N.D. Farm Bureau, Inc. v. Stenehjem

United States District Court for the District of North Dakota

September 21, 2018, Decided; September 21, 2018, Filed

Case No. 1:16-cv-137

Reporter

333 F. Supp. 3d 900 *; 2018 U.S. Dist. LEXIS 161572 **; 2018 WL 4550391

North Dakota Farm Bureau, Inc., Galegher Farms, Inc., Brian Gerrits, Breeze Dairy Group, LLC, North Dakota Pork Council, and Bill Price, Plaintiffs, vs. Wayne Stenehjem, in his official capacity as Attorney General of North Dakota, Defendant, Farmers' Educational and Cooperative Union of America North Dakota Division, d/b/a North Dakota Farmers Union, Intervenor-Defendant, Dakota Resource Council, a North Dakota Nonprofit Corporation, Intervenor-Defendant.

Subsequent History: Costs and fees proceeding at, Motion granted by, in part *N.D. Farm Bureau, Inc. v. Stenehjem, 2019 U.S. Dist. LEXIS 145169, 2019 WL 4045643 (D.N.D., Aug. 27, 2019)*

Prior History: *N. Dakota Farm Bureau, Inc. v. Stenehjem, 2016 U.S. Dist. LEXIS 205100, 2016 WL 11782594 (D.N.D., Sept. 28, 2016)*

Core Terms

farm, family farm, limited liability company, ranch, domestic, shareholder, Farmers, residing, dormant, out-of-state, legislative history, physical presence, Dairy, contends, domestic corporation, farming operations, agriculture, declarations, district court, Pork, discriminatory purpose, pleadings, facial, definitions, severance, entities, limits, summary judgment motion, foreign corporation, statutory language

Case Summary

Overview

HOLDINGS: [1]-On its face, the family farm exception, *N.D.C.C. § 10-06.1-12*, prevents foreign corporations and foreign limited liability companies from engaging in the business of farming or owning farm land in North Dakota while permitting North Dakota corporations and limited liability companies to do so, thus, by definition, the statute had a discriminatory effect and violated the dormant *Commerce Clause*; [2]-The court ordered the State permanently enjoined from enforcing or seeking to enforce *§ 10-06.1-12* in a manner which limits its application to only North Dakota corporations and limited liability companies.

Outcome

Motions for summary judgment granted, in part, and denied, in part; motion to strike, motion to dismiss, and motion for judgment on the pleadings denied.

LexisNexis® Headnotes

Business & Corporate Compliance > Businesses & Corporations > Corporations > Corporate Formation

Business & Corporate Law > Corporations > Corporate Formation

Governments > Agriculture & Food > General Overview

Business & Corporate Law > Limited Liability

Companies > Formation

HN1[] Corporations, Corporate Formation

The Corporate or Limited Liability Company Farming law, *N.D.C.C. § 10-06.1-01 et seq.*, in its original form, the Corporate Farming Law prohibits corporations from owning farm or ranch land or engaging in the business of farming or agriculture. Since 1932, the law has been amended a number of times and it now permits a number of exceptions to the general rule prohibiting corporate farming. Chapter 10-06.1 is rooted in the desire to preserve rural agricultural land for use by family farmers by making unlawful, with some exceptions, corporate farming and corporate ownership of farms as well as farming and ownership of farms by limited liability companies.The Corporate or Limited Liability Company Farming law, *N.D.C.C. § 10-06.1-01 et seq.*, has been originally enacted in 1932 as an initiated measure. In its original form, the Corporate Farming Law prohibits corporations from owning farm or ranch land or engaging in the business of farming or agriculture. Since 1932, the law has been amended a number of times and it now permits a number of exceptions to the general rule prohibiting corporate farming. Chapter 10-06.1 is rooted in the desire to preserve rural agricultural land for use by family farmers by making unlawful, with some exceptions, corporate farming and corporate ownership of farms as well as farming and ownership of farms by limited liability companies.

Business & Corporate
Compliance > Businesses &
Corporations > Corporations > Corporate
Formation
Business & Corporate
Law > Corporations > Corporate Formation

Business & Corporate Law > Limited Liability
Companies > Formation

Governments > Agriculture & Food > General
Overview

HN2[] Corporations, Corporate Formation

N.D.C.C. § 10-06.1-12, the family farm exception, provides an exception for family farms to the general ban on corporate farming if the shareholders or members do not exceed fifteen in number, are family members within a specified degree of kinship, and meet other specified requirements. The family farm exception was added to the Corporate Farming Law in 1981. See *State v. J.P. Lamb Land Co., 401 N.W.2d 713, 715 (N.D. 1987)*. The Plaintiffs contend the family farm exception is facially discriminatory and violates the *Commerce Clause*, the Privileges and Immunities Clause, and the *Equal Protection Clause of the United States Constitution*, and *42 U.S.C. § 1983*. The Plaintiffs seek a declaration that the entirety of Chapter 10-06.1 is unconstitutional and an injunction prohibiting its enforcement.

Governments > Agriculture & Food
Business & Corporate
Compliance > Governments > Agriculture &
Food

Business & Corporate Law > Limited Liability
Companies > Formation

Business & Corporate
Compliance > Businesses &
Corporations > Corporations > Corporate
Formation
Business & Corporate
Law > Corporations > Corporate Formation

HN3[] Governments, Agriculture & Food

N.D.C.C. § 10-06.1-12 does not prohibit a domestic corporation or a domestic limited liability company from owning real estate and engaging in the business of farming or ranching, if the corporation meets all the requirements of N.D.C.C. § 10-19.1 or the limited liability company meets all the requirements of N.D.C.C. § 10-32.1 which are not

inconsistent with the hapter.

Civil Procedure > ... > Summary Judgment > Supporting Materials > Affidavits

HN4[] **Supporting Materials, Affidavits**

Fed. R. Civ. P. 56(c) requires that an affidavit or declaration used to support a summary judgment motion must be made upon personal knowledge and that the content of the affidavit consists of facts that would be admissible at trial.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN5[] **Defenses, Demurrers & Objections, Motions to Dismiss**

Fed. R. Civ. P. 12(b)(1) governs motions to dismiss for lack of subject matter jurisdiction. Subject matter jurisdiction defines the court's authority to hear a given type of case. Jurisdictional issues are a matter for the court to resolve prior to trial.

Business & Corporate Law > Limited Liability Companies
Business & Corporate Compliance > Businesses & Corporations > Limited Liability Companies

Civil Procedure > Preliminary Considerations > Jurisdiction > Subject Matter Jurisdiction

HN6[] **Businesses & Corporations, Limited Liability Companies**

A federal district court's diversity jurisdiction is limited to civil actions where the matter in controversy exceeds $75,000 and is between citizens of different states. *28 U.S.C.S. § 1332(a)(1)*. It is well-established that diversity of citizenship is determined at the time the action is filed, and complete diversity among all parties is required under *28 U.S.C.S. § 1332* to invoke federal jurisdiction. Complete diversity of citizenship exists where no defendant holds citizenship in the same state where any plaintiff holds citizenship. An LLC's 's citizenship is the citizenship of each of its members.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN7[] **Defenses, Demurrers & Objections, Motions to Dismiss**

A court deciding a motion under *Fed. R. Civ. P. 12(b)(1)* must distinguish between a facial attack and a factual attack on jurisdiction. In a facial attack, the court restricts itself to the face of the pleadings, and the non-moving party receives the same protections as it would defending against a motion brought under *Rule 12(b)(6)*. In a factual attack, the court considers matters outside the pleadings, and the non-moving party does not have the benefit of 12(b)(6) safeguards.

