the market for those apples declines as a result of the North Carolina statute. P. 345.

2. The requirements of *ß 1331* are satisfied. Since appellee has standing to litigate its constituents' claims, it may rely on them to meet the requisite amount of $ 10,000 in controversy. And it does not appear "to a legal certainty" that the claims of at least some of the individual growers and dealers will not come to that amount in view of the substantial annual sales volume of Washington apples in North Carolina (over $2 million) and the continuing nature of the statute's interference with the Washington apple industry, coupled with the evidence in the record that growers and dealers have suffered and will continue to suffer losses of various types from the operation of the challenged statute. *St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283*. Pp. 346-348.

3. The North Carolina statute violates the *Commerce Clause* by burdening and discriminating against the interstate sale of Washington apples. Pp. 348-354.

(a) The statute raises the costs of doing business in the North Carolina market for Washington growers and dealers while leaving unaffected their North Carolina counterparts, who were still free to market apples under the federal grade or none at all. Pp. 350-351.

(b) The statute strips the Washington apple industry of the competitive and economic advantages it has earned for itself by an expensive, stringent mandatory state inspection and grading system that exceeds federal requirements. By requiring Washington apples to be sold under the inferior grades of their federal counterparts, the North Carolina statute offers the North Carolina apple industry the very sort of protection against out-of-state competition that the *Commerce Clause* was designed to prohibit. Pp. 351-352.

(c) Even if the statute was not intended to be discriminatory and was enacted for the declared purpose of protecting consumers from deception and fraud because of the multiplicity of state grades, the statute does remarkably little to further that goal, at least with respect to Washington apples and grades, for it permits marketing of apples in closed containers under *no* grades at all and does nothing to purify the flow of information at the retail level. Moreover, Washington grades could not have led to the type of deception at which the statute was assertedly aimed, since those grades equal or surpass the comparable federal standards. Pp. 352-354.

(d) Nondiscriminatory alternatives to the outright ban of Washington State grades are readily available. P. 354.

408 F.Supp. 857, affirmed.

BURGER, C.J., delivered the opinion of the Court, in which all Members joined except REHNQUIST, J., who took no part in the consideration or decision of the case.

COUNSEL: *John R. Jordan, Jr.,* argued the cause for appellants. With him on the brief were *Rufus L. Edmisten,* Attorney General of North Carolina, and *Millard R. Rich, Jr.,* Deputy Attorney General.

Slade Gorton, Attorney General of Washington, argued the cause for appellee. With him on the brief were *Edward B. Mackie,* Deputy Attorney General, and *James Arneil,* Special Assistant Attorney General.

JUDGES: Burger, Brennan, Stewart, White, Marshall, Blackmun, Powell, Stevens; Rehnquist took no part in the consideration or decision of the case.

OPINION BY: BURGER

OPINION

[*335] [***389] [**2437] MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

In 1973, North Carolina enacted a statute which required, *inter alia,* all closed containers of apples sold, offered for sale, or shipped into the State to bear "no grade other than the applicable U.S. grade or standard." *N.C.Gen. Stat. ß 106-189.1* (1973). In an action brought by the Washington State Apple Advertising Commission, a three-judge Federal District Court invalidated the statute insofar as it prohibited the display of Washington State apple grades on the ground that it unconstitutionally discriminated against interstate commerce.

[*336] [**2438] [***LEdHR1A] [1A] [***LEdHR2A] [2A] [***LEdHR3A] [3A]The specific questions presented on appeal are (a) whether the Commission had standing to bring this action; (b) if so, whether it satisfied the jurisdictional amount requirement of *28 U.S.C. ß 1331*; [1] and *(c)* whether the challenged North Carolina statute constitutes an unconstitutional burden on interestate commerce.

1 *Section 1331* provides in pertinent part:

> [HN1] "(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $ 10,000, exclusive of interest and costs...."

(1)

Washington State is the Nation's largest producer of apples, its crops accounting for approximately 30% of all apples grown domestically and [***390] nearly half of all apples shipped in closed containers in interstate commerce. As might be expected, the production and sale of apples on this scale is a multimillion dollar enterprise which plays a significant role in Washington's economy. Because of the importance of the apple industry to the State, its legislature has undertaken to protect and enhance the reputation of Washington apples by establishing a stringent, mandatory inspection program, administered by the State's Department of Agriculture, which requires all apples shipped in interstate commerce to be tested under strict quality standards and graded accordingly. In all cases, the Washington State grades, which have gained substantial acceptance in the trade, are the equivalent of, or superior to, the comparable grades and standards adopted by the United States Department of Agriculture (USDA). Compliance with the Washington inspection scheme costs the State's growers approximately $ 1 million each year.

In addition to the inspection program, the state legislature has sought to enhance the market for Washington apples through the creation of a state agency, the Washington State Apple Advertising Commission, charged with the statutory [*337] duty of promoting and protecting the State's apple industry. The Commission itself is composed of 13 Washington apple growers and dealers who are nominated and elected within electoral districts by their fellow growers and dealers. *Wash. Rev. Code ßß*

15.24.020, *15.24.030* (1974). Among its activities are the promotion of Washington apples in both domestic and foreign markets through advertising, market research and analysis, and public education, as well as scientific research into the uses, development, and improvement of apples. Its activities are financed entirely by assessments levied upon the apple industry, ß 15.24.100; in the year during which this litigation began, these assessments totaled approximately $1.75 million. The assessments, while initially fixed by statute, can be increased only upon the majority vote of the apple growers themselves. ß 15.24.090.

In 1972, the North Carolina Board of Agriculture adopted an administrative regulation, unique in the 50 States, which in effect required all closed containers of apples shipped into or sold in the State to display either the applicable USDA grade or a notice indicating no classification. State grades were expressly prohibited. [2] In addition to its obvious consequence -- prohibiting the display of Washington State apple grades on containers of apples shipped into North Carolina, the regulation presented the Washington apple industry with a marketing problem of potentially nationwide significance. Washington apple growers annually ship in commerce approximately 40 million closed containers of apples, nearly 500,000 of which eventually find their way into North Carolina, stamped with the applicable Washington State variety [*338] and grade. It is the industry's practice to [***391] purchase these containers preprinted with the various apple varieties [**2439] and grades, prior to harvest. After these containers are filled with apples of the appropriate type and grade, a substantial portion of them are placed in cold-storage warehouses where the grade labels identify the product and facilitate its handling. These apples are then shipped as needed throughout the year; after February 1 of each year, they constitute approximately two-thirds of all apples sold in fresh markets in this country. Since the ultimate destination of these apples is unknown at the time they are placed in storage, compliance with North Carolina's unique regulation would have required Washington growers to obliterate the printed labels on containers shipped to North Carolina, thus giving their product a damaged appearance. Alternatively, they could have changed their marketing practices to accommodate the needs of the North Carolina market, *i.e.*, repack apples to be shipped to North Carolina in containers bearing only the USDA grade, and/or store the estimated portion of the harvest destined for that market in such special containers. As a last resort, they could discontinue the use of the preprinted containers entirely. None of these costly and less efficient options was very attractive to the industry. Moreover, in the event a number of other States followed North Carolina's lead, the resultant inability to display the Washington grades could force the Washington growers to abandon the State's expensive inspection and grading system which their customers had come to know and rely on over the 60-odd years of its existence.

2 The North Carolina regulation, as amended, provides in pertinent part:

"(6) Apple containers must show the applicable U.S. Grade on the principal display panel or marked 'Unclassified,' 'Not Graded,' or 'Grade Not Determined.' State grades shall not be shown." ß 3-24.5(6), Rules, Regulations, Definitions and Standards of the North Carolina Department of Agriculture.

With these problems confronting the industry, the Washington State Apple Advertising Commission petitioned the North Carolina Board of Agriculture to amend its regulation to permit the display of state grades. An administrative hearing was held on the question but no relief was granted. [*339] Indeed, North Carolina hardened its position shortly thereafter by enacting the regulation into law: S

[HN2] "All apples sold, offered for sale or shipped into this State in closed containers shall bear on the container, bag or other receptacle, no grade other than the applicable U.S. grade or standard or the marking 'unclassified,' 'not graded' or 'grade not determined.'" *N.C. Gen. Stat. ß 106-189.1* (1973).I

Nontheless, the Commission once again requested an exemption which would have permitted the Washington apple growers to display both the United States and the Washington State grades on their shipments to North Carolina. This request, too, was denied.

Unsuccessful in its attempts to secure administrative relief, the Commission [3] instituted this action challenging the constitutionality of the statute in the United States District Court for the Eastern District of North Carolina. Its complaint, which invoked the District Court's jurisdiction under *28 U.S.C. ßß 1331* and *1343*, sought a declaration that the statute violated, *inter alia*, the *Commerce Clause of the United States Constitution, Art. I, ß 8, cl. 3*, insofar as it prohibited the display of Washington [***392] State grades, and prayed for a permanent injunction against its enforcement in this manner. A three-judge Federal District Court was convened pursuant to *28 U.S.C. ßß 2281* and *2284* to consider the Commission's constitutional attack on the statute.

3 Under Washington law, the Commission is a corporation and is specifically granted the power to sue and be sued. *Wash. Rev. Code ß 15.24.070(8)* (1974).

After a hearing, the District Court granted the requested relief. *408 F.Supp. 857 (1976)*. At the outset, it held that the Commission had standing to challenge the statute both in its own right and on behalf of the Washington State growers and dealers, and that the $ 10,000 amount-in-controversy [*340] requirement of *ß 1331* had been satisfied.[4] *408 F.Supp. at 858*. [**2440] Proceeding to the merits, the District Court found that the North Carolina statute, while neutral on its face, actually discriminated against Washington State growers and dealers in favor of their local counterparts. *Id., at 860-861*. This discrimination resulted from the fact that North Carolina, unlike Washington, had never established a grading and inspection system. Hence, the statute had no effect on the existing practices of North Carolina producers; they were still free to use the US DA grade or none at all. Washington growers and dealers, on the other hand, were forced to alter their long-established procedures, at substantial cost, or abandon the North Carolina market. The District Court then concluded that this discrimination against out-of-state competitors was not justified by the asserted local interest - the elimination of deception and confusion from the marketplace - arguably furthered by the statute. Indeed, it noted that the statute was "irrationally" drawn to accomplish that alleged goal since it permitted the marketing of closed containers of apples without any grade at all. *Id., at 861-862*. The court therefore held that the statute unconstitutionally discriminated against commerce, insofar as it affected the interstate shipment of Washington apples, [5] and enjoined its application. This appeal followed and we postponed further consideration of the question of jurisdiction to the hearing of the case on the [*341] merits *sub nom. Holshouser v. Washington State Apple Advertising Comm'n, 429 U.S. 814 (1976)*.

4 In this regard, it adopted the ruling of the single District Judge who had previously denied appellants' motion to dismiss the complaint brought on the same grounds. App. 51-58. That judge had found it unnecessary to determine whether jurisdiction was also proper under *28 U.S.C. ß 1343* in view of his determination that jurisdiction had been established under *ß 1331*. App. 57 n.2.

5 As an alternative ground for its holding, the District Court found that the statute would have constituted an undue burden on commerce even if it had been neutral and nondiscriminatory in its impact. *Pike v. Bruce Church, Inc., 397 U.S. 137 (1970). 408 F.Supp., at 862 n.9.*

(2)

[***LEdHR1B] [1B]In this Court, as before, the North Carolina officials vigorously contest the Washington Commission's standing to prosecute this action, either in its own right, or on behalf of that State's apple industry which it purports to represent. At the outset, appellants maintain that the Commission lacks the "personal stake" in the outcome of this litigation essential to its invocation of federal-court jurisdiction. *Baker v. Carr, 369 U.S. 186, 204 (1962).*The Commission, they point out, is a state agency, not itself engaged in the [***393] production and sale of Washington apples or their shipment into North Carolina. Rather, its North Carolina activities are limited to the promotion of Washington apples in that market through advertising. [6] Appellants contend that the challenged statute has no impact on that activity since it prohibits only the display of state apple grades on closed containers of apples. Indeed, since the statute imposed no restrictions on the advertisement of Washington apples or grades other than the labeling ban, which affects only those parties actually engaged in the apple trade, the Commission is said to be free to carry on the same activities that it engaged in prior to the regulatory program. Appellants therefore argue that the Commission suffers no injury, economic or otherwise, from the statute's operation, and, as a result, cannot make out the "case or controversy" between itself and the appellants needed to establish standing in the constitutional sense. *E. g., Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 260-264 (1977)*; *Warth v. Seldin, 422 U.S. 490, 498-499 (1975)*.

6 During 1974, the Commission spent in excess of $25,000 advertising Washington apples in the North Carolina market. *Id., at 859*.

Moreover, appellants assert, the Commission cannot rely on [*342] the injuries which the statute allegedly inflicts individually or collectively on Washington apple growers and dealers in order to confer [**2441] standing on itself. Those growers and dealers, appellants argue, are under no disabilities which prevent them from coming forward to protect their own rights if they are, in fact, injured by the statute's operation. In any event, appellants contend that the Commission is not a proper representative of industry interests. Although this Court has recognized that an association may have standing to assert the claims of its members even where it has suffered no injury from the challenged activity, *e.g., Warth v. Seldin, supra, at 511*; *National Motor Freight Assn. v. United States, 372 U.S. 246 (1963)*, the Commission is not a traditional voluntary membership organization such as a trade association, for it has no members at all. Thus, since the Commission has no members whose claims it might raise, and since it has suffered no "distinct and palpable injury" to itself, it can assert no more than an abstract concern for the well-being of the Washington apple industry as the basis for its standing. That type of interest, appellants argue, cannot "substitute for the con-

crete injury required by Art. III." *Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 40 (1976).*

[***LEdHR4] [4]If the Commission were a voluntary membership organization - a typical trade association - its standing to bring this action as the representative of its constituents would be clear under prior decisions of this Court. In *Warth v. Seldin, supra,* we stated: S

"Even in the absence of injury to itself, an association may have standing solely as the representative of its members.... The association must allege that its members, or any one of them, are suffering [***394] immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit.... So long as this can be established, and so long as the nature of the claim and [*343] of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause, the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction." *422 U.S., at 511*.

See also *Simon v. Eastern Ky. Welfare Rights Org., supra, at 39-40*; *Meek v. Pittenger, 421 U.S. 349, 355-356, n. 5 (1975)*; *Sierra Club v. Morton, 405 U.S. 727, 739 (1972)*; *National Motor Freight Assn. v. United States, supra*. We went on in *Warth* to elaborate on the type of relief that an association could properly pursue on behalf of its members: S

"[W]hether an association has standing to invoke the court's remedial powers on behalf of its members depends in substantial measure on the nature of the relief sought. If in a proper case the association seeks a declaration, injunction, or some other form of prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured. Indeed, in all cases in which we have expressly recognized standing in associations to represent their members, the relief sought has been of this kind." *422 U.S., at 515*.I

Thus we have recognized that [HN3] an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

The prerequisites to "associational standing" described in *Warth* are clearly present here. The Commission's complaint alleged, and the District Court found as a fact, that the North Carolina statute had caused some Washington apple growers and dealers (a) to obliterate Washington State grades from the [*344] large volume of closed containers destined for the North Carolina [**2442] market at a cost ranging from 5 to 15 cents per carton; (b) to abandon the use of preprinted containers, thus diminishing the efficiency of their marketing operations; or (c) to lose accounts in North Carolina. Such injuries are direct and sufficient to establish the requisite "case or controversy" between Washington apple producers and appellants. Moreover, the Commission's attempt to remedy these injuries are and to secure the industry's right to publicize its grading system is central to the Commission's purpose of protecting and enhancing the market for Washington apples. Finally, neither the interstate commerce claim nor the request for declaratory and injunctive relief requires individualized proof and both are thus properly resolved in a group context.

The only question presented, [***395] therefore, is whether, on this record, the Commission's status as a state agency, rather than a traditional voluntary membership organization, precludes it from asserting the claims of the Washington apple growers and dealers who form its constituency. We think not. The Commission, while admittedly a state agency, for all practical purposes performs the functions of a traditional trade association representing the Washington apple industry. As previously noted, its purpose is the protection and promotion of the Washington apple industry; and, in the pursuit of that end, it has engaged in advertising, market research and analysis, public education campaigns, and scientific research. It thus serves a specialized segment of the State's economic community which is the primary beneficiary of its activities, including the prosecution of this kind of litigation.

Moreover, while the apple growers and dealers are not "members" of the Commission in the traditional trade association sense, they possess all of the indicia of membership in an organization. They alone elect the members of the Commission; they alone may serve on the Commission; they alone finance its activities, including the costs of this lawsuit, [*345] through assessments levied upon them. In a very real sense, therefore, the Commission represents the State's growers and dealers and provides the means by which they express their collective views and protect their collective interests. Nor do we find it significant in determining whether the Commission may properly represent its constituency that "membership" is "compelled" in the form of mandatory assessments. Membership in a union, or its equivalent, is often required. Likewise, membership in a bar association, which may also be an agency of the State, is often a prerequisite to the practice of law. Yet in neither instance would it be reasonable to suggest that such an organization lacked standing to assert the claims of its constituents.

Finally, we note that the interests of the Commission itself may be adversely affected by the outcome of this litigation. The annual assessments paid to the Commission are tied to the volume of apples grown and packaged as "Washington Apples." In the event the North Carolina statute results in a contraction of the market for Washington apples or prevents any market expansion that might otherwise occur, it could reduce the amount of the assessments due the Commission and used to support its activities. This financial nexus between the interests of the Commission and its constituents coalesces with the other factors noted above to "assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr, 369 U.S., at 204*; see also *NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 459-460 (1958)*.

Under the circumstances presented here, it would exalt form over substance to differentiate between the Washington Commission and a traditional trade association representing the individual growers and dealers who collectively form its constituency. We therefore agree with the District Court that the [***396] Commission has standing to bring this action in a representational capacity.

[*346] [**2443] (3)

[***LEdHR2B] [2B]We turn next to the appellants' claim that the Commission has failed to satisfy the $ 10,000 amount-in-controversy requirement of *28 U.S.C. ß 1331*. As to this, the appellants maintain that the Commission itself has not demonstrated that its right to be free of the restrictions imposed by the challenged statute is worth more than the requisite $ 10,000. Indeed, they argue that the Commission has made no real effort to do so, but has instead attempted to rely on the actual and threatened injury to the individual Washington apple growers and dealers upon whom the statute has a direct impact. This, they claim, it cannot do, for those growers and dealers are not parties to this litigation. Alternatively, appellants argue that even if the Commission can properly rely on the claims of the individual growers and dealers, it cannot establish the required jurisdictional amount without aggregating those claims. Such aggregation, they argue, is impermissible under this Court's decisions in *Snyder v. Harris, 394 U.S. 332 (1969)*, and *Zahn v. International Paper Co., 414 U.S. 291 (1973)*.

[***LEdHR5] [5]Our determination that the Commission has standing to assert the rights of the individual growers and dealers in a representational capacity disposes of the appellants' first contention. Obviously, if the Commission has standing to litigate the claims of its constituents, it may also rely on them to meet the requisite amount in controversy. Hence, we proceed to the question of whether those claims were sufficient to confer subject-matter jurisdiction on the District Court. In resolving this issue, we have found it unnecessary to reach the aggregation question posed by the appellants for it does not appear to us "to a legal certainty" that the claims of at least some of the individual growers and dealers will not amount to the required $ 10,000. *St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 288-289 (1938)*.

[*347] [***LEdHR6] [6] [***LEdHR7] [7][HN4] In actions seeking declaratory or injunctive relief, it is well established that the amount in controversy is measured by the value of the object of the litigation. *E.g., McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 181 (1936)*; *Glenwood Light & Water Co. v. Mutual Light, Heat & Power Co., 239 U.S. 121, 126 (1915)*; *Hunt v. New York Cotton Exchange, 205 U.S. 322, 336 (1907)*; 1 J. Moore, Federal Practice PP0.95, 0.96 (2d ed. 1975); C. Wright, A. Miller, & E. Cooper, Federal Practice & Procedure ß 3708 (1976). Here, that object is the right of the individual Washington apple growers and dealers to conduct their business affairs in the North Carolina market free from the interference of the challenged statute. The value of that right is measured by the losses that will follow from the statute's enforcement. *McNutt, supra, at 181*; *Buck v. Gallagher, 307 U.S. 95, 100 (1939)*; *Kroger Grocery & Baking Co. v. Lutz, 299 U.S. 300, 301 (1936)*; *Packard v. Banton,* [***397] *264 U.S. 140, 142 (1924)*.

Here the record demonstrates that the growers and dealers have suffered and will continue to suffer losses of various types. For example, there is evidence supporting the District Court's finding that individual growers and shippers lost accounts in North Carolina as a direct result of the statute. Obviously, those lost sales could lead to diminished profits. There is also evidence to support the finding that individual growers and dealers incurred substantial costs in complying with the statute. As previously noted, the statute caused some growers and dealers to manually obliterate the Washington grades from closed containers to be shipped to North Carolina at a cost of from 5 to 15 cents per carton. Other dealers decided to alter their marketing practices, not without cost, by repacking apples or abandoning the use of preprinted containers entirely, among other things. Such costs of [**2444] compliance are properly considered in computing the amount in controversy. *Buck v. Gallagher, supra; Packard v. Banton, supra; Allway Taxi, Inc. v. New York, 340 F.Supp. 1120* [*348] (SDNY), aff'd, *468 F.2d 624 (CA2 1972)*. In addition, the statute deprived the growers and dealers of their rights to utilize most effectively the Washington State grades which, the record demonstrates, were of long standing and had gained wide acceptance in the trade. The competitive advantages thus lost could not be regained without incurring additional

costs in the form of advertising, etc. Cf. *Spock v. David, 502 F.2d 953, 956 (CA3 1974)*, rev'd on other grounds, *424 U.S. 828 (1976)*. Moreover, since many apples eventually shipped to North Carolina will have already gone through the expensive inspection and grading procedure, the challenged statute will have the additional effect of causing growers and dealers to incur inspection costs unnecessarily.

Both the substantial volume of sales in North Carolina -- the record demonstrates that in 1974 alone, such sales were in excess of $ 2 million [7] -- and the continuing nature of the statute's interference with the business affairs of the Commission's constituents, preclude our saying "to a legal certainty," on this record, that such losses and expenses will not, in time, if they have not done so already, amount to the requisite $ 10,000 for at least some of the individual growers and dealers. That is sufficient to sustain the District Court's jurisdiction. The requirements of *ß 1331* are therefore met.

7 In addition, apples worth approximately 30 to 40 percent of that amount were transshipped into North Carolina in 1974 after direct shipment to apple brokers and wholesalers located in other States.

(4)

[***LEdHR3B] [3B]We turn finally to the appellants' claim that the District Court erred in holding that the North Carolina statute violated the *Commerce Clause* insofar as it prohibited the display of Washington State grades on closed containers of apples shipped into the State. Appellants do not really contest the District Court's determination that the challenged statute burdened the Washington apple industry by increasing its [*349] costs of doing business in the North Carolina [***398] market and causing it to lose accounts there. Rather, they maintain that any such burdens on the interstate sale of Washington apples were far outweighed by the local benefits flowing from what they contend was a valid exercise of North Carolina's inherent police powers designed to protect its citizenry from fraud and deception in the marketing of apples.

Prior to the statute's enactment, appellants point out, apples from 13 different States were shipped into North Carolina for sale. Seven of those States, including the State of Washington, had their own grading systems which, while differing in their standards, used similar descriptive labels (*e.g.*, fancy, extra fancy, etc.). This multiplicity of inconsistent state grades, as the District Court itself found, posed dangers of deception and confusion not only in the North Carolina market, but in the Nation as a whole. The North Carolina statute, appellants claim, was enacted to eliminate this source of deception and confusion by replacing the numerous state grades with a single uniform standard. Moreover, it is contended that North Carolina sought to accomplish this goal of uniformity in an evenhanded manner as evidenced by the fact that its statute applies to all apples sold in closed containers in the State without regard to their point of origin. Nonetheless, appellants argue that the District Court gave "scant attention" to the obvious benefits flowing from the challenged legislation and to the long line of decisions from this Court holding that the States possess "broad powers" to protect local purchasers from fraud and deception in the marketing of foodstuffs. *E.g., Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963)*; *Pacific* [**2445] *States Box & Basket Co. v. White, 296 U.S. 176 (1935)*; *Corn Products Refining Co. v. Eddy, 249 U.S. 427 (1919)*.