Civil Procedure > Preliminary Considerations > Justiciability > Case & Controversy Requirements

HN8[] **Justiciability, Case & Controversy Requirements**

U.S. Const. art. III, § 2 limits the subject matter jurisdiction of federal courts to cases and controversies. This jurisdictional limitation requires every plaintiff to demonstrate it has standing when bringing an action in federal court. It is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers. The essence of standing is whether the party invoking federal jurisdiction is entitled to have the court decide the merits of the dispute. The three elements

which constitute the irreducible constitutional minimum of standing are injury in fact, causation, and redressability.

Civil Procedure > Judgments > Summary Judgment > Burdens of Proof

Civil Procedure > Preliminary Considerations > Justiciability > Standing

HN9 **Summary Judgment, Burdens of Proof**

It is important to note that an inquiry into standing is not a review of the merits of the plaintiff's claims. At the summary judgment stage all material facts alleged must be accepted as true as long as they are capable of proof at trial. The burden is on the party responding to a summary judgment motion to present some evidence creating an issue of material fact on the issues of injury, causation, and redressability. Generalized allegations of injury resulting from the defendant's conduct will suffice to establish standing at the pleading stage.

Civil Procedure > ... > Justiciability > Standing > Burdens of Proof

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN10 **Standing, Burdens of Proof**

A plaintiff's standing is distinct from the merits of the plaintiff's cause of action. Where there are multiple plaintiffs and multiple claims, at least one plaintiff must demonstrate standing for each claim and each form of relief being sought. If a plaintiff lacks Article III standing, a federal court has no subject-matter jurisdiction over the claim and the court must dismiss the action.

Civil Procedure > ... > Justiciability > Standing > Burdens of Proof

HN11 **Standing, Burdens of Proof**

The plaintiffs meet the Article III standing requirement if any one of them has standing to sue. When a state statute is alleged to violate the dormant *Commerce Clause*, plaintiffs have standing if the law has a direct negative effect on their borrowing power, financial strength, and fiscal planning. An injury can be actual or threatened. The plaintiffs have standing to challenge the facial validity of a law when they allege an actual, well-founded fear the law will be enforced against them.

Civil Procedure > ... > Justiciability > Standing > Injury in Fact

HN12 **Standing, Injury in Fact**

A negative effect on borrowing power or denial of business opportunity constitute sufficient injury for Article III standing purposes.

Civil Procedure > ... > Justiciability > Standing > Burdens of Proof

HN13 **Standing, Burdens of Proof**

It is not necessary for a plaintiff to show that he had contracted with an out-of-state company in order to show the injury necessary for standing to exist. This is because plaintiffs have standing to challenge the facial validity of a regulation notwithstanding the pre-enforcement nature of a lawsuit, where the impact of the regulation is direct and immediate and they allege an actual, well-founded fear that the law will be enforced against them.

Civil

Constitutional Law > Equal Protection > Nature & Scope of Protection

HN14[] Equal Protection, Nature & Scope of Protection

The basic underlying principle of the *Equal Protection Clause* requires the government to treat similarly situated people alike.

Civil Rights Law > Protection of Rights > Section 1983 Actions > Elements

HN15[] Section 1983 Actions, Elements

In order to state a claim under *42 U.S.C.S. § 1983*, a plaintiff must allege the violation of a right, privilege, or immunity secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law, regulation, or ordinance. *Section 1983* does not itself create substantive rights or confer standing, but rather provides a remedy for the deprivations of rights established elsewhere. Standing must be established on another basis before a *section 1983* claim can proceed. In other words, a plaintiff who challenges the constitutionality of a state statute using *Section 1983* must establish only the traditional elements of Article III standing for the underlying claim as there are no Section 1983-specific standing requirements. *Section 1983*.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

HN16[] Entitlement as Matter of Law, Appropriateness

Summary judgment is appropriate when the evidence, viewed in a light most favorable to the non-moving party, indicates that no genuine issues of material fact exist and that the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(a)*. Summary judgment is not appropriate if there are factual disputes that may affect the outcome of the case under the applicable substantive law. An issue of material fact is genuine if the evidence would allow a reasonable jury to return a verdict for the non-moving party. A court must inquire whether the evidence presents a sufficient disagreement to require the submission of the case to a jury or whether the evidence is so one-sided that one party must prevail as a matter of law. The moving party bears the responsibility of informing the court of the basis for the motion and identifying the portions of the record which demonstrate the absence of a genuine issue of material fact. The non-moving party may not rely merely on allegations or denials in its own pleading; rather, its response must set out specific facts showing a genuine issue for trial. *Fed. R. Civ. P. 56(c)(1)*. The court must consider the substantive standard of proof when ruling on a motion for summary judgment.

Constitutional Law > Congressional Duties & Powers > Commerce Clause

HN17[] Congressional Duties & Powers, Commerce Clause

The *Commerce Clause* grants to the United States Congress the power to regulate Commerce among the several States. *U.S. Const. Art. I, § 8*. The *Commerce Clause* has long been understood to have a negative or dormant implication. The dormant *Commerce Clause* prohibits states from enacting laws that discriminate against or unduly burden interstate commerce. The purpose of the dormant *Commerce Clause* is to prevent states from promulgating protectionist policies which would inhibit free trade among the states. The *Commerce Clause* reflects a central concern of the Framers that was an immediate reason for calling the

Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.

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

HN18 **Commerce Clause, Dormant Commerce Clause**

When a state law is challenged on dormant *Commerce Clause* grounds it is subject to a two-tiered analysis. The first tier analysis requires the court to determine whether the law discriminates against interstate commerce. Discrimination in this context means the differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the later. A law can discriminate in three ways: 1) it can discriminate on its face; 2) it can have a discriminatory purpose; or 3) it can have a discriminatory effect. If a state law is determined to be discriminatory, it is per se invalid unless the state can show, under rigorous scrutiny, that it has no other means to advance the legitimate state interest. If a law is found non-discriminatory under a first tier analysis, the second tier analysis, otherwise known as the Pike balancing test, provides the law will be found unconstitutional if the burden it imposes on interstate commerce is clearly excessive in relation to its putative local benefits.

Business & Corporate Compliance > Businesses & Corporations > Corporations > Corporate Formation

Business & Corporate Law > Corporations > Corporate Formation

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

Governments > Agriculture & Food > General Overview

Business & Corporate Law > Limited Liability Companies > Formation

HN19 **Corporations, Corporate Formation**

From the plain language of the definitions, it is clear that the family farm exception, *N.D.C.C. § 10-06.1-12*, requires the entity to be a North Dakota corporation or a limited liability company in order for the exception to apply. The court finds that such a requirement would clearly discriminate against out-of-state interests in violation of the dormant *Commerce Clause* under current Eighth Circuit case law. The differential treatment of in-state and out-of-state entities that benefits the former while burdening the latter violates the dormant *Commerce Clause*.

Administrative Law > Judicial Review > Standards of Review > Deference to Agency Statutory Interpretation

Governments > Legislation > Interpretation

HN20 **Standards of Review, Deference to Agency Statutory Interpretation**

Agency interpretation of statutory language should be given deference if the statutory language is ambiguous but not if the statutory language is clear, plain, and unambiguous. A statute is ambiguous if it is susceptible to differing but rational meanings. Statutory language must be given its most natural and obvious meaning.

Governments > Legislation > Interpretation

Governments > State & Territorial Governments > Legislatures

HN21[] Legislation, Interpretation

It is improper to resort to legislative history when the statute itself is plainly unambiguous. If the language of a statute is unambiguous, legislative intent is presumed clear from the face of the statute, legislative history should only be consulted when a statute contains textual ambiguity.