[***LEdHR8] [8] [***LEdHR9] [9]As the appellants properly point out, not every exercise of state authority imposing some burden on the free flow of commerce is invalid. *E.g., Great Atlantic & Pacific Tea Co.* [*350] *v. Cottrell, 424 U.S. 366, 371 (1976)*; *Freeman v. Hewit, 329 U.S. 249, 252 (1946)*. Although the *Commerce Clause* acts as a limitation upon state power even without congressional implementation, *e.g., Great Atlantic & Pacific Tea Co., supra, at 370-371*; *Freeman v. Hewit, supra, at 252*; *Cooley v. Board of Wardens, 12 How. 299 (1852)*, our opinions have long recognized that, S

[HN5] "in the absence of conflicting legislation by Congress, there is a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it." *Southern Pacific Co. v. Arizona ex rel Sullivan, 325 U.S. 761, 767 (1945)*.I

Moreover, as appellants correctly note, that "residuum" is particularly strong when the State acts to protect its citizenry in matters pertaining to the sale of foodstuffs. *Florida Lime & Avocado Growers, Inc., supra, at 146*. By the same token, however, a finding that state legislation furthers matters of [***399] legitimate local concern, even in the health and consumer protection areas, does not end the inquiry. Such a view, we have noted, "would mean that the *Commerce Clause* of itself imposes no limitations on state action... save for the rare instance where a state artlessly discloses an avowed purpose to discriminate against interstate goods." *Dean Milk Co. v. Madison, 340 U.S. 349, 354 (1951)*. Rather, when such state legislation comes into conflict with the *Commerce Clause*'s overriding requirement of a national "common market," we are confronted with the task of effecting an accommodation of the competing national and local interests. *Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)*; *Great Atlantic & Pacific Tea Co., supra, at 370-372*. We turn to that task.

As the District Court correctly found, the challenged statute has the practical effect of not only burdening interstate sales of Washington apples, but also discriminating against them. This discrimination takes various forms. The first, and most [*351] obvious, is the statute's consequence of raising 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. As previously noted, this disparate effect results from the fact that 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.

Second, 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. The record demonstrates that the Washington apple-grading system has gained nationwide acceptance in the apple trade. Indeed, it contains numerous affidavits from 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, [**2446] its emphasis on color, and its supporting mandatory inspections. Once again, the statute had no similar impact on the North Carolina apple industry and thus operated to its benefit.

Third, 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 [*352] 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 [***400] 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.

Despite the statute's facial neutrality, the Commission suggests that its discriminatory impact on interstate commerce was not an unintended by product and there are some indications in the record to that effect. The most glaring is the response of the North Carolina Agriculture Commissioner to the Commission's request for an exemption following the statute's passage in which he indicated that before he could support such an exemption, he would "want to have the sentiment from our apple producers *since they were mainly responsible for this legislation being passed*...." App. 21 (emphasis added). Moreover, we find it somewhat suspect that North Carolina singled out only closed containers of apples, the very means by which apples are transported in commerce, to effectuate the statute's ostensible consumer protection purpose when apples are not generally sold at retail in their shipping containers. However, we need not ascribe an economic protection motive to the North Carolina Legislature to resolve this case; we conclude that the challenged statute cannot stand insofar as it prohibits the [*353] display of Washington State grades even if enacted for the declared purpose of protecting consumers from deception and fraud in the marketplace.

[***LEdHR10] [10][HN6] When discrimination against commerce of the type we have found is demonstrated, the burden falls on the State to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake. *Dean Milk Co. v. Madison, 340 U.S., at 354*.See also *Great Atlantic & Pacific Tea Co., 424 U.S., at 373*; *Pike v. Bruce Church, Inc., 397 U.S., at 142*; *Polar Ice Cream & Creamery Co. v. Andrews, 375 U.S. 361, 375 n. 9 (1964)*; *Baldwin v. G.A.F. Seeling, Inc., 294 U.S. 511, 524 (1935)*. North Carolina has failed to sustain that burden on both scores.

The several States unquestionably possess a substantial interest in protecting their citizens from confusion and deception in the marketing of foodstuffs, but the challenged statute does remarkably little to further that laudable goal at least with respect to Washington apples and grades. The statute, as already noted, permits the marketing of closed containers of apples under *no* grades at all. Such a result can hardly be thought to eliminate the problems of deception and confusion created by the multiplicity of differing state grades; indeed, it magnifies them by depriving purchasers of all information concerning the quality [***401] of the contents of closed apple containers. Moreover, [**2447] although the statute is

ostensibly a consumer protection measure, it directs its primary efforts, not at the consuming public at large, but at apple wholesalers and brokers who are the principal purchasers of closed containers of apples. And those individuals are presumably the most knowledgeable individuals in this area. Since the statute does nothing at all to purify the flow of information at the retail level, it does little to protect consumers against the problems it was designed to eliminate. Finally, we note that any potential [*354] for confusion and deception created by the Washington grades [8] was not of the type that led to the statute's enactment. Since Washington grades are in all cases equal or superior to their USDA counterparts, they could only "deceive" or "confuse" a consumer to his benefit, hardly a harmful result.

8 Indeed, the District Court specifically indicated in its findings of fact that there had been no showing that the Washington State grades had caused any confusion in the North Carolina market. *408 F.Supp., at 859.*

In addition, it appears that nondiscriminatory alternatives to the outright ban of Washington State grades are readily available. For example, North Carolina could effectuate its goal by permitting out-of-state growers to utilize state grades only if they also marked their shipments with the applicable USDA label. In that case, the U.S.D.A. grade would serve as a benchmark against which the consumer could evaluate the quality of the various state grades. If this alternative was for some reason inadequate to eradicate problems caused by state grades inferior to those adopted by the USDA, North Carolina might consider banning those state grades which, unlike Washington's, could not be demonstrated to be equal or superior to the corresponding USDA categories. Concedely, even in this latter instance, some potential for "confusion" might persist. However, it is the type of "confusion" that the national interest in the free flow of goods between the States demands be tolerated. [9]

9 Our conclusion in this regard necessarily rejects North Carolina's suggestion that the burdens on commerce imposed by the statute are justified on the ground that the standardization required by the statute serves the national interest in achieving uniformity in the grading and labeling of foodstuffs.

The judgment of the District Court is

Affirmed.

MR. JUSTICE REHNQUIST took no part in the consideration or decision of the case.

REFERENCES

32 Am Jur 2d, Federal Practice and Procedure 129 et seq.; *52 Am Jur 2d, Markets and Marketing 32*; *59 Am Jur 2d, Parties 27*

1 Federal Procedural Forms L Ed, Actions in District Court 1:11 et seq.

5 Am Jur Pl & Pr Forms (Rev Ed), Commerce, Form 3; 11 Am Jur Pl & Pr Forms (Rev Ed), Federal Practice and Procedure, Forms 541 et seq.

28 USCS 1331; *Constitution, Article I, Section 8, Clause 3*

US L Ed Digest, Commerce 200; Courts 427, 431; Parties 23

ALR Digests, Commerce 115; Courts 290; Parties 71

L Ed Index to Annos, Amount in Controversy; Commerce; Containers; Parties

ALR Quick Index, Amount in Controversy; Capacity to Sue or be Sued; Commerce; Containers; Grading of Products

Federal Quick Index, Commerce ;Containers ;Injunctions; Parties

Annotation References:

Supreme Court's view as to what is a "case or controversy" within the meaning of Article III of the Federal Constitution or an "actual controversy" within the meaning of the Declaratory Judgment Act (*28 USCS 2201*). *40 L Ed 2d 783*.

Commerce clause of Federal Constitution as violated by state or local regulation or prohibition affecting business of selling, distributing, packaging, packing, labeling, or processing food intended for human consumption. *25 L Ed 2d 846*.

Jurisdictional amount in Federal case other than for recovery of money judgment. *81 L Ed 189*.

Criterion of jurisdictional amount to vest jurisdiction of federal court where injunction is sought. *30 ALR2d 602*.

Jurisdictional amount in its relation to suit for declaratory judgment. 115 ALR 1489.

Validity of statute or ordinance as to "containers." 5 ALR 1068, 101 ALR 862.

4 of 20 DOCUMENTS

INTERNATIONAL DAIRY FOODS ASSOCIATION (09-3515); ORGANIC TRADE ASSOCIATION (09-3526), Plaintiffs-Appellants, v. ROBERT J. BOGGS, in his official capacity as Ohio Director of Agriculture, Defendant-Appellee.

Nos. 09-3515/3526

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

10a0322p.06; *622 F.3d 628*; *2010 U.S. App. LEXIS 20184*; *2010 FED App. 0322P (6th Cir.)*

June 10, 2010, Argued
September 30, 2010, Decided
September 30, 2010, Filed

PRIOR HISTORY: [**1]

Appeal from the United States District Court for the Southern District of Ohio at Columbus. Nos. 08-00628; 08-00629--James L. Graham, District Judge.

Int'l Dairy Foods Ass'n v. Boggs, 2009 U.S. Dist. LEXIS 27074 (S.D. Ohio, Apr. 2, 2009)

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff dairy-processor trade organizations filed separate suits, asserting that *Ohio Admin. Code ß 901:11-8-01* violated their *First Amendment* rights and the dormant *Commerce Clause*. The United States District Court for the Southern District of Ohio granted defendant State summary judgment on all but one claim and denied the processor's motion for a preliminary injunction. The processors filed an interlocutory appeal with regard to both orders.

OVERVIEW: The district court held that composition claims were inherently misleading because they implied a compositional difference between those products that were produced with recombinant bovine somatotropin (rbST) and those that were not, in contravention of a Food and Drug Administration's contrary finding. The district court's conclusion was belied by the record, however, which showed that a compositional difference did exist between milk from untreated cows and milk from cows treated with rbST. The court concluded that (1) composition claims like "rbST free" were not inherently misleading; (2) *Ohio Admin. Code ß 901:11-8-01* did not directly advance the state's interest in preventing misleading labeling, and (3) it was more extensive than necessary to serve that interest. Section 901:11-8-01's disclosure requirement was reasonably related to the State's interest in preventing consumer deception, however, there was no rational basis between this concern and the contiguous requirement of such a disclosure. There was no dormant *Commerce Clause* violation because the alleged burdens on interstate commerce were not excessive in relation to the putative local benefits.

OUTCOME: The judgment was reversed to the extent that it upheld the Ohio Rule's prophylactic ban on composition claims and its prohibition on the use of an asterisk for required disclosures to accompany production claims, but remainder of the judgment was affirmed. The case was remanded for further proceedings.

CORE TERMS: milk, processor, cow's, misleading, dairy, consumer, composition, disclosure requirement, label, hormone, out-of-state, disclosure, conventional, interstate commerce, deception, labeling, ban, commerce, dormant, summary judgment, extraterritorial, advertising, inherently, invalid, artificial, milk products, per se, disclaimer, farmers, Ohio Rule's

LexisNexis(R) Headnotes

Governments > Agriculture & Food > General Overview

[HN1] The Organic Foods Production Act, *7 U.S.C.S. ß 6501 et seq.*, forbids the use of antibiotics, artificial hormones, and pesticides in food production.

Governments > Agriculture & Food > General Overview

[HN2] See *Ohio Admin. Code ß 901:11-8-01*.

Civil Procedure > Summary Judgment > Appellate Review > Standards of Review

[HN3] A circuit court of appeals reviews de novo a district court's grant of summary judgment.

Civil Procedure > Summary Judgment > Standards > Appropriateness

[HN4] Summary judgment is proper where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)(2)*. In considering a motion for summary judgment, the district court must draw all reasonable inferences in favor of the nonmoving party. The central issue is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions
Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

[HN5] The decision of whether to grant a motion for a preliminary injunction is left to the sound discretion of the district court. A district court, in deciding whether to grant an injunction, abuses its discretion when it applies the incorrect legal standard, misapplies the correct legal standard, or relies upon clearly erroneous findings of fact.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

[HN6] The following factors are to be considered by a district court in deciding whether to grant a preliminary injunction: (1) whether the plaintiff has established a substantial likelihood or probability of success on the merits; (2) whether there is a threat of irreparable harm to the plaintiff; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by granting injunctive relief.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Commercial Speech > General Overview

[HN7] Under the commercial-speech framework, truthful advertising related to lawful activities is entitled to the protections of the *First Amendment*, but the government is free to prevent the dissemination of commercial speech that is false, deceptive, or misleading.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Commercial Speech > General Overview

[HN8] Prophylactic bans on commercial speech are evaluated under a four-part analysis first set forth in Central Hudson Gas & Electric Corp. v. Public Service Commission. Pursuant to that analysis, a court first determines whether the speech concerns unlawful activity or is misleading. If a court finds in the affirmative on either prong, the speech is not entitled to *First Amendment* protection, and the analysis ends. But if the court finds that the speech is entitled to *First Amendment* protection, it then makes three additional inquiries: (1) whether the asserted governmental interest is substantial, (2) whether the regulation directly advances that interest, and (3) whether the regulation is more extensive than necessary to serve the asserted interest.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Commercial Speech > General Overview

[HN9] Misleading advertising may be prohibited entirely, including where the speech is inherently likely to deceive or where the record indicates that a particular form or method of advertising has in fact been deceptive. Where speech is only potentially misleading, however, the Central Hudson framework applies. Under these circumstances, the preferred remedy is more disclosure, rather than less.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Commercial Speech > General Overview

[HN10] The last two steps of the Central Hudson test are complementary. They involve asking whether the speech restriction is not more extensive than necessary to serve the interests that support it. Accordingly, there must be a reasonable fit between the legislature's ends and the means chosen to accomplish those ends, a means narrowly tailored to achieve the desired objective. If there are numerous and obvious less-burdensome alternatives to

the restriction on commercial speech, that is certainly a relevant consideration in determining whether the fit between ends and means is reasonable.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Commercial Speech > Misleading Speech

[HN11] The States may not place an absolute prohibition on certain types of potentially misleading information if the information also may be presented in a way that is not deceptive.