Governments > State & Territorial
Governments > Employees & Officials

Governments > Courts > Judicial Precedent

HN22[] State & Territorial Governments, Employees & Officials

In North Dakota, an Attorney General's opinion, while not binding on North Dakota courts, has important bearing on the construction and interpretation of a statue. An Attorney General's opinion which gives contemporaneous construction to a statute is entitled to special consideration. Legislative acquiescence over time affords an Attorney General's opinion greater weight. A weight is due an attorney general's opinion implicitly approved by the Legislature.

Business & Corporate Compliance > Businesses & Corporations > Corporations > Corporate Formation
Business & Corporate Law > Corporations > Corporate Formation

Business & Corporate Law > Limited Liability Companies > Formation

Governments > Agriculture & Food > General Overview

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

HN23[] Corporations, Corporate Formation

The Court finds the operational requirements in N.D.C.C. § 10-06.1-12(6), the family farm exception, do not violate the dormant Commerce Clause. Despite the operational requirements do not require a physical presence on the farm, it would be helpful if the Legislature adopted a clarifying definition or otherwise revised the statutory language to make it clear no actual physical presence on the farm is required.

Constitutional Law > Congressional Duties & Powers > Commerce Clause

Governments > Legislation > Interpretation

HN24[] Congressional Duties & Powers, Commerce Clause

To determine whether there was a discriminatory purpose behind a law, courts look to both direct and indirect evidence. Direct evidence includes statements by lawmakers and statements and conduct by drafters. Indirect evidence includes irregularities in the drafting process that hint at such a purpose.

Governments > Legislation > Interpretation

Governments > State & Territorial
Governments > Legislatures

HN25[] Legislation, Interpretation

Witness testimony carries little weight in assessing legislative intent as witnesses are not lawmakers. The statements by lawmakers may evidence a discriminatory purpose.

Constitutional Law > Congressional Duties & Powers > Commerce Clause

HN26[] Congressional Duties & Powers,

Commerce Clause

In some sense, every state law is enacted to further state interests. But this does not mean every state law violates the *Commerce Clause*. There must be a showing of discriminatory purpose. The *Commerce Clause* does not guarantee access to the corporate form. Noting a corporation is a creature of statute which cannot exist without the consent of the state and which is subject to whatever conditions a state may impose.

Constitutional Law > Congressional Duties & Powers > Commerce Clause

HN27 **Congressional Duties & Powers, Commerce Clause**

If a law fails any one of the three first-tier tests for facial discrimination, discriminatory purpose, or discriminatory effect, then the law survives only if the state can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest.

Governments > Legislation > Severability

HN28 **Legislation, Severability**

Severance is the preferred remedy under both North Dakota and federal law. The United States Supreme Court's preference is for enjoining only the unconstitutional language while leaving the remainder intact. The declaration of part of a law as being unconstitutional does not require a court to also declare the remainder void, unless all provisions are so connected and dependent upon each other that it cannot be presumed that the legislature would have enacted the valid sections without the unconstitutional sections. It is a fundamental principle that a statute may be constitutional in one part and unconstitutional in another part and that if the valid part is severable from the rest, the portion which is constitutional may stand while that which is unconstitutional is stricken out and rejected. North Dakota law also contains a general savings clause which reinforces the principle of preferring severance to voiding an entire enactment. *N.D. C.C. § 1-02-20* provides that in the event that any clause, sentence, paragraph, chapter, or other part of any title, is adjudged by any court of competent or final jurisdiction to be invalid, such judgment does not affect, impair, nor invalidate any other clause, sentence, paragraph, section, or part thereof directly involved in the controversy in which such judgment has been rendered.

Governments > Legislation > Severability

HN29 **Legislation, Severability**

In determining whether severance is permissible, the primary question involves the ascertainment of legislative intent.

Counsel: **[**1]** For North Dakota Farm Bureau, Inc., Galegher Farms, Inc., Brian Gerrits, Breeze Dairy Group, LLC, Paul Ivesdal, North Dakota Pork Council, Bill Price, Global Beef Consultants, LLC, Plaintiffs: Claire Louise Smith, DORSEY & WHITNEY LLP, LEAD ATTORNEYS, DORSEY & WHITNEY LLP, FARGO, ND; JoLynn Markison, DORSEY & WHITNEY LLP, Minneapolis, MN.

For Attorney General of North Dakota, Wayne Stenehjem in his official capacity as Attorney General of North Dakota, Defendant: Joseph P. Bialke, Matthew A. Sagsveen, Attorney General's Office, Bismarck, ND.

For Farmers' Educational and Cooperative Union of America, North Dakota Division, doing business as, North Dakota Farmers Union, Intervenor: Scott W. Carlson, LEAD ATTORNEY, Farmers' Legal Action Group, Inc., St. Paul, MN; Charles M. Carvell, PEARCE & DURICK, BISMARCK, ND.

For Dakota Resource Council, a North Dakota Non-Profit Corporation, Intervenor: Derrick L.

Braaten, JJ William England, Kyra Hill, BAUMSTARK BRAATEN LAW PARTNERS, BISMARCK, ND.

Judges: Daniel L. Hovland, Chief United States District Judge.

Opinion by: Daniel L. Hovland

Opinion

[*905] ORDER ON MOTIONS

Before the Court is Defendant North Dakota Attorney General Wayne Stenehjem's ("State") motion for partial summary judgment **[**2]** filed on June 21, 2017, and the Plaintiffs' motion for summary judgment filed on July 12, 2017. See Docket Nos. 64 and 71. Also before the Court is Defendant Dakota Resource Council's ("DRC") motion to strike filed on September 6, 2017, and Defendant Farmers' Educational and Cooperative Union of America North Dakota Division's ("Farmers Union") motion to dismiss and, in the alternative, motion for judgment on the pleadings filed on October 4, 2017. See Docket Nos. 93, 104, and 113. The motions have been fully briefed. See Docket Nos. 65, 72, 76, 78, 79, 80, 91, 92, 93-1, 95, 96, 100, 102, 105, 109, and 110. For the reasons set forth below, the motions for summary judgment are granted in part and denied in part. The motion to strike, motion to dismiss, and motion for judgment on the pleadings are denied.

I. BACKGROUND

On June 2, 2016, the Plaintiffs initiated this declaratory judgment action challenging the constitutionality of *Chapter 10-06.1 of the North Dakota Century Code*. See Docket No. 1. The Plaintiffs filed an **[*906]** amended complaint on August 17, 2016. See Docket No. 19. On January 1, 2017, the Court entered an order allowing Farmers Union and the DRC to intervene as Defendants. See Docket No. 56.

HN1[↑] Chapter 10-06.1 is officially known **[**3]** as the Corporate or Limited Liability Company Farming law ("Corporate Farming Law"). The Corporate Farming Law was originally enacted in 1932 as an initiated measure. See *Stenehjem ex rel. State v. Nat'l Audubon Soc'y, Inc., 2014 ND 71, 844 N.W.2d 892, 897 (N.D. 2014)*. In its original form, the Corporate Farming Law prohibited corporations from owning farm or ranch land or engaging in the business of farming or agriculture. Id. Since 1932, the law has been amended a number of times and it now permits a number of exceptions to the general rule prohibiting corporate farming. *Chapter 10-06.1* "is rooted in the desire to preserve rural agricultural land for use by family farmers" by making unlawful, with some exceptions, corporate farming and corporate ownership of farms as well as farming and ownership of farms by limited liability companies.

The Plaintiffs specifically challenge *HN2*[↑] *N.D.C.C. § 10-06.1-12* ("the family farm exception") which provides an exception for family farms to the general ban on corporate farming if the shareholders or members do not exceed fifteen in number, are family members within a specified degree of kinship, and meet other specified requirements. The family farm exception was added to the Corporate Farming Law in 1981. See *State v. J.P. Lamb Land Co., 401 N.W.2d 713, 715 (N.D. 1987)*. The Plaintiffs contend the family farm exception is facially **[**4]** discriminatory and violates the *Commerce Clause*, the *Privileges and Immunities Clause*, and the *Equal Protection Clause of the United States Constitution*, and *42 U.S.C. § 1983*. The Plaintiffs seek a declaration that the entirety of *Chapter 10-06.1* is unconstitutional and an injunction prohibiting its enforcement.