Governments > Agriculture & Food > General Overview

[HN12] In addition to composition claims, *Ohio Admin. Code ß 901:11-8-01* regulates the use of production claims such as "this milk is from cows not supplemented with recombinant bovine somatotropin (rbST)." When using these claims, processors must include a disclosure on the label stating that the Food and Drug Administration has determined that no significant difference has been shown between milk derived from rbST-supplemented and non-rbST-supplemented cows. *Ohio Admin. Code ß 901:11-8-01(B)(2)*. This disclosure must be on the same label panel, in exactly the same font, style, case, and color and at least half the size (but no smaller than seven point font) as the production claim. ß 901:11-8-01(B)(2).

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Commercial Speech > General Overview

[HN13] Disclosure requirements do not violate an advertiser's *First Amendment* rights where the requirements are reasonably related to the State's interest in preventing deception of consumers. Such requirements, however, cannot be unjustified or unduly burdensome.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Commercial Speech > General Overview

[HN14] Zauderer, which held that disclosure requirements do not violate an advertiser's *First Amendment* rights where the requirements are reasonably related to the State's interest in preventing deception of consumers, applies where a disclosure requirement targets speech that is inherently misleading. Zauderer also controls a court's analysis where the speech at issue is potentially misleading.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Commercial Speech > General Overview

[HN15] There are material differences between purely factual and uncontroversial disclosure requirements and outright prohibitions on speech. Such differential treatment is due to the fact that the mandated disclosure of accurate, factual, commercial information does not offend the core *First Amendment* values of promoting efficient exchange of information or protecting individual liberty interests.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Commercial Speech > Misleading Speech

[HN16] A State's burden of providing evidence that speech is misleading is more relaxed where disclosure requirements are at issue (as opposed to a ban on commercial speech) and the possibility of deception is self-evident.

Governments > Agriculture & Food > General Overview

[HN17] The *Ohio Admin. Code ß 901:11-8-01* stipulates that disclosures must be in the same label panel, in exactly the same font, style, case, and color and at least half the size (but no smaller than seven point font) as the production claim. *Ohio Admin. Code ß 901:11-8-01(B)(2)*. A disclosure also must be contiguous to the production claim.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Commercial Speech > General Overview

[HN18] The *First Amendment* is satisfied by a rational connection between the purpose of a commercial disclosure requirement and the means employed to realize that purpose.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > Dormant Commerce Clause

[HN19] The Constitution grants Congress power to regulate Commerce with foreign nations, and among the several States. *U.S. Const. art. I, ß 8, cl. 3*. Although the *Commerce Clause* is by its text an affirmative grant of power to Congress to regulate interstate and foreign commerce, the Clause has long been recognized as a self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce. In this "dormant" form, the *Commerce Clause*

limits the power of states to erect barriers against interstate trade.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > Dormant Commerce Clause
[HN20] Dormant *Commerce Clause* claims are traditionally evaluated using a two-tiered analysis. The first inquiry requires a court to determine whether a state statute directly regulates or discriminates against interstate commerce, or whether its effect is to favor in-state economic interests over out-of-state interests. If a state statute does either, it is generally struck down without further inquiry. A discriminatory 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 nondiscriminatory alternatives. But if the statute has only indirect effects on interstate commerce and regulates evenhandedly, a court then moves on to the second inquiry, which requires the application of the balancing test set forth in Pike v. Bruce Church, Inc. That test upholds a state regulation unless the burden it imposes upon interstate commerce is clearly excessive in relation to the putative local benefits.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > Dormant Commerce Clause
[HN21] The first inquiry under Brown-Forman focuses on whether a regulation has a direct effect or only an incidental effect on interstate commerce. But what counts as a direct burden on interstate commerce has long been a matter of difficulty for courts, and, presumably due to its questionable value as an analytical device, the direct/incidental distinction has fallen out of use in dormant *commerce clause* analysis. The U.S. Court of Appeals for the Sixth Circuit has thus reformulated the dormant *Commerce Clause* analysis as follows: The first prong targets the core concern of the dormant *commerce clause*, protectionism--that is, differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter. Protectionist laws are generally struck down without further inquiry, because absent an extraordinary showing the burden they impose on interstate commerce will always outweigh their local benefits. However, if the court determines that the law is not protectionist, it goes on to analyze the law under the deferential Pike balancing test.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > Dormant Commerce Clause
[HN22] In addition to regulations that are protectionist, the U.S. Supreme Court has recognized a second category of regulation that is also virtually per se invalid under the dormant *Commerce Clause*: a regulation that has the practical effect of controlling commerce that occurs entirely outside of the state in question. The *Commerce Clause* precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State. A state, in other words, cannot project its legislation into another state, such as by forcing an out-of-state merchant to seek regulatory approval in one State before undertaking a transaction in another. Most critical to this inquiry is the issue of whether the practical effect of the regulation is to control conduct beyond the boundaries of the State. Like a regulation that favors in-state economic interests at the expense of out-of-state interests, a state's regulation that controls extraterritorial conduct is per se invalid. A statute will be invalid per se if it has the practical effect of extraterritorial control of commerce occurring entirely outside the boundaries of the state in question.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > Dormant Commerce Clause
[HN23] A state regulation that governs extraterritorially is a per se violation of the *Commerce Clause*. A statute may violate the dormant *Commerce Clause* in one of three ways: (1) the statute clearly discriminates against interstate commerce in favor of in-state commerce; (2) it imposes a burden on interstate commerce that outweighs any benefits received; or (3) it has the practical effect of extraterritorial control of interstate commerce.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > Dormant Commerce Clause
[HN24] The critical consideration in any dormant *Commerce Clause* analysis is the overall effect of the statute on both local and interstate activity. Nevertheless, a state regulation is virtually per se invalid if it is either extraterritorial or discriminatory in effect. When it is neither, then the Pike balancing test controls.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > Dormant Commerce Clause
[HN25] A statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority. The U.S. Supreme Court has struck down state regulations due to their extraterritorial effects in the context of price-affirmation statutes.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > Dormant Commerce Clause

[HN26] A state regulation can discriminate against out-of-state interests in three different ways: (a) facially, (b) purposefully, or (c) in practical effect.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > Dormant Commerce Clause

[HN27] There are two complementary components to a claim that a statute has a discriminatory effect on interstate commerce: the claimant must show both how local economic actors are favored by the legislation, and how out-of-state actors are burdened by the legislation.

COUNSEL: ARGUED: Charles M. English, Jr., OBER, KALER, GRIMES & SHRIVER, Washington, D.C., Randall J. Sunshine, LINER GRODE STEIN YANKELEVITZ SUNSHINE REGENSTREIF & TAYLOR LLP, Los Angeles, California, for Appellants.

David M. Lieberman, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellee.

ON BRIEF: Charles M. English, Jr., Wendy Yoviene, OBER, KALER, GRIMES & SHRIVER, Washington, D.C., Randall J. Sunshine, LINER GRODE STEIN YANKELEVITZ SUNSHINE REGENSTREIF & TAYLOR LLP, Los Angeles, California, for Appellants.

David M. Lieberman, Benjamin C. Mizer, Stephen P. Carney, William J. Cole, James Patterson, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellee.

Gregory R. Flax, BAKER & HOSTETLER LLP, Columbus, Ohio, for Amici Curiae.

Paige Tomaselli, THE CENTER FOR FOOD SAFETY, San Francisco, California, for Amici Curiae.

JUDGES: Before: GILMAN and WHITE, Circuit Judges; THAPAR, District Judge. *

* The Honorable Amul R. Thapar, United States District Judge for the Eastern District of Kentucky, sitting by designation.

OPINION BY: RONALD LEE GILMAN

OPINION

[*632] [***2] RONALD LEE GILMAN, Circuit [**2] Judge. In response to a number of dairy processors advertising their nonuse of artificial hormones in the production of milk, the Ohio Department of Agriculture (ODA) adopted a regulation designed to curb the allegedly misleading labeling of dairy products. The regulation prohibits dairy processors from making claims about the absence of artificial hormones in their milk products (composition claims), and it also requires them to include a disclaimer when making such claims about their production processes. Two separate dairy-processor trade organizations filed suit, asserting that the regulation violates their *First Amendment* rights and the dormant *Commerce Clause*.

The district court granted summary judgment in favor of the state of Ohio on all but one of these claims. Based on this ruling, the court also denied the dairy processors' motion for a preliminary injunction. The processors then filed an interlocutory appeal with regard to both orders. For the following reasons, we **REVERSE** the judgment of the district court to the extent that it upheld the regulation's prophylactic ban on composition claims and its prohibition on the use of an asterisk for required disclosures to accompany [**3] production claims, **AFFIRM** the remainder of the judgment, and **REMAND** the case to the district court for further proceedings consistent with this opinion.

I. BACKGROUND

A. Factual history

This case concerns the labeling of milk products to reflect the nonuse of artificial hormones by members of two dairy-processor trade organizations, the International Dairy Foods Association (IDFA) and the Organic Trade Association (OTA). The IDFA [***3] is a trade organization whose collective membership consists of an estimated 85 percent of the milk, cultured-products, cheese, and frozen-desserts producers in the United States. In contrast, OTA's members span the entire organic industry, including dairy production. Several OTA members are certified organic dairy processors that must comply with [HN1] the Organic Foods Production Act (OFPA), *7 U.S.C. ß 6501 et seq.*, which forbids the use of antibiotics, artificial hormones, and pesticides in food production. (The IDFA and the OTA are hereinafter collectively referred to as "the Processors.")

At issue in this case is a genetically engineered hormone called recombinant bovine somatotropin (rbST), also known as recombinant bovine growth hormone (rbGH). The substance [**4] is given to lactating cows to increase their milk production. As used, rbST combines with the naturally occurring bovine somatotropin (bST) to increase dairy cows' milk production by up to 10 percent over cows not given the artificial hormone.

In 1993, the Food and Drug Administration (FDA) approved the use of rbST in cows, concluding that the artificial hormone "is safe and effective for dairy cows, that milk from rbST-treated cows is safe for human con-

sumption, and that production and use of the product do not have a significant impact on the environment." Interim Guidance on the Voluntary Labeling of Milk and Milk Products from Cows that Have Not Been Treated with *Recombinant Bovine Somatotropin, 59 Fed. Reg. 6279, 6279-80 (Feb. 10, 1994)*; *see also 58 Fed. Reg. 59946 (Nov. 12, 1993)* (approving the use of rbST). The agency further "found that there was no significant difference between milk from treated and untreated cows." *Id. at 6280*. Recognizing that some food companies might wish to inform consumers that they do not use [*633] milk from cows receiving rbST, the FDA determined that such companies could voluntarily label their products as such, provided that "any statements made are truthful [**5] and not misleading." *Id*.

In response to requests from several states for further guidance on this issue, the FDA in 1994 published an Interim Guidance regarding the labeling of milk and milk products from cows not treated with rbST. The Guidance addressed two types of claims: (1) "composition claims," which refer to the final composition of the milk or milk [***4] product (*e.g.*, "rbST free"), and (2) "production claims," which refer to the manner in which the product is produced (*e.g.*, "from cows not treated with rbST"). With regard to composition claims, the FDA strongly discouraged their use. It concluded that the term "bST-free" would be false under any circumstances, given that bST is naturally present in milk. *59 Fed. Reg. at 6280*. The FDA next addressed the claim "rbST free," noting that it was "concerned that the term . . . may imply a compositional difference between milk from treated and untreated cows rather than a difference in the way the milk is produced." *Id*.