The relevant provisions of *Chapter 10-06.1* provide as follows:

> All corporations and limited liability companies, except as otherwise provided in this chapter, are prohibited from owning or leasing

land used for farming or ranching and from engaging in the business of farming or ranching. A corporation or a limited liability company may be a partner in a partnership that is in the business of farming or ranching only if that corporation or limited liability company complies with this chapter.

N.D.C.C. § 10-06.1-02.

HN3[⬆] This chapter does not prohibit a **domestic** corporation or a **domestic** limited liability company from owning real estate and engaging in the business of farming or ranching, if the corporation meets all the requirements of *chapter 10-19.1* or the limited liability company meets all the requirements of *chapter 10-32.1* which are not inconsistent with this chapter. The following requirements also apply:

1. If a corporation, the corporation must not have more than fifteen shareholders. If a limited liability company, the limited **[**5]** liability company must not have more than fifteen members.
2. Each shareholder or member must be related to each of the other shareholders or members within one of the following degrees of kinship or affinity: parent, son, daughter, stepson, stepdaughter, grandparent, grandson, granddaughter, brother, sister, uncle, aunt, nephew, niece, great-grandparent, great-grandchild, first cousin, or the spouse of a person so related.
3. Each shareholder or member must be an individual or one of the following:

   a. A trust for the benefit of an individual or a class of individuals who are **[*907]** related to every shareholder of the corporation or member of the limited liability company within the degrees of kinship or affinity specified in this section.
   b. An estate of a decedent who was related to every shareholder of the corporation or member of the limited liability company within the degrees of kinship or affinity specified in this section.
4. A trust or an estate may not be a shareholder or member if the beneficiaries of the trust or the estate together with the other shareholders or members are more than fifteen in number.
5. Each individual who is a shareholder or member must be a citizen of the United **[**6]** States or a permanent resident alien of the United States.
6. If a corporation, the officers and directors of the corporation must be shareholders who are **actively engaged in operating the farm or ranch** and at least one of the corporation's shareholders must be an individual **residing on or operating the farm or ranch**. If a limited liability company, the governors and managers of the limited liability company must be members who are **actively engaged in operating the farm or ranch** and at least one of its members must be an individual **residing on or operating the farm or ranch**.
7. An annual average of at least sixty-five percent of the gross income of the corporation or limited liability company over the previous five years, or for each year of its existence, if less than five years, must have been derived from farming or ranching operations.
8. The income of the corporation or limited liability company from nonfarm rent, nonfarm royalties, dividends, interest, and annuities cannot exceed twenty percent of the gross income of the corporation or limited liability company.

N.D.C.C. § 10-06.1-12 (emphasis added). The dispute between the parties largely centers on the meaning of the word "domestic" and the phrases **[**7]** "actively engaged in operating the farm or ranch" and "residing on or operating the farm or ranch" in *Section 10-06.1-12*.

Plaintiff North Dakota Farm Bureau ("Farm Bureau") is a non-profit corporation organized under the laws of North Dakota, with its principal place of business in Fargo, North Dakota. The Farm

Bureau's voluntary membership consists of more than 26,000 farm, ranch, and rural families residing in North Dakota. The mission of the Farm Bureau is to advocate for agriculture and enhance the economic opportunities of its membership while promoting individual freedoms and self-reliance. The Farm Bureau contends the Corporate Farming Law interferes with its ability to fulfill its organizational purpose and injures it members because the law prohibits farmers from utilizing beneficial business structures and limits the value of their farms and ranches.

Plaintiff Galegher Farms, Inc., is a farming corporation organized under the laws of North Dakota, with its principal place of business in Thompson, North Dakota. Galegher Farms leases approximately 3,100 acres of North Dakota farmland for crop farming purposes. The president and vice-president of Galegher Farms are first cousins and currently meet **[**8]** the kinship requirements of *Chapter 10-06.1-12*. However, the president's son and the vice-president's nephew have expressed interest in becoming shareholders in the corporation but cannot as they do not meet the kinship requirements of *Section 10-06.1-12*. Galegher Farms contends it is harmed by the Corporate Farming Law's kinship requirements.

Plaintiff Brian Gerrits is an individual who resides in De Pere, Wisconsin. Gerrits **[*908]** is a member of a Wisconsin limited liability company, Breeze Dairy Group, LLC, that engages in dairy farming in Wisconsin. Gerrits contends *Chapter 10-06.1* prohibits him and Breeze Dairy from expanding into North Dakota which limits his ability to earn a living in his chosen occupation.

Plaintiff Breeze Dairy Group, LLC ("Breeze Dairy") is an LLC incorporated in the State of Wisconsin. Breeze Dairy was founded in 2003 in response to the changing farming economy. Breeze Dairy was formed in 2003 by five families who merged their dairy operations into a single limited liability company. Breeze Dairy contends it is not a "domestic" LLC as defined by North Dakota's Corporate Farming Law. For these reasons, Breeze Dairy contends it cannot expand into North Dakota and thus is harmed by **[**9]** *Chapter 10-06.1*.

Plaintiff North Dakota Pork Council ("Pork Council") is a non-profit corporation organized under the laws of North Dakota. The Pork Council promotes the interests of pork producers and provides them with educational resources and services which enhance profitability. The Pork Council contends *Chapter 10-06.1* interferes with its ability to fulfill its mission to help pork producers enhance profitably as it precludes them from utilizing beneficial business structures and limits the value of the pork production operations located within the state; causes them harm by limiting the number of pork producers in North Dakota, which in turn reduces its membership; and limits its members access to capital and thus limits the number of pork producers within North Dakota, which negatively impacts the Pork Council's membership.

Plaintiff Bill Price is an individual who resides in Center, North Dakota. Price is a farmer and rancher involved in multiple farming and ranching operations in North Dakota, including the Price Cattle Ranch which is organized as a limited liability partnership. Several of the operations in which Price is involved in have been unable to utilize the corporate **[**10]** business structure due to their inability to meet the requirements in *Chapter 10-06.1*, and they have also been unable to bring in capital through corporate investments. Price is the managing partner of Price Cattle Ranch. Price contends he would prefer to operate Price Cattle Ranch as a corporation or limited liability company but is prohibited by *Chapter 10-06.1* from doing so. Price also contends the next generation of the Price family will not be able to continue the Price Cattle Ranch as they do not meet the kinship requirements of *Section 10-06.1-12*.

Defendant Wayne Stenehjem is the Attorney General for the State of North Dakota. As Attorney General, Stenehjem is charged with enforcing

Chapter 10-06.1. The enforcement provisions include court-ordered divestment and civil penalties. See *N.D.C.C. § 10-06.1-24*.

Defendant Farmers Union is a non-profit organization founded in 1927 to provide assistance to farm families. Farmers Union is the largest general farm organization in North Dakota, with 45,500 member families. Farmers Union works to advance family farms and ranches and the quality of life for North Dakotans through member advocacy, educational programs, cooperative initiatives, and insurance services. In the early **[**11]** 1930s, Farmers Union drafted the language for what would ultimately become North Dakota's Corporate Farming Law. Farmers Union has long been committed to preserving and has actively defended North Dakota's Corporate Farming Law which it sees as the foundation of family farms, rural communities, the State's agrarian heritage, and stewardship of natural resources.