Instead, the agency encouraged dairy processors to use production claims such as "from cows not treated with rbST." But it cautioned that even these claims have "the potential to be misunderstood by consumers" because they [**6] "may imply that milk from untreated cows is safer or of higher quality than milk from treated cows," an implication that would be "false and misleading." *Id*. The FDA therefore suggested that processors place production claims "in a proper context," such as by pairing a production claim with the statement that "[n]o significant difference has been shown between milk derived from rbST-treated and non-rbST-treated cows," or "by conveying the firm's reasons (other than safety or quality) for choosing not to use milk from cows treated with rbST." *Id*.

Bowing to "the traditional role of the States in overseeing milk production," the FDA clarified that its Guidance was a nonbinding document intended to give states assistance in formulating their own labeling laws. *Id*. The FDA also recommended that states require food companies to maintain records substantiating their claims and to make those records available for inspection. *Id*.

In the 14 years since the FDA issued its Guidance, consumer demand for dairy products made with milk from non-rbST-treated cows has increased. Many dairy processors, including those belonging to both the IDFA and the OTA, no longer accept milk from dairy farmers that [**7] comes from cows treated with rbST. Some IDFA processors, for example, have entered into agreements with milk suppliers to ensure that the milk received is from untreated cows, and the processors label their products to [***5] reflect this fact. And OTA members who label their products as "organic" are specifically precluded by the OFPA from using milk from cows treated with rbST or any other artificial hormone.

Several of these Processors advertised their nonuse of rbST on dairy products that they sold in Ohio. In response, Ohio Governor Ted Strickland issued an executive order in February 2008 that directed the ODA to "define what constitutes false and misleading labels on milk and milk products." Ohio Governor Executive Order 2008-03S (Feb. 7, 2008). He further ordered the agency to require dairy producers claiming that they do not use rbST to submit supporting documentation and to create labels containing representations consistent with the FDA's rbST findings.

The ODA then issued a proposed Rule restricting the types of claims that dairy processors could make about milk and milk [*634] products. To gauge public support for these labeling restrictions, the ODA solicited comments about the proposed [**8] Rule and held two public hearings. Less than 70 of the 2,700 emails and letters sent to the ODA during this time period were in favor of the proposed Rule, according to estimates made by the Processors.

ODA Director Robert Boggs nevertheless adopted the Rule in May 2008. In relevant part, the final Rule states that

> [HN2] (A) Pursuant to *sections 917.05* and *3715.60 of the Revised Code*, dairy products will be deemed to be misbranded if they contain a statement which is false or misleading.
>
> (B) A dairy label which contains a production claim that "this milk is from cows not supplemented with rbST" (or a substantially equivalent claim) may be considered misleading on the basis of such language, unless:
>
> (1) The labeling entity has verified that the claim

> is accurate, and proper documents, including, but not limited to, producer signed affidavits, farm weight tickets and plant audit trails, to support the claim, are made readily available to ODA for inspection; and
>
> (2) The label contains, in the same label panel, in exactly the same font, style, case, and color and at least half the [***6] size (but no smaller than seven point font) as the foregoing representation, the following contiguous additional statement [**9] (or a substantially equivalent statement): "The FDA has determined that no significant difference has been shown between milk derived from rbST-supplemented and non-rbST-supplemented cows."
>
> (C) Making claims regarding the composition of milk with respect to hormones, such as "No Hormones", "Hormone Free", "rbST Free", "rbGH Free", "No Artificial Hormones" and "bST Free", is false and misleading. ODA will not permit such statements on any dairy product labels.
>
> (D) Statements may be considered to be false or misleading if they indicate the absence of a compound not permitted by the United States [F]ood and [D]rug [A]dministration to be present in any dairy product, including, but not limited to antibiotics or pesticides. Except as otherwise provided in this rule, accurate production claims will not be deemed false or misleading.

Ohio Admin. Code ß 901:11-8-01.

B. Procedural history

Shortly after the final adoption of the Rule, the IDFA and the OTA filed separate lawsuits in the district court, challenging the Rule as unconstitutional. The two cases were later consolidated by the district court. According to the Processors, Ohio's labeling Rule infringes on their *First Amendment* rights, violates [**10] the dormant *Commerce Clause*, is unconstitutionally vague, and is preempted by the OFPA. The IDFA also asserted an equal protection claim in its complaint.

The Processors sought a preliminary injunction, after which both sides moved for summary judgment on all issues except the IDFA's equal protection claim. Addressing all three motions in one order, the district court granted summary judgment in favor of the State on the Processors' *Commerce Clause*, void-for-vagueness, and preemption claims. Regarding the Processors' *First Amendment* claim, the court granted summary judgment in favor of the State on the issue of the Rule's prohibition of composition claims. But it granted the State only partial summary judgment as to the Rule's restrictions on production claims in light of an undeveloped factual record on the [***7] issue of whether the Rule's requirements were unduly burdensome as applied to small containers. [*635] The court found that, in light of these rulings, the Processors had not shown that they were likely to prevail on the merits of their claims and therefore denied their motion for a preliminary injunction. This interlocutory appeal of the district court's preliminary injunction and summary [**11] judgment orders followed. The Processors contest the district court's ruling only as it pertains to their *First Amendment* and *Commerce Clause* claims.

II. ANALYSIS

A. Standards of review

[HN3] We review de novo a district court's grant of summary judgment. *ACLU of Ky. v. Grayson County, 591 F.3d 837, 843 (6th Cir. 2010)*. [HN4] Summary judgment is proper where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)(2)*. In considering a motion for summary judgment, the district court must draw all reasonable inferences in favor of the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*. The central issue is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*.

By contrast, [HN5] the decision of whether to grant a motion for a preliminary injunction is "left to the sound

discretion of the district court." *Deja Vu of Cincinnati, L.L.C. v. Union Twp. Bd. of Trs., 411 F.3d 777, 782 (6th Cir. 2005)*. "A district court, in deciding [**12] whether to grant an injunction, abuses its discretion when it applies the incorrect legal standard, misapplies the correct legal standard, or relies upon clearly erroneous findings of fact." *Id*. (citation and internal quotation marks omitted). [HN6] The following factors are to be considered by a district court in deciding whether to grant a preliminary injunction:

> (1) whether the plaintiff has established a substantial likelihood or probability of success on the merits; (2) whether there is a threat of irreparable harm to the plaintiff; (3) whether issuance of the injunction [***8] would cause substantial harm to others; and (4) whether the public interest would be served by granting injunctive relief.

Nightclubs, Inc. v. City of Paducah, 202 F.3d 884, 888 (6th Cir. 2000), overruled on other grounds by 729, Inc. v. Kenton County Fiscal Court, 515 F.3d 485 (6th Cir. 2008).

Like the parties, the district court focused exclusively on the first of these four factors--whether the Processors are likely to succeed on the merits of their claims--and relied on its summary judgment ruling to conclude that the Processors were not entitled to injunctive relief. The key issue on appeal is thus whether the district [**13] court erred in its adverse rulings on the Processors' (1) *First Amendment* challenge to the Rule's prophylactic ban on composition claims, (2) *First Amendment* challenge to the Rule's disclosure requirement for production claims, and (3) dormant *Commerce Clause* challenge to the Rule. We address each claim in turn below.

B. *First Amendment* challenge to the ban on composition claims

The Processors contend that the Ohio rule violates the *First Amendment* by placing a prophylactic ban on composition claims such as "rbST free," "antibiotic-free," and "pesticide-free." Both sides agree that the composition claims at issue constitute commercial speech and are thus afforded less extensive protection under the *First Amendment* than noncommercial speech. *See Zauderer v. Office of Disciplinary* [*636] *Counsel of the Supreme Court of Ohio, 471 U.S. 626, 637, 105 S. Ct. 2265, 85 L. Ed. 2d 652, 17 Ohio B. 315 (1985)* (making the commercial-noncommercial distinction in the context of restrictions on attorney advertising). [HN7] Under the commercial-speech framework, "[t]ruthful advertising related to lawful activities is entitled to the protections of the *First Amendment*," *In re R.M.J., 455 U.S. 191, 203, 102 S. Ct. 929, 71 L. Ed. 2d 64 (1982)*, but the government is "free to prevent the dissemination [**14] of commercial speech that is false, deceptive, or misleading," *Zauderer, 471 U.S. at 638*.

[HN8] Prophylactic bans on commercial speech are evaluated under a four-part analysis first set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980)*. Pursuant to that analysis, a court first determines whether the speech concerns unlawful activity or is misleading. *Id. at 566*. If a court finds in the [***9] affirmative on either prong, the speech is not entitled to *First Amendment* protection, and the analysis ends. *Id*. But if the court finds that the speech is entitled to *First Amendment* protection, it then makes three additional inquiries: (1) whether the asserted governmental interest is substantial, (2) whether the regulation directly advances that interest, and (3) whether the regulation is more extensive than necessary to serve the asserted interest. *Id*.

1. Whether the Processors' composition claims are inherently misleading

The district court in the present case concluded that the composition claims were misleading and therefore not entitled to any *First Amendment* protection. [HN9] "Misleading advertising may be prohibited entirely," including where the speech is "inherently [**15] likely to deceive or where the record indicates that a particular form or method of advertising has in fact been deceptive." *In re R.M.J., 455 U.S. at 202-03*. Where speech is only potentially misleading, however, the *Central Hudson* framework applies. *Id. at 203*. Under these circumstances, "the preferred remedy is more disclosure, rather than less." *Bates v. State Bar of Ariz., 433 U.S. 350, 374-75, 97 S. Ct. 2691, 53 L. Ed. 2d 810 (1977)* (striking down a ban on price advertising for "routine" legal services in part because "it seems peculiar to deny the consumer, on the ground that the information is incomplete, at least some of the relevant information needed to reach an informed decision").

The district court held that the composition claims were inherently misleading because "they imply a compositional difference between those products that are produced with rb[ST] and those that are not," in contravention of the FDA's finding that there is no measurable compositional difference between the two. This conclusion is belied by the record, however, which shows that, contrary to the district court's assertion, a compositional difference does exist between milk from untreated cows and conventional milk ("conventional milk," [**16] as used throughout this opinion, refers to milk from cows

treated with rbST). As detailed by the amici parties seeking to strike down the Rule, the use of rbST in milk production has been shown to elevate the levels of insulin-like growth factor 1 (IGF-1), a naturally-occurring hormone that in high levels is linked to several types of cancers, among other things. The amici also point to certain [***10] studies indicating that rbST use induces an unnatural period of milk production during a cow's "negative energy phase." According to these studies, milk produced during this [*637] stage is considered to be low quality due to its increased fat content and its decreased level of proteins. The amici further note that milk from treated cows contains higher somatic cell counts, which makes the milk turn sour more quickly and is another indicator of poor milk quality. This evidence precludes us from agreeing with the district court's conclusion that there is no compositional difference between the two types of milk.

In addition, and more salient to the regulation of composition claims like "rbST free," the failure to discover rbST in conventional milk is not necessarily because the artificial hormone is [**17] absent in such milk, but rather because scientists have been unable to perfect a *test* to detect it. As recognized by the State's brief in the district court, "given existing technology, it is currently impossible to test milk to determine whether the hormones present are natural hormones or recombinant hormones (such as rbST)." The State further conceded this point at oral argument, acknowledging that conventional milk "could" contain rbST, but that no test has been able to verify if this is in fact the case. This uncertainty is also implicit in the FDA's 1994 Guidance. There, the agency stated that "there [i]s no *significant* difference between milk from treated and untreated cows" because "[t]here is currently no way to differentiate analytically between naturally occurring bST and [r]bST in milk." *59 Fed. Reg. 6279, 6280* (emphasis added). The FDA thus appears to have left room for the fact that *some* compositional difference between the two types of milk may exist, leaving open the possibility that one day a method might exist to detect whether rbST is in fact present in conventional milk.

Taken collectively, this evidence points to two distinct types of milk. On the one hand is milk [**18] from cows never given rbST, which in turn cannot produce milk that has rbST as a matter of fact. The composition claim "rbST free" is therefore demonstrably true as applied to this milk. On the other hand, milk from cows treated with rbST might contain the artificial hormone, although there is currently no way to determine whether that is the case. But even if rbST is not present in conventional milk, there is still [***11] evidence that it contains increased levels of IGF-1 and might be compositionally of a lesser quality.