[*909] Defendant DRC is a nonprofit organization formed in 1978 with the purpose of protecting North Dakota's rural communities, family farms, agricultural economy, soil, land, and water. The DRC consists of approximately 1,000 members, more than half of whom are farmers and ranchers

II. LEGAL DISCUSSION

A. MOTION TO STRIKE

The DRC moves to strike portions of the declarations of John L. Galegher, Jr. (Docket No. 81), Brian Gerrits (Docket. No. 82), Tamra Heins (Docket No. 84), and Bill Price (Docket No. 85) filed by the Plaintiffs in support of their motion for summary judgment. See Docket No. 93. The DRC contends the declarations do not comply with *Rule 56(c) of the Federal Rules of Civil Procedure*. The Plaintiffs maintain they have complied with the requirements of *Rule 56(c)*.

HN4[↑] *Rule 56(c)* requires that an affidavit or declaration used to support a summary judgment motion must be made upon personal knowledge **[**12]** and that the content of the affidavit consists of facts that would be admissible at trial. A careful review of the declarations to which the DRC has objected reveals the Plaintiffs have complied with the rule. In this case, the Court is faced with cross-motions for summary judgment in a declaratory judgment action challenging the constitutionality of a state law. The declarations in question relate to the issue of standing and whether the Plaintiffs have suffered an injury. In this context, the witnesses are competent to give their lay opinions as to the impact of the Corporate Farming Law on themselves, their farming operations, their membership, and the organizations they operate. The Court would permit such testimony at trial. As such, the Court finds the DRC's contentions meritless and the motion is denied.

B. STANDING

The State contends the Plaintiffs lack standing to bring their *Commerce Clause* claim. Farmers Union contends the Plaintiffs lack standing to bring their claims for violation of the *Commerce Clause* (Count I), the *Privileges and Immunities Clause* (Count II), and the *Equal Protection Clause* (Count III) and *42 U.S.C. § 1983* (Count IV). The Plaintiffs concede their *Privileges and Immunities Clause* claim (Count II) should be dismissed as it is foreclosed by case law from the Eighth Circuit Court of Appeals. **[**13]** Upon careful review of the entire record, the Court concludes, for the reasons set forth below, that the Plaintiffs have standing.

HN5[↑] *Federal Rule of Criminal Procedure 12(b)(1)* governs motions to dismiss for lack of subject matter jurisdiction. "Subject matter jurisdiction defines the court's authority to hear a given type of case." *Carlsbad Tech., Inc. v. HIF Bio, Inc., 556 U.S. 635, 639, 129 S. Ct. 1862, 173*

L. Ed. 2d 843 (2009). Jurisdictional issues are a matter for the Court to resolve prior to trial. *Osborn v. United States, 918 F.2d 724, 729 (8th Cir. 1990)*.

HN6[↑] A federal district court's diversity jurisdiction is limited to civil actions where the matter in controversy exceeds $75,000 and is between citizens of different states. *28 U.S.C. § 1332(a)(1)*. It is well-established that diversity of citizenship is determined at the time the action is filed, and complete diversity among all parties is required under *28 U.S.C. § 1332* to invoke federal jurisdiction. *Associated Ins. Mgmt. Corp. v. Ark. Gen. Agency, Inc., 149 F.3d 794, 796 (8th Cir. 1998)*. "Complete diversity of citizenship exists where no defendant holds citizenship in the same state where any plaintiff holds citizenship." *OnePoint Solutions, LLC v. Borchert, 486 F.3d 342, 346 (8th Cir. 2007)*. An LLC's citizenship is the citizenship of each of its members. Id.

[*910] ***HN7***[↑] "A court deciding a motion under *Rule 12(b)(1)* must distinguish between a 'facial attack' and a 'factual attack'" on jurisdiction. *Osborn, 918 F.2d at 729 n.6*. In a facial attack, "the court restricts itself to the face of the pleadings, and the non-moving party receives the same protections as it **[**14]** would defending against a motion brought under *Rule 12(b)(6)*." Id. (internal citations omitted). "In a factual attack, the court considers matters outside the pleadings, and the non-moving party does not have the benefit of *12(b)(6)* safeguards." Id. (internal citation omitted). In this case, the facts are disputed, numerous affidavits have been submitted, and cross-motions for summary judgment are also pending. Thus, the Court will treat the motion as a factual attack, consider material outside the pleadings, and not assume the facts asserted in the complaint are true in ruling on the motion. See *Branson Label, Inc. v. City of Branson, 793 F.3d 910, 915 (8th Cir. 2015)*.

HN8[↑] Article III of the United States Constitution limits the subject matter jurisdiction of federal courts to "cases" and "controversies." *U.S. Const. art. III, § 2*. This jurisdictional limitation requires every plaintiff to demonstrate it has standing when bringing an action in federal court. *Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)*. "It is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers." *Warth v. Seldin, 422 U.S. 490, 518, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975)*. The essence of standing is whether the party invoking federal jurisdiction is entitled to have the court decide the merits of the dispute. *Id. at 498*. The three elements which constitute the **[**15]** "irreducible constitutional minimum of standing" are injury in fact, causation, and redressability. *Lujan, 504 U.S. at 560-61*.

HN9[↑] It is important to note that an inquiry into standing is not a review of the merits of the plaintiff's claims. *Oti Kaga, Inc. v. S.D. Hous. Dev. Auth., 342 F.3d 871, 878 (8th Cir. 2003)*. At the summary judgment stage all material facts alleged must be accepted as true as long as they are capable of proof at trial. Id. The burden is on the party responding to a summary judgment motion to present some evidence creating an issue of material fact on the issues of injury, causation, and redressability. Id. Generalized allegations of injury resulting from the defendant's conduct will suffice to establish standing at the pleading stage. See *Lujan, 504 U.S. at 561*; *Constitution Party of S.D. v. Nelson, 639 F.3d 417, 420 (8th Cir. 2011)*.

HN10[↑] A plaintiff's standing is distinct from the merits of the plaintiff's cause of action. *Am. Farm Bureau Fed'n v. United States EPA, 836 F.3d 963, 968 (8th Cir. 2016)*. Where there are multiple plaintiffs and multiple claims, at least one plaintiff must demonstrate standing for each claim and each form of relief being sought. *Town of Chester, N.Y. v. Laroe Estates, Inc., 137 S. Ct. 1645, 1650-51, 198 L. Ed. 2d 64 (2017)*. If a plaintiff lacks Article III standing, a federal court has no subject-matter jurisdiction over the claim and the court must dismiss the action. *Higgins Elec., Inc. v. O'Fallon Fire Prot. Dist., 813 F.3d 1124, 1128 (8th Cir.*

2016).

1. COUNT I — DORMANT COMMERCE CLAUSE

The Defendants contend the Plaintiffs do not have standing to bring a dormant *Commerce Clause* claim because **[**16]** they have failed to introduce admissible **[*911]** evidence sufficient to establish that any Plaintiff has suffered an "actual or imminent" injury that is causally connected to any state action. The Plaintiffs contend otherwise. The Court concludes the Plaintiffs, much like the plaintiffs in *Hazeltine* and *Jones*, have standing because the Corporate Farming Law has a direct negative impact on their ability to raise out-of-state capital, earn income, increase farm values, and utilize preferred business structures. See *S.D. Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583, 592 (8th Cir. 2003)* (finding plaintiffs who expected an imminent loss of business had standing to challenge South Dakota's ban on corporate farming); *Jones v. Gale, 470 F.3d 1261, 1267 (8th Cir. 2006)* (finding plaintiffs had standing to challenge a Nebraska ban on corporate farming because the law had a direct negative effect on their ability to earn income, borrow money, and optimize financial planning decisions).