A compositional difference thus exists between the two types of milk, although the extent of this difference--namely whether conventional milk does in fact contain rbST--is still very much an open question. As such, the composition claim "rbST free" at best informs consumers of a meaningful distinction between conventional and other types of milk and at worst potentially misleads them into believing that a compositionally distinct milk adversely affects their health. Under these circumstances, we conclude that composition claims like "rbST free" are not inherently misleading. We must therefore apply the remaining three *Central Hudson* factors to assess the constitutionality [**19] of the Rule's prophylactic ban on the composition claims "rbST free" and "artificial hormone free."

As a separate matter, the Processors challenge on appeal the Rule's ban of composition claims related to antibiotics and pesticides. The State responds that antibiotics and pesticides are "largely detectable in milk" and that "all milk is routinely tested for antibiotics, and the presence of any antibiotic in any amount renders the milk unacceptable for consumption." It added that cost considerations prevent the routine testing of every batch of milk. The State, however, did not present any evidence with regard to testing procedures used to detect antibiotics and pesticides.

[*638] Evidence of this testing might well influence our determination as to whether the claims "antibiotic free" and "pesticide free" are inherently misleading. If the State's testing can detect these substances and prevent any amount of them from being present in conventional milk, then such claims would be inherently misleading because they falsely imply that conventional milk contains antibiotics and pesticides when in fact the State tests to ensure that it does not. But there is no evidence in the record to verify the [**20] State's contention. In light of this insufficiently developed factual record, the State has not shown that it is entitled to summary judgment on this challenge. We therefore remand the issue for further proceedings.

[***12] ***2. The remaining* Central Hudson *factors***

Having determined that the composition claim "rbST free" is not inherently misleading, we must review the State's ban on such claims under the final three *Central Hudson* factors: (1) whether the State's asserted interest is substantial, (2) whether the regulation directly advances that interest, and (3) whether the regulation is no more extensive than necessary to serve the asserted interest. *See Central Hudson, 447 U.S. at 566*. All three of these factors must be met in order for the Rule to be upheld. *See id.*

Turning to the first factor, we note that the Rule's purported purpose is to prevent the use of "false or misleading" labeling. *See Ohio Admin. Code ß 901:11-8-01(A)*. The Processors concede that this interest is substantial. But because the Rule is aimed at preventing consumer deception, the State bears the burden to "demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material [**21] degree." *Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation, Bd. of Accountancy, 512 U.S. 136, 146, 114 S. Ct. 2084, 129 L. Ed. 2d 118 (1994)* (citation omitted). In *Ibanez*, the Supreme Court declared unconstitutional the Florida Board of Accountancy's censuring of an attorney for referring to her designation as a Certified Public Accountant and as a Certified Financial Planner in her advertising materials and other communications with the public. The Court's ruling stemmed from "the failure of the Board to point to any harm that is potentially real, not purely hypothetical" and the "complete absence of any evidence of deception." *Id. at 145-46* (citation omitted).

In the present case, the record of deception is weak at best. The only evidence that the State points to is the FDA's Interim Guidance and consumer comments that it received in response to the proposed Rule. But the Guidance provides little support in this regard. The FDA suggests in the Guidance that the claim "rbST free" "*may* imply a compositional difference" between the two types of milk, *59 Fed. Reg. 6279, 6280* (emphasis added), but this statement does not establish that such a claim is necessarily misleading in every context. Furthermore, the FDA cited no [**22] evidence or studies in the Guidance to support its concerns regarding consumer confusion. The Guidance therefore does not constitute "evidence of deception" as required under *Ibanez*.

[***13] Also unhelpful are the consumer comments that the ODA received after issuing the proposed Rule. The State received approximately 2,700 comments, of which the Processors estimate that only 70 were in support of the Rule. We agree with the State that some of these comments demonstrate consumer confusion regarding the use of rbST in milk production. One commenter, for example, asserted that she needed "to know that the milk I drink has no added hormones," thereby indicating [*639] that she believed rbST to be present in conventional milk. But few if any of these commenters indicated that their confusion stemmed from the product labels. The commenter quoted above, for instance, was informed about rbST and milk production from conversations with her oncologist, not from reading the labels. Although there is not a "complete absence of deception" as there was in *Ibanez*, the proof falls far short of establishing that Ohio consumers have been misled by dairy-product labeling.

We need not address this issue further, however, [**23] because we conclude that the Rule does not directly advance the State's interest and is more extensive than necessary to serve that interest. [HN10] These last two steps of the *Central Hudson* test are complementary. They involve "asking whether the speech restriction is not more extensive than necessary to serve the interests that support it." *Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 556, 121 S. Ct. 2404, 150 L. Ed. 2d 532 (2001)* (citation omitted). Accordingly, there must be a "reasonable fit between the legislature's ends and the means chosen to accomplish those ends, a means narrowly tailored to achieve the desired objective." *Id.* (citation, ellipsis, and internal quotation marks omitted). "[I]f there are numerous and obvious less-burdensome alternatives to the restriction on commercial speech, that is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable." *City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 417 n.13, 113 S. Ct. 1505, 123 L. Ed. 2d 99 (1993)*.

We agree with the Processors that the potential consumer confusion created by the composition claim "rbST free" could be alleviated by accompanying the claim with a disclaimer informing consumers that rbST has yet to be detected in conventional [**24] milk. Examples of possible disclaimers include a statement regarding the lack of evidence that [***14] conventional milk contains rbST, or even the disclaimer already required by the Rule to accompany production claims: "The FDA has determined that no significant difference has been shown between milk derived from rbST-supplemented and non-rbST-supplemented cows."

The district court rejected the use of a disclaimer to cure any confusion caused by the claim "rbST free," reasoning that "such a statement would only serve to confuse a consumer." In the district court's view, "the label would contain contradictory information--it would say a product is 'free' of rbST, but at the same time state that there is no rbST in other products, which defeats the purpose of making the claim in the first place." But this conclusion rests on the assumption that conventional milk has conclusively been shown to be free of rbST, when in fact that possibility remains an open question. The claim "rbST free," when used in conjunction with an appropriate disclaimer, could assure consumers that the substance is definitively not in milk so labeled while also advising them that it has yet to be detected in conventional [**25] milk. There thus exists a method by which the potential difference between the two types of milk can be presented without also being deceptive. *See In re R.M.J., 455 U.S. 191, 203, 102 S. Ct. 929, 71 L. Ed. 2d 64 (1982)* ([HN11] "[T]he States may not place an absolute prohibition on certain types of potentially misleading infor-

mation . . . if the information also may be presented in a way that is not deceptive.").

For these reasons, we conclude that the Rule's prophylactic ban of composition claims such as "rbST free" is more extensive than necessary to serve the State's interest in preventing consumer deception. [*640] This provision of the Rule therefore cannot withstand scrutiny under *Central Hudson*.

C. *First Amendment* challenge to the disclosure requirement for production claims

[HN12] In addition to composition claims, the Ohio Rule regulates the use of production claims such as "this milk is from cows not supplemented with rbST." When using these claims, processors must include a disclosure on the label stating that "[t]he FDA has determined that no significant difference has been shown between milk derived from [***15] rbST-supplemented and non-rbST-supplemented cows." *Ohio Admin. Code ß 901:11-8-01(B)(2)*. This disclosure must be on the same [**26] label panel, "in exactly the same font, style, case, and color and at least half the size (but no smaller than seven point font)" as the production claim. *Id*.

The district court granted the State partial summary judgment on this issue. First, the court held that the disclosure requirement is subject to a reasonableness standard rather than intermediate scrutiny under the *Central Hudson* test. The court then found that the claim "this milk is from cows not supplemented with rbST" implies that processors using rbST have an inferior or unsafe product, and that the State has an interest in preventing the dissemination of this potentially misleading information. Although the court rejected the Processors' argument that the cost of ensuring that their labels comply with the Rule makes the Rule unduly burdensome, it found that there was a factual dispute as to whether the Rule's formatting requirements were unduly burdensome to the extent that the Processors might not be able to include the required disclosure on small containers. The court therefore denied the State summary judgment on this latter issue.

1. Proper standard for evaluating disclosure requirements

As an initial matter, the Processors [**27] argue that the district court failed to employ the appropriate standard of review for evaluating disclosure requirements. The court relied on *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626, 105 S. Ct. 2265, 85 L. Ed. 2d 652, 17 Ohio B. 315 (1985)*, where the Supreme Court articulated a more lenient standard than the *Central Hudson* test to use when disclosure requirements, as opposed to outright prohibitions on speech, are at issue. In *Zauderer*, the Supreme Court explained that, "because disclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech, warnings or disclaimers might be appropriately required in order to dissipate the possibility of consumer confusion or deception." *Id. at 651* (alterations, citation, and ellipsis omitted). It therefore held that [HN13] disclosure requirements do not violate an advertiser's *First Amendment* rights where the requirements "are reasonably related to the State's interest in preventing deception of [***16] consumers." *Id*. Such requirements, however, cannot be "unjustified or unduly burdensome." *Id*.

The Supreme Court recently clarified the standard of review to apply to disclosure requirements in *Milavetz, Gallop & Milavetz, P.A. v. United States, 130 S. Ct. 1324, 176 L. Ed. 2d 79 (2010)*. [**28] That case involved challenges to recent revisions of the Bankruptcy Code, including provisions that require certain professionals providing debt-relief assistance to disclose in their advertisements that their help was related to bankruptcy relief and to identify themselves as debt-relief agencies. *Id. at 1330*. The Court observed that the relevant provisions targeted marketing claims that were inherently [*641] deceptive because they promised "debt relief without any reference to the possibility of filing for bankruptcy, which has inherent costs." *Id. at 1340*. Given this, and the fact that the regulation required a disclosure rather than imposing a prohibition on speech, the Court upheld the constitutionality of the provisions under *Zauderer*. *Id*.

Milavetz thus established that *[HN14] Zauderer* applies where a disclosure requirement targets speech that is *inherently* misleading. We conclude that *Zauderer* also controls our analysis where, as here, the speech at issue is *potentially* misleading. Several reasons support this conclusion. First, in *Milavetz*, the Court did not explicitly limit its application of *Zauderer* to inherently misleading speech, instead stating that a relaxed standard of review applies [**29] to disclosure requirements regulating "*misleading* commercial speech." *Id. at 1339* (emphasis in original). *But see id*. (Thomas, J., concurring) ("[A] disclosure requirement passes constitutional muster only to the extent that it is aimed at advertisements that, by their nature, [are inherently likely to deceive or have in fact been deceptive].").

In addition, as the Court recognized in *Milavetz*, the impetus behind the formation of the *Zauderer* standard was the fact that "*First Amendment* protection for commercial speech is justified in large part by the information's value to consumers." *Id*. The speech rights of advertisers, in contrast, are of less value; specifically, their "constitutionally protected interest in *not* providing the required factual information is 'minimal.'" *Id*. (citing

Zauderer, 471 U.S. at 651). This justification for the [***17] *Zauderer* standard thus fits regulations that require a disclosure, regardless of whether the speech being targeted is inherently or potentially misleading. Because the Ohio Rule regulates production claims by requiring them to be accompanied by a disclosure, *Zauderer* controls our review.

Our sister circuits have similarly recognized this rationale [**30] for employing the *Zauderer* standard. The Court of Appeals for the Second Circuit, for example, has held that [HN15] "there are material differences between purely factual and uncontroversial disclosure requirements and outright prohibitions on speech." *Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 113 (2d Cir. 2001)* (citing *Zauderer*) (brackets and internal quotation marks omitted). Such differential treatment is due to the fact that the "mandated disclosure of accurate, factual, commercial information does not offend the core *First Amendment* values of promoting efficient exchange of information or protecting individual liberty interests." *Id. at 114*; *see also United States v. Wenger, 427 F.3d 840, 849 (10th Cir. 2005)* (observing that advertisers' "constitutionally protected interest in not providing any particular factual information in [their] advertising is minimal" (quoting *Zauderer*)).

In arguing to the contrary, the Processors rely on two decisions from the Eleventh Circuit Court of Appeals in which that court applied the *Central Hudson* factors to disclosure requirements. One of these is *Borgner v. Brooks, 284 F.3d 1204, 1210-13 (11th Cir. 2002)*, which applied the *Central Hudson* test [**31] to a statute requiring dentists to include disclaimers when advertising a specialty practice not recognized by the Florida Board of Dentistry and/or membership in an organization affiliated with such a specialty. The other is *Mason v. Florida Bar, 208 F.3d 952, 954-55 (11th Cir. 2000)*, where the court analyzed a Florida Bar disclosure requirement for "self laudatory" statements under the *Central Hudson* framework. But in neither case did the Eleventh Circuit explain its decision to employ the *Central Hudson* test instead of *Zauderer*. [*642] Moreover, the *Borgner* decision acknowledged that "[c]ourts have been more tolerant of regulations mandating disclosure requirements than they have been of regulations that [***18] impose a total ban on commercial speech." *Borgner, 284 F.3d at 1214*. We therefore find these two cases unpersuasive in determining the proper standard of review.