HN11[↑] This case involves six plaintiffs. The Plaintiffs meet the Article III standing requirement if any one of them has standing to sue. *N.D. v. Heydinger, 825 F.3d 912, 917 (8th Cir. 2016)*. When a state statute is alleged to violate the dormant *Commerce Clause*, plaintiffs have standing if the law "has a direct negative effect on their borrowing power, financial strength, and fiscal planning." *Jones, 470 F.3d at 1267*; *Heydinger, 825 F.3d at 917*. An injury can **[**17]** be actual or threatened. *Keller v. City of Fremont, 719 F.3d 931, 947 (8th Cir. 2013)*. Plaintiffs have standing to challenge the facial validity of a law when they allege an "actual, well-founded fear the law will be enforced against them." Id. It is undisputed the State regularly enforces the Corporate Farming Law. As the declarations of Gerrits, Price, and Galegher demonstrate, the Plaintiffs have a reasonable belief, based upon the plain text of the statute, that the Corporate Farming Law will be enforced against them to their economic detriment. See Docket Nos. 81, 82, and 85. Thus, they have standing to assert a facial challenge to the constitutionality of the law.

Plaintiff Breeze Dairy Group is a Wisconsin LLC, and its chief executive officer is Brian Gerrits. Gerrits asserts in his declaration that Breeze Dairy would like to expand its dairy operations into North Dakota but cannot do so based on the plain language of the Corporate Farming Law which permits only "domestic" entities from farming in North Dakota. The Corporate Farming Law also requires at least one member or shareholder to "reside on or operate the farm or ranch." Breeze Dairy and Gerrits contend these restrictions prevent Breeze Dairy from expanding its farming operations **[**18]** into North Dakota, thus causing them economic harm.

Plaintiff Bill Price is a fourth generation North Dakota farmer and rancher. He has been engaged in multiple farming, ranching, and consulting operations in North Dakota over the last 25+ years. One such operation is the Price Cattle Ranch, a limited liability partnership. Price would like to bring out-of-state capital into his operations through corporate investments, but contends he is prohibited from doing so by the Corporate Farming Law. Price contends this prohibition causes him economic harm.

Plaintiff Galegher Farms, Inc. is a North Dakota corporation established in 1986. John Galegher, Jr., is the president and owner of Galegher Farms. It leases approximately 3,100 acres of North Dakota farmland for crop farming purposes. Galegher Farms would like to access out-of-state capital through corporate investment in order to fund its operations but is prohibited from doing so by the Corporate Farming Law. This prohibition increases the cost of capital investments and thus harms

Galegher Farms economically.

[*912] These injuries to Gerrits, Breeze Dairy, Price, and Galegher are comparable to the economic harms suffered by the plaintiffs in **[**19]** *Jones* and *Hazeltine*. See *Jones, 470 F.3d at 1267*; *Hazeltine, 340 F.3d at 592*. ***HN12***[⬆] A negative effect on borrowing power or denial of business opportunity constitute sufficient injury for Article III standing purposes. *Hazeltine, 340 F.3d at 592*. The Plaintiffs in this case have shown such an injury.

Contrary to the suggestion of the Defendants, the Plaintiffs here, who raise a facial challenge to the Corporate Farming Law, are not required to show they applied for and were denied certificates to farm in North Dakota in order to demonstrate an injury. ***HN13***[⬆] It is not necessary for a plaintiff to show that he had contracted with an out-of-state company in order to show the injury necessary for standing to exist. *Jones, 470 F.3d at 1267*. This is because "'plaintiffs have standing to challenge the facial validity of a regulation notwithstanding the pre-enforcement nature of a lawsuit, where the impact of the regulation is direct and immediate and they allege an actual, well-founded fear that the law will be enforced against them.'" *Keller, 719 F.3d at 947* (quoting *Gray v. City of Valley Park, 567 F.3d 976, 984 (8th Cir.2009))*. The Plaintiffs' fears that the Corporate Farming Law will be enforced against them are well-supported by the plain language of the law and reinforced by the undisputed fact that the North Dakota Attorney General regularly enforces the law which provides **[**20]** for civil penalties and court-ordered divestment as remedies for violation of the law. See *Heydinger, 825 F.3d at 917*; see also Stenehjem ex rel. State v. Nat'l Audubon Soc'y, Inc., No. 47-2009-C-425 (Stutsman County Dist. Ct. Dec. 12, 2011) ("NAS I"); *Stenehjem ex rel. State v. Crosslands, Inc.*, No. 20-05-C-002 (Griggs County Dist. Ct. June 5, 2009) ("*Crosslands I* "). The Defendants' contention that the Plaintiffs have misinterpreted the Corporate Farming Law is unpersuasive as such an argument goes to the merits of the Plaintiffs' claims; such an examination being impermissible when assessing standing. *Warth, 422 U.S. at 500* ("standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal").

The Court finds the Plaintiffs have established, for purposes of standing, an actual and well-founded fear, supported by admissible evidence, that the Corporate Farming Law may be enforced against them. Having determined that a concrete and imminent injury has been shown, there can be no question that the injury has been caused by state action which can be redressed by a favorable ruling and a properly tailored injunction. *Jones, 470 F.3d at 1267*; *Keller, 719 F.3d at 947-48* (noting that when state action is subject to a facial challenge by a plaintiff **[**21]** who is a target or object of that action there is usually little question that the action has caused the plaintiff injury, and that a judgment and injunction preventing the action will redress it).

2. COUNT III — *EQUAL PROTECTION CLAUSE*

Farmers Union contends in its motion to dismiss that the Plaintiffs do not have standing to pursue an Equal Protection challenge to *Chapter 10-06.1* because they have not suffered any concrete harm. The Plaintiffs allege in the amended complaint that *Chapter 10-06.1* allows some North Dakota corporations and LLCs the opportunity to own farm land or ranch land in North Dakota while denying the same opportunities to out-of-state entities. Specifically, Plaintiffs contend *Section 10-06.1-12* creates exceptions to the general prohibition on owning farmland and ranchland **[*913]** for only domestic corporations and domestic limited liability companies, thereby treating them differently than it does foreign corporations and foreign limited liability companies. See Docket No. 19, ¶ 113.

HN14[⬆] The basic underlying principle of the *Equal Protection Clause* requires "the government to treat similarly situated people alike." *Klinger v. Dep't of Corr., 31 F.3d 727, 731 (8th Cir. 1994)*.

As the Plaintiffs read *Section 10-06.1-12*, the family farm exception violates the simple command of the *Equal Protection Clause*, by treating corporations and limited **[**22]** liability companies interested or engaged in the business of farming and ranching differently based on where they are incorporated or organized. While the Defendants disagree with this reading of the family farm exception, it is certainly reasonable, and standing in no way depends on the merits of a plaintiff's claim or contention that particular conduct is prohibited by law. *Warth, 422 U.S. at 500*. The Plaintiffs have alleged they are harmed by the family farm exception as they are not "domestic" entities and thus are unable to take advantage of it, and it limits their access to out-of-state capital. These allegations are supported by declarations (see Docket Nos. 81, 82, 83, 85, and 97) setting forth specific facts which the Court must accept as true for purposes of determining standing. *Lujan, 504 U.S. at 561*. For instance, Breeze Dairy is a Wisconsin LLC and thus not a "domestic" LLC as the Plaintiffs read *Section 10-06.1-12*. Any member of the Farm Bureau or Pork Council seeking to take advantage of the family farm exception through the use of a "foreign" corporation or LLC would be unable to do so, while this would not be the case for "domestic" entities. The Court concludes that the Plaintiffs have adequately alleged how Chapter 10-06.1 **[**23]** injures them by treating them differently than it does domestic corporations and LLCs and individuals seeking to establish entities to own farmland or ranchland in North Dakota. Therefore, the Plaintiffs have standing to pursue an Equal Protection challenge.

3. COUNT IV — *42 U.S.C. § 1983*

HN15[↑] In order to state a claim under *42 U.S.C. § 1983*, a plaintiff must allege the violation of a right, privilege, or immunity secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law, regulation, or ordinance. *Neighborhood Enterprises, Inc. v. City of St. Louis, 540 F.3d 882, 885 (8th Cir. 2008)*. *Section 1983* does not itself create substantive rights or confer standing, but rather provides a remedy for the deprivations of rights established elsewhere. *Tarsney v. O'Keefe, 225 F.3d 929, 939 (8th Cir. 2000)*. "Standing must be established on another basis before a *section 1983* claim can proceed." Id. In other words, a plaintiff who challenges the constitutionality of a state statute using *Section 1983* must establish only the traditional elements of Article III standing for the underlying claim as there are no "*Section 1983*-specific" standing requirements. See *Virginia v. Am. Booksellers Ass'n, Inc., 484 U.S. 383, 392, 108 S. Ct. 636, 98 L. Ed. 2d 782 (1988)* (finding standing to bring a claim under *Section 1983* existed because "the law is aimed directly at plaintiffs, who, if their interpretation of the statute is correct, will have to take **[**24]** significant and costly compliance measures or risk criminal prosecution"). Because the Plaintiffs have demonstrated they have standing to pursue their dormant *Commerce Clause* and Equal Protection claims, they also have standing to pursue relief under *42 U.S.C. § 1983*. As North Dakota Attorney General Wayne Stenehjem is the state official charged with enforcing *Chapter 10-06.1*, it was entirely **[*914]** appropriate to name him as a defendant in his official capacity. Farmers Union's arguments to the contrary go to the merits of a *Section 1983* claim rather than the standing issue and are unpersuasive.

C. JUDGMENT ON THE PLEADINGS

In the alternative to its standing argument, Farmers Union contends the amended complaint mischaracterizes and inaccurately describes the requirements of the Corporate Farming Law such that judgment on the pleadings is warranted. The Plaintiffs maintain these alleged mischaracterizations are simply their substantive position as to the proper interpretation and application of *Chapter 10-06.1*. The Court agrees that these interpretive disagreements are not

mischaracterizations that would justify judgment on the pleadings. Rather, such disputes go to the heart of the case and will be resolved below in relation to the **[**25]** summary judgment motions. Accordingly, Farmers Union's motion for judgment on the pleadings is denied.

D. DORMANT COMMERCE CLAUSE

The State and the Plaintiffs have both moved for summary judgment on the Plaintiffs' dormant *Commerce Clause* claim. ***HN16***[] Summary judgment is appropriate when the evidence, viewed in a light most favorable to the non-moving party, indicates that no genuine issues of material fact exist and that the moving party is entitled to judgment as a matter of law. *Davison v. City of Minneapolis, Minn., 490 F.3d 648, 654 (8th Cir. 2007)*; see *Fed. R. Civ. P. 56(a)*. Summary judgment is not appropriate if there are factual disputes that may affect the outcome of the case under the applicable substantive law. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. An issue of material fact is genuine if the evidence would allow a reasonable jury to return a verdict for the non-moving party. Id.

The Court must inquire whether the evidence presents a sufficient disagreement to require the submission of the case to a jury or whether the evidence is so one-sided that one party must prevail as a matter of law. *Diesel Mach., Inc. v. B.R. Lee Indus., Inc., 418 F.3d 820, 832 (8th Cir. 2005)*. The moving party bears the responsibility of informing the court of the basis for the motion and identifying the portions of the record which demonstrate the absence of a genuine issue of material fact. *Torgerson v. City of Rochester, 643 F.3d 1031, 1042 (8th Cir. 2011)*. The non-moving party may not **[**26]** rely merely on allegations or denials in its own pleading; rather, its response must set out specific facts showing a genuine issue for trial. Id.; *Fed. R. Civ. P. 56(c)(1)*. The court must consider the substantive standard of proof when ruling on a motion for summary judgment. *Anderson, 477 U.S. at 252*.

The Plaintiffs' dormant *Commerce Clause* contentions are two-fold. First, the Plaintiffs maintain that *Section 10-06.1-12* of the Corporate Farming Law, known as the family farm exception, prohibits out-of-state individuals and corporations from engaging in farming or ranching in North Dakota. See Docket No. 19, ¶¶ 36, 51, 57, and 70. Second, the Plaintiffs contend the family farm exception prevents North Dakota farmers from utilizing outside capital in their operations, or entering into business relationships with out-of-state corporations. See Docket No. 19, ¶¶ 36, 70, 71, and 78. Specifically, the Plaintiffs object to the phrases "domestic corporation" or "domestic limited liability company" and "actively engaged in operating the farm or ranch" and "residing on or operating the **[*915]** farm or ranch" found in the language of the family farm exception.

HN17[] The *Commerce Clause* grants to Congress the power "[t]o regulate Commerce . . . among the several States." *U.S. Const. Art. I, § 8*. The *Commerce Clause* has long been understood **[**27]** to have a "negative or dormant implication." *S. Union Co. v. Mo. Public Serv. Comm'n, 289 F.3d 503, 507 (8th Cir. 2002)*. The dormant *Commerce Clause* prohibits states from "enact[ing] laws that discriminate against or unduly burden interstate commerce." *Hazeltine, 340 F.3d at 592*. The purpose of the dormant *Commerce Clause* is to prevent states from promulgating protectionist policies which would inhibit free trade among the states. Id. The *Commerce Clause* "reflect[s] a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Hughes v. Okla., 441 U.S. 322, 325, 99 S. Ct. 1727, 60 L. Ed. 2d 250 (1979)*.

HN18[↑] When a state law is challenged on dormant *Commerce Clause* grounds it is subject to a two-tiered analysis. *Hazeltine, 340 F.3d at 593*. The first tier analysis requires the court to determine whether the law discriminates against interstate commerce. *Jones, 470 F.3d at 1267*. "Discrimination in this context means the 'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the later.'" *Hazeltine, 340 F.3d at 593* (quoting *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality, 511 U.S. 93, 99, 114 S. Ct. 1345, 128 L. Ed. 2d 13 (1994)*). A law can discriminate in three ways: 1) it can discriminate on its face; 2) it can have a discriminatory purpose; or 3) it can have a discriminatory effect. **[**28]** *Jones, 470 F.3d at 1267*; *Hazeltine, 340 F.3d at 593*. If a state law is determined to be discriminatory, it is *per se* invalid unless the state can show, under rigorous scrutiny, that it has no other means to advance the legitimate state interest. *Jones, 470 F.3d at 1270*; *Hazeltine, 340 F.3d at 593*. If a law is found non-discriminatory under a first tier analysis, the second tier analysis, otherwise known as the *Pike* balancing test, provides the law will be found unconstitutional "if the burden it imposes on interstate commerce 'is clearly excessive in relation to its putative local benefits.'" *Hazeltine, 340 F.3d at 593* (quoting *Pike v. Bruce Church, Inc., 397 U.S. 137, 142, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970)*).

1. FACIAL DISCRIMINATION

The Court will first address whether the Corporate Farming Law discriminates on its face. In order to do that, the Court must address the two clauses in the family farm exception which the Plaintiffs contend violate the dormant *Commerce Clause*.

a. Domestic Corporation

The disputed portion of *Section 10-06.1-12* which references "domestic corporation" and "domestic limited liability company" provides as follows:

> This chapter does not prohibit a **domestic corporation** or a **domestic limited liability company** from owning real estate and engaging in the business of farming or ranching, if the corporation meets all the requirements of *chapter 10-19.1* or the limited liability company meets all the requirements **[**29]** of *chapter 10-32.1* which are not inconsistent with this chapter.