In sum, we conclude that the Rule's disclosure requirement is reasonably related to the State's interest in preventing consumers from being deceived by production claims. Like composition claims, production claims such as "this milk is from cows not supplemented with rbST" are potentially misleading because they imply that conventional [**32] milk is inferior or unsafe in some way. But neither the FDA nor any study has conclusively shown that to be the case. Furthermore, unlike its regulation of composition claims, the Rule does not prohibit the use of production claims. It instead requires only the disclosure of accompanying information. We therefore conclude that the less-burdensome analytical framework from *Zauderer* should apply.

***2. Evaluation of the disclosure requirement under* Zauderer**

Under *Zauderer*, the Rule's disclosure requirement for production claims must be "reasonably related to the State's interest in preventing deception of consumers" and cannot be "unjustified or unduly burdensome." *Zauderer, 471 U.S. at 651*. The district court concluded that the Rule was in compliance with the *Zauderer* standard because the production claim that "this milk is from cows not supplemented with rbST," despite its accuracy, nevertheless "implies that those processors that do use rbST have an inferior or unsafe product or that it is compositionally different." Ohio's Rule, the court continued, "strikes the right balance between preventing misleading information and providing enough information for consumers to make an informed choice."

The [**33] Processors first contend that the State failed to show that their production claims are misleading. But [HN16] the State's burden of providing such evidence is more relaxed where disclosure requirements are at issue (as opposed to a ban on commercial speech) and "the possibility of deception is . . . self-evident." See *Zauderer, 471 U.S. at 652* (holding that, to justify the state's imposition of a disclosure requirement for attorney advertising, the state need not "conduct a survey of the public before it may determine that the advertisement had a tendency to mislead" (alterations, citation, and ellipsis omitted)).

[***19] The Supreme Court rejected a similar argument made by those challenging the revised Bankruptcy Code in *Milavetz*, noting *Zauderer's* holding that a survey of the public was unnecessary. *Milavetz, 130 S. Ct. at 1340*. It instead determined that "[e]vidence in the congressional record demonstrating a pattern of [misleading] advertisements . . . is adequate to establish that the likelihood of deception in this case is hardly a speculative one." *Id.* (citation and internal quotation marks omitted). Although the FDA's Interim Guidance and the consumer comments relied on by the State constitute [**34] weak evidence of deception, they at least demonstrate that the risk of deception in this case is not speculative. At a minimum, the Guidance supports the conclusion that production claims can be misleading and the comments show that there is general confusion among some Ohio consumers regarding what substances are (or

are not) in the milk they purchase. The district court accordingly did not err in concluding that the Rule's disclosure requirement is reasonably related to thwarting that risk.

[*643] Notwithstanding our conclusion that the Rule's disclosure requirement is reasonably related to the State's interest in preventing consumer deception, we find there to be no rational basis between this concern and the "contiguous" requirement of such a disclosure. [HN17] The Rule stipulates that disclosures must be "in the same label panel, in exactly the same font, style, case, and color and at least half the size (but no smaller than seven point font)" as the production claim. *Ohio Admin. Code ß 901:11-8-01(B)(2)*. A disclosure also must be contiguous to the production claim. The font, style, case, and color requirements for the disclosure's text have a self-evident rational basis. As Director Boggs testified [**35] in his deposition, these provisions are in place to prevent marketers from rendering the disclosure "unreadable" by using a miniscule font or "washing the color out." These provisions thus prevent label designers from hiding the disclosure by manipulating the text.

In contrast, we find no rational basis in the record for the Rule's contiguity requirement. The Processors specifically take issue with this provision, noting that it prevents them from linking the production claim to the disclosure through the use of an asterisk. Director Boggs testified in his deposition that the ODA decided against the use [***20] of an asterisk based on his "anecdotal experience" of talking to consumers in grocery stores. According to Director Boggs, these consumers informed him that "oftentimes it's hard to understand labels, especially when the print is so small." But these observations reveal nothing about whether the use of an asterisk to link information was effective in conveying a disclosure to consumers. Nor did Director Boggs point to any other basis for his belief. He instead asserted, without any supporting evidence, that he had "been aware of [asterisks being a problem in conveying information] for [**36] a long time."

In light of the paucity of evidence supporting the Rule's contiguity requirement, we conclude that it has no demonstrable connection to ensuring that consumers are not misled. We therefore hold that it lacks a rational basis. *See Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 115 (2d Cir. 2001)* ([HN18] "The [First] Amendment is satisfied . . . by a rational connection between the purpose of a commercial disclosure requirement and the means employed to realize that purpose.").

Finally, the Processors challenge the Rule's disclosure requirement as being unduly burdensome. They contend that it hinders their ability to convey their message regarding rbST as well as their ability to operate in interstate commerce. But the Processors' concerns regarding the ability to convey their message stem largely from the Rule's prohibition on asterisks, a concern that we have dealt with above. And they have not pointed to any evidence that the Rule's font, size, and color requirements impair their ability to communicate effectively.

Any alleged burden that the Rule imposes on the Processors' ability to participate in interstate commerce has similarly been alleviated. The Processors argue that [**37] the Rule's requirements are sufficiently distinct from those of other states so as to necessitate Ohio-specific labels and to cause disruption of the nationwide distribution of dairy products. Without the prophylactic ban on composition claims and the prohibition on asterisk use, however, the Rule will be largely indistinguishable from similar regulations in other states. *See, e.g., Alaska Stat. ß 17.20.013(a)* (requiring production claims to be accompanied by the disclaimer "No significant difference has [***21] been shown between milk derived from rBST treated and non-rBST treated cows"); *Vt. Stat. Ann. tit. 6, ß 2762(3)* (requiring production [*644] claims to be followed by a disclaimer such as "[T]he U.S. Food and Drug Administration has not found a significant difference to exist between milk derived from rbST-treated and non-rbST-treated cows"). The Processors' concerns regarding the allegedly more demanding scope of Ohio's regulation, including the extra costs of compliance, have thus been effectively addressed by our rulings above.

D. Dormant *Commerce Clause*

As a final challenge to the Rule, the Processors claim that it violates the dormant *Commerce Clause*. [HN19] The Constitution grants Congress power [**38] "[t]o regulate Commerce with foreign Nations, and among the several States." *U.S. Const. art. I, ß 8, cl. 3*. "Although the *Commerce Clause* is by its text an affirmative grant of power to Congress to regulate interstate and foreign commerce, the Clause has long been recognized as a self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce." *S.-Cent. Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 87, 104 S. Ct. 2237, 81 L. Ed. 2d 71 (1984)*. In this "dormant" form, the *Commerce Clause* limits the power of states "to erect barriers against interstate trade." *Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 35, 100 S. Ct. 2009, 64 L. Ed. 2d 702 (1980)*.

1. Standard for evaluating dormant Commerce Clause challenges

The parties initially dispute whether the district court used the proper standard to evaluate the Processors' *Commerce Clause* claims. [HN20] Such claims are tradi-

tionally evaluated using a two-tiered analysis. The first inquiry requires a court to determine whether "a state statute directly regulates or discriminates against interstate commerce, or [whether] its effect is to favor in-state economic interests over out-of-state interests." *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 579, 106 S. Ct. 2080, 90 L. Ed. 2d 552 (1986)*. [**39] If a state statute does either, it is "generally struck down . . . without further inquiry." *Id.; see also Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 338, 128 S. Ct. 1801, 170 L. Ed. 2d 685 (2008)* (holding that a discriminatory 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 [***22] nondiscriminatory alternatives" (citation and internal quotation marks omitted)). But if the "statute has only indirect effects on interstate commerce and regulates evenhandedly," *Brown-Forman, 476 U.S. at 579*, a court then moves on to the second inquiry, which requires the application of the balancing test set forth in *Pike v. Bruce Church, Inc., 397 U.S. 137, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970)*. That test upholds a state regulation unless the burden it imposes upon interstate commerce is "clearly excessive in relation to the putative local benefits." *Id. at 142*.

[HN21] The first inquiry under *Brown-Forman* focuses on whether a regulation has a direct effect or only an incidental effect on interstate commerce. But "[w]hat counts as a 'direct' burden on interstate commerce has long been a matter of difficulty for courts, and, presumably due to its questionable value as an analytical [**40] device, the 'direct/incidental' distinction has fallen out of use in dormant *commerce clause* analysis." *Tenn. Scrap Recyclers Ass'n v. Bredesen, 556 F.3d 442, 448-49 (6th Cir. 2009)*. This court in *Tennessee Scrap* thus reformulated the dormant *Commerce Clause* analysis as follows:

> The first prong targets the core concern of the dormant *commerce clause*, protectionism--that is, differential treatment of in-state and out-of-state economic interests that benefits the former and burdens [*645] the latter. Protectionist laws are generally struck down without further inquiry, because absent an extraordinary showing the burden they impose on interstate commerce will always outweigh their local benefits. However, if the Court determines that the law is not protectionist, it goes on to analyze the law under the deferential *Pike* balancing test.

Id. at 449 (citations and internal quotation marks omitted).

[HN22] In addition to regulations that are protectionist, the Supreme Court has recognized a second category of regulation that is also virtually per se invalid under the dormant *Commerce Clause*: a regulation that has the practical effect of controlling commerce that occurs entirely outside of the state in question. [**41] The *Commerce Clause* "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State." *Healy v. Beer Inst., 491 U.S. 324, 336, 109 S. Ct. 2491, 105 L. Ed. 2d 275 (1989)* (citation omitted) (striking down as [***23] unconstitutional a New York liquor price-affirmation statute that caused distillers to adjust their pricing in other states). A state, in other words, cannot "project its legislation" into another state, *Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 521, 55 S. Ct. 497, 79 L. Ed. 1032 (1935)*, such as by forcing "an out-of-state merchant to seek regulatory approval in one State before undertaking a transaction in another," *Healy, 491 U.S. at 337*. Most critical to this inquiry is the issue of "whether the practical effect of the regulation is to control conduct beyond the boundaries of the State." *Id. at 336*. Like a regulation that favors in-state economic interests at the expense of out-of-state interests, a state's regulation that controls extraterritorial conduct is per se invalid. *See KT & G Corp. v. Att'y Gen. of Okla., 535 F.3d 1114, 1143 (10th Cir. 2008)* ("[A] statute will be invalid *per se* if it has the practical effect of extraterritorial [**42] control of commerce occurring entirely outside the boundaries of the state in question." (citation omitted)).

The district court in the present case addressed the Processors' extraterritorial arguments in the latter half of its analysis under *Tennessee Scrap*, where it employed the *Pike* test. According to the Processors, the court erred by failing to recognize that the Rule is per se invalid if it has the practical effect of controlling commerce outside of Ohio. In response, the State defends the court's analysis as correct in light of *Tennessee Scrap*.

But the plaintiffs in *Tennessee Scrap* did not argue that the regulation at issue in that case had any extraterritorial effects. *Tenn. Scrap, 556 F.3d at 448*. Moreover, recent cases from other circuits have expressly held that [HN23] a state regulation that governs extraterritorially is a per se violation of the *Commerce Clause*. The Eighth Circuit Court of Appeals, for example, has held that

> [a] statute may violate the dormant *Commerce Clause* in one of three ways: (1) the statute clearly discriminates against interstate commerce in favor of in-state commerce; (2) it imposes a burden on interstate commerce that outweighs any benefits received; or [**43] (3) it has

> the practical effect of extraterritorial control of interstate commerce.

Grand River Enters. Six Nations, Ltd. v. Beebe, 574 F.3d 929, 942 (8th Cir. 2009) (citations omitted).