N.D.C.C. § 10-06.1-12 (emphasis added). The Corporate Farming Law does not define "domestic corporation" or "domestic limited liability company" but it does incorporate *North Dakota's Business Corporation Act (N.D.C.C. ch. 10-19.1*) **[*916]** and *North Dakota's Limited Liability Company Act (N.D.C.C. ch. 10-32.1*). See *N.D.C.C. §§ 10-06.1-13* and *10-06.1-14*. These Acts are fully applicable to the family farm exception, "except when inconsistent with the intent of this chapter" and thus the Court will look to them for definitions. Id.

Chapter 10-19.1 (the Business Corporation Act) defines "domestic corporation" as "a corporation, other than a foreign corporation, organized for profit and incorporated under or governed by this chapter." *N.D.C.C. § 10-19.1-01(16)*. It defines the term "foreign corporation," as "a corporation organized for profit which is incorporated under laws other than the laws of this state for a purpose for which a corporation may be incorporated under this chapter." *N.D.C.C. § 10-19.1-01(26)*. It defines "domestic limited liability company" as "a limited liability company, other than a foreign limited liability company, organized under or governed by chapter 10-32.1." *N.D.C.C. § 10-19.1-01(34)*. It defines the term "foreign limited liability company," as "a limited liability company **[**30]** organized under laws other than the laws of this state for a purpose for which a limited liability company may be organized under chapter 10-32.1." *N.D.C.C. § 10-19.1-01(27)*.

Chapter 10-32.1 (the North Dakota LLC Act) defines "domestic corporation" as "a corporation, other than a foreign corporation, organized for profit and incorporated under chapter 10-19.1." *N.D.C.C. § 10-32.1-02(9)*. It defines "domestic limited liability company" as "a limited liability company, other than a foreign limited liability company, organized under or governed by this chapter excluding a nonprofit limited liability company organized under or governed by chapter 10-36." *N.D.C.C. § 10-32.1-02(28)*. It defines the terms "foreign corporation" and "foreign limited liability company," virtually identically to the North Dakota Business Corporation Act. *N.D.C.C. §§ 10-32.1-02(20)* and *(21)*.

HN19[⬆] From the plain language of these definitions, it is clear that the family farm exception requires the entity to be a North Dakota corporation or a limited liability company in order for the exception to apply. The Court finds that such a requirement would clearly discriminate against out-of-state interests in violation of the dormant *Commerce Clause* under current Eighth Circuit case law. See *Jones, 470 F.3d at 1267* (stating differential treatment of in-state and out-of-state **[**31]** entities that benefits the former while burdening the latter violates the dormant *Commerce Clause*).

However, the Defendants maintain this interpretation of the term "domestic" is incorrect. The Defendants contend the word "domestic" means "within the United States." This position is taken by the North Dakota Attorney General, a position which effectively ignores the plain language of the statute and the laws it incorporates. The Defendants maintain this interpretation is permissible because the term "domestic" is ambiguous. The Defendants contend the meaning they afford the term "domestic" is supported by the legislative history, a state district court opinion, and is reasonable because it avoids constitutional infirmity. The Court finds that the Defendants' interpretation of the word "domestic" is unreasonable and clearly contrary to the plain language of the Corporate Farming Law and the state laws it incorporates.

Because the North Dakota Attorney General's interpretation is inconsistent with the clear and unambiguous statutory language, that interpretation need not be given deference. *Delorme v. N.D. Dep't of Human Servs., 492 N.W.2d 585, 587-88 (N.D. 1992)* (noting ***HN20***[⬆] agency interpretation of statutory language should be given deference if the statutory language is ambiguous **[**32]** but not if the statutory language is **[*917]** clear, plain, and unambiguous). A statute is ambiguous if it is susceptible to "differing but rational meanings." *Id. at 588*. Statutory language must be given its most natural and obvious meaning. *Jones, 470 F.3d at 1268*; *Little v. Tracy, 497 N.W.2d 700, 705 (N.D. 1993)* (noting that when the wording of a statute is unambiguous, "the letter of it is not to be disregarded under the pretext of pursuing its spirit").

In this case, the terms "domestic corporation" and "domestic limited liability company" are expressly defined in Chapters 10-19.1 and 10-32.1 to mean a corporation or limited liability company created under the laws of North Dakota. *N.D.C.C. §§ 10-19.1-01(16)*, *(26)*, *(27)*, and *(34)* and *N.D.C.C. §§ 10-32.1-02(9)*, *(20)*, *(21)*, and *(28)*. By incorporating the requirements of Chapters 10-19.1 and 10-32.1, the Corporate Farming Law necessarily adopts those Chapters' definitions of "domestic corporation" and "domestic limited liability company." See N.D.C.C. §§ 10-06.1.13 and *10-06.1-14*. The household dictionary definitions provided by the Defendants are unpersuasive when the statute and the laws it incorporates define the terms in question. In addition, Black's Law Dictionary defines a "domestic corporation" as one "organized and chartered under the laws of a state" while a "foreign corporation" is one "organized and chartered under **[**33]** the laws of another state." Black's Law Dictionary (9th ed. 2009). The Black's Law Dictionary's definitions are consistent with the statutory definitions provided for under North

Dakota law.

As for the decision of the North Dakota state district court in *NAS I*, giving the term "domestic" the broad definition proposed by the State, the Court finds it unpersuasive. The state district court offered scant analysis in support of its conclusion and simply found the State's argument persuasive and supported by the legislative history. The lack of analysis renders the opinion unhelpful. The apparent reliance on legislative history misses the mark as well. ***HN21***[⬆] It is improper to resort to legislative history when the statute itself is plainly unambiguous. See *Olson v. Job Serv. N.D., 2013 ND 24, 826 N.W.2d 36, 40 (N.D. 2013)* (noting that if the language of a statute is unambiguous, "legislative intent is presumed clear from the face of the statute"); *Olson v. Fairview Health Servs. of Minn., 831 F.3d 1063, 1071 (8th Cir. 2016)* (noting legislative history should only be consulted when a statute contains textual ambiguity).

While the broad meaning of the term "domestic" offered by the State is understandable from the standpoint of avoiding a dormant *Commerce Clause* violation, accepting the State's construction would render the Corporate Farming Law's incorporation **[**34]** of Chapters 10-19.1 and 10-32.1 meaningless. Because the Court can find no ambiguity in the term "domestic" as used in *Section 10-06.1-12*, and because when the term "domestic" is given its plain and ordinary meaning it gives preference to North Dakota entities, the Court finds this provision of the Corporate Farming Law clearly violates the dormant *Commerce Clause*.

b. Operational Requirements

Section 10-06.1-12(6), provides as follows:

> If a corporation, the officers and directors of the corporation must be shareholders who are **actively engaged in operating the farm or ranch** and at least one of the corporation's shareholders must be an individual **residing on or operating the farm or ranch**. If a limited liability company, the governors and managers of the limited liability company must be members who are **actively engaged in operating the farm or ranch** and at least one of its members **[*918]** must be an individual **residing on or operating the farm or ranch**.

N.D.C.C. § 10-06.1-12(6) (emphasis added). The Plaintiffs contend the emphasized language ("operational requirements") amounts to a requirement that at least one member or shareholder reside on the farm and such a requirement violates the dormant *Commerce Clause*. See *Jones, 470 F.3d at 1268* (finding the requirement of Nebraska law that at least one family member **[**35]** reside on or engage in the daily labor or management of the farm violated the dormant *Commerce Clause* as it favored Nebraska residents). A requirement that someone reside on or work on the farm clearly violates the dormant *Commerce Clause*. Id. Neither of the operational requirements are defined by the Corporate Farming Law