[***24] At least three other circuits have expressed their *Commerce Clause* jurisprudence in a similar three-part fashion. *See Selevan v. N.Y. Thruway Auth., 584 F.3d 82, 90 (2d Cir. 2009)*; *KT & G Corp., 535 F.3d at 1143*; *Cloverland-Green Spring Dairies, Inc. v. Pa. Milk Mktg. Bd., 462 F.3d 249, 261-63 (3d Cir. 2006)*. And five [*646] more circuits recognize the extraterritorial-effects inquiry as being distinct from the *Pike* balancing test. *See Midwest Title Loans, Inc. v. Mills, 593 F.3d 660, 665 (7th Cir. 2010)* ("But another class of nondiscriminatory local regulations is invalidated without a balancing of local benefit against out-of-state burden, and that is where states actually attempt to regulate activities in other states."); *Carolina Trucks & Equip., Inc. v. Volvo Trucks of N. Am., Inc., 492 F.3d 484, 489 (4th Cir. 2007)* ("The principle that state laws may not generally operate extraterritorially is one of constitutional magnitude."); *Alliance of Auto. Mfrs. v. Gwadosky, 430 F.3d 30, 35 (1st Cir. 2005)* ("A [**44] state statute that purports to regulate commerce occurring wholly beyond the boundaries of the enacting state outstrips the limits of the enacting state's constitutional authority and, therefore, is per se invalid."); *Bainbridge v. Turner, 311 F.3d 1104, 1112 (11th Cir. 2002)* (holding that "laws that directly regulate commerce occurring in other states are invalid"); *Gerling Global Reinsurance Corp. of Am. v. Low, 240 F.3d 739, 746 (9th Cir. 2001)* ("The *Commerce Clause* seeks to prevent extraterritorial economic 'effects' . . . .").

To be sure, [HN24] "the critical consideration" in any dormant *Commerce Clause* analysis "is the overall effect of the statute on both local and interstate activity." *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 579, 106 S. Ct. 2080, 90 L. Ed. 2d 552 (1986)* (remarking that "there is no clear line separating the category of state regulation that is virtually *per se* invalid under the *Commerce Clause*, and the category subject to the *Pike v. Bruce Church* balancing approach"). Nevertheless, a state regulation is "virtually *per se* invalid" if it is *either* extraterritorial *or* discriminatory in effect. When it is neither, then the *Pike* balancing test controls. *Id.*

[***25] ***2. Whether the*** [**45] ***Rule governs extraterritorially***

Our first consideration is therefore whether the Ohio Rule has any extraterritorial effect. As discussed above, [HN25] "a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority." *Healy, 491 U.S. at 336*.

The Supreme Court has struck down state regulations due to their extraterritorial effects in the context of price-affirmation statutes. In *Brown-Forman*, for example, the Court analyzed a New York law that required liquor distillers selling to wholesalers in the state to affirm that the prices charged were not higher than the lowest price at which the same product was sold in any other state during the month covered by the affirmation. Certain distillers offered "promotional allowances" to wholesalers purchasing their products, but were not allowed to do so in New York. The state further determined that promotional allowances offered to wholesalers in other states effectively lowered the prices charged in those states, a view that was not shared by other states with affirmation laws. These distillers were therefore faced with the choice of either reducing their New [**46] York prices, in violation of the affirmation laws in other states, or discontinuing their promotional programs in the other states. *Brown-Forman, 476 U.S. at 576, 579-82*.

The Supreme Court struck down New York's affirmation law. As a result of the statute, the Court observed, distillers who had posted prices in New York were unable to change their prices elsewhere during the relevant month. The statute therefore had the effect of "[f]orcing a merchant to seek regulatory approval in one State before undertaking a transaction [*647] in another." *Id. at 582*. Although New York was free to regulate the price of liquor within its own borders, it could not "project its legislation into other States by regulating the price to be paid for liquor in those States." *Id. at 582-83* (brackets, citation, and internal quotation marks omitted).

The Supreme Court struck down a somewhat different affirmation law in *Healy*. There, a Connecticut statute required out-of-state beer shippers to affirm that their posted prices for products sold to in-state wholesalers were no higher, at the moment of posting, [***26] than prices charged in all neighboring states. The Court reasoned that the statute effectively required "out-of-state [**47] shippers to forgo the implementation of competitive-pricing schemes in out-of-state markets because those pricing decisions are imported by statute into the Connecticut market regardless of local competitive conditions." *Healy, 491 U.S. at 339*. By having "the undeniable effect of controlling commercial activity occurring wholly outside the boundary of the State," the Court concluded that the statute violated the *Commerce Clause*. *Id. at 337*.

Ohio's Rule, by contrast, does not affect interstate commerce in the same manner as the statutes at issue in *Brown-Forman* and *Healy*. The Processors argue that,

due to the complex national distribution channels through which milk products are delivered and the costs associated with changing their labels, the Rule in effect forces them to create a nationwide label in accordance with Ohio's requirements. But unlike the price-affirmation statutes, which directly tied their pricing requirements to the prices charged by the distillers in other states, the Ohio Rule's labeling requirements have no direct effect on the Processors' out-of-state labeling conduct. That is to say, how the Processors label their products in Ohio has no bearing on how they are [**48] required to label their products in other states (or vice versa). Nor does compliance with the Ohio Rule raise the possibility that the Processors would be in violation of the regulations of another state--the key problem with the New York statute in *Brown-Forman*. The Rule accordingly does not purport to "regulate conduct occurring wholly outside the state." *See Brown-Forman, 476 U.S. at 582* (alteration and citation omitted).

In addition to *Brown-Forman* and *Healy*, the Processors rely on *Southern Pacific Co. v. Arizona, 325 U.S. 761, 65 S. Ct. 1515, 89 L. Ed. 1915 (1945)*, in support of their extraterritorial argument. The Supreme Court in that case struck down an Arizona statute that restricted the maximum number of railroad cars comprising a train in that state to 14 for passenger trains and 70 for freight trains. *Id. at 763*. Because most trains in the country exceeded those number of cars, train operators were forced to break up their trains prior to entering Arizona and reassemble them upon leaving the state. Observing that the Arizona statute essentially governed the flow of train traffic from Los Angeles, California to El Paso, Texas, the [***27] Court held that "[t]he practical effect of such regulation is to control [**49] train operations beyond the boundaries of the state exacting it." *Id. at 775*. National uniformity in the regulation of railroads, the Court pointed out, was "practically indispensable to the operation of an efficient and economical national railway system." *Id. at 771*.

Unlike the Arizona statute, the Ohio Rule in the present case does not impede or control the flow of milk products across the country. The Rule therefore does not create a "serious impediment to the free flow of commerce." *See id. at 775*. Moreover, the need for regulation [*648] "prescribed by a single body having a nationwide authority [was] apparent" in *Southern Pacific*, *id.*, whereas in the present case the FDA explicitly acknowledged the power of the states to regulate the labeling of products from cows not treated with rbST. *See Interim Guidance, 59 Fed. Reg. 6279, 6280* ("Given the traditional role of the States in overseeing milk production, the agency intends to rely primarily on the enforcement activities of the interested States . . . ."). *Southern Pacific* is [**50] therefore distinguishable on this basis. We accordingly reject the Processors' argument that the Rule governs extraterritorially and is per se invalid as a result.

3. Whether the Rule is protectionist

In addition to a consideration of the Rule's alleged extraterritorial effects, we must assess whether it is protectionist; that is, whether the Rule results in "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Tenn. Scrap Recyclers Ass'n v. Bredesen, 556 F.3d 442, 449 (6th Cir. 2009)* (citation omitted). [HN26] "A [state regulation] can discriminate against out-of-state interests in three different ways: (a) facially, (b) purposefully, or (c) in practical effect." *E. Ky. Res. v. Fiscal Court of Magoffin County, 127 F.3d 532, 540 (6th Cir. 1997)*. The Processors have not alleged that the Rule is facially discriminatory, so we need address only the latter two types of discrimination.

In general, the purpose of a regulation can be ascertained from its language. *Id. at 542*. Here, the Rule's purpose is to prevent the "false or misleading" labeling of dairy products. *Ohio Admin. Code ß 901:11-8-01(A)*. Nothing about this purpose indicates [**51] [***28] that Ohio is attempting to protect its local economic interests or burden out-of-state actors.

The Processors argue, however, that other evidence indicates the presence of a discriminatory purpose. They allege that traditional Ohio dairy farmers and Monsanto, which is headquartered in Missouri, "were the driving force behind the proposals." According to the Processors, traditional Ohio dairy farmers and Monsanto pushed through the enactment of the Rule in order to derail other Ohio dairy processors in their effort to use milk only from cows not given rbST. A number of out-of-state processors, who had already committed to not using milk from cows treated with rbST, were also stripped of any competitive advantage they had developed from advertising their nonuse of such milk in Ohio.

But the Processors' discriminatory-purpose argument is undermined by their own evidence. They assert that traditional Ohio dairy farmers and Monsanto lobbied for the Rule in an effort to prevent other *Ohio* dairy processors from converting to products made with milk from cows not treated with rbST. Their argument therefore does not support the conclusion that the Rule is aimed at favoring Ohio economic actors [**52] at the expense of out-of-state interests.

The Processors next contend that the Rule has a discriminatory effect. [HN27] "[T]here are two complementary components to a claim that a statute has a discriminatory effect on interstate commerce: the claimant must show both how local economic actors are favored by the

legislation, and how out-of-state actors are burdened by the legislation." *E. Ky. Res., 127 F.3d at 543*.

The case of *Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977)*, is illustrative of this point. In *Hunt*, a North Carolina regulation prohibited the importation into the state of closed containers of apples bearing another state's grading or classification system. Washington [*649] state apple growers, who were subject to strict grading requirements under their own state's law, were therefore unable to sell apples in North Carolina using their labels. Although the regulation was not facially discriminatory and did not have a discriminatory purpose, the Supreme Court held that [***29] it nevertheless burdened Washington growers by preventing them from advertising their grading system and by essentially requiring them to downgrade their product. *Id. at 352*. This in turn benefitted [**53] North Carolina growers, whose apples were not of as high a quality as those from Washington. *Id*.

In the present case, the Processors argue that the Rule favors those Ohio dairy farmers who wish to continue treating their cows with rbST, and harms out-of-state farmers and processors who have committed to discontinuing the use of the hormone. But the Rule burdens Ohio dairy farmers and processors who do not use rbST in their production of milk products to the same extent as it burdens out-of-state farmers and processors not using rbST. Conversely, the Rule favors out-of-state farmers and processors who *do* use rbST in the same way that it favors Ohio farmers and processors who use rbST. The point is made all the more clear by the fact that an out-of-state processor whose production includes the use of rbST benefits from the Rule more than an Ohio processor who uses milk from cows not treated with rbST.

As the district court noted, the Processors' "argument is more akin to stating that the law discriminates against dairy producers that do not use rbST as opposed to dairy producers that do use rbST." The problem with the Processors' argument is that it is of no help in meeting their burden [**54] of demonstrating how Ohio economic actors are favored by the Rule at the expense of out-of-state actors. Both Ohio and out-of-state processors are in effect either benefitted or burdened equally. Accordingly, we conclude that the Processors' claim that the Rule is protectionist and thus per se invalid is without merit.

4. Weighing the Rule's burdens and benefits

Because the Rule does not have an impermissible extraterritorial effect and is not protectionist, we must weigh its burdens and benefits in accordance with the *Pike* test. *See Tenn. Scrap Recyclers Ass'n v. Bredesen, 556 F.3d 442, 449 (6th Cir. 2009)*. That test requires us to uphold the Rule "unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc., 397 U.S. 137, 142, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970)*.

[***30] Applying *Pike* to the present case results in our finding that the alleged burdens on interstate commerce are not excessive in relation to the putative local benefits. The Processors' primary complaint is that Ohio's absolute prohibitions, formatting restrictions, and cumbersome requirements are different from those in other states, and the economic realities will require [**55] them to either stop selling in Ohio or conform their national labels to Ohio's requirements. But these burdens have largely been alleviated by our conclusion that the more restrictive provisions of the Rule are invalid under the *First Amendment*.

Moreover, Ohio has a reasonable basis to believe that the Rule's intended benefit--consumer protection--is significant. "[T]he supervision of the readying of foodstuffs for market has always been deemed a matter of peculiarly local concern," and states "have always possessed a legitimate interest in the protection of their people against fraud and deception in the sale of food products." *Fla. Lime & Avocado* [*650] *Growers, Inc. v. Paul, 373 U.S. 132, 144, 83 S. Ct. 1210, 10 L. Ed. 2d 248 (1963)* (brackets, citation, and internal quotation marks omitted). Because there is a rational basis to believe that the Rule's benefit outweighs any burden that it imposes, the Rule is constitutional under *Pike*.

III. CONCLUSION

For all of the reasons set forth above, we **REVERSE** the judgment of the district court to the extent that it upheld the Ohio Rule's prophylactic ban on composition claims and its prohibition on the use of an asterisk for required disclosures to accompany production claims, **AFFIRM** [**56] the remainder of the judgment, and **REMAND** the case to the district court for further proceedings consistent with this opinion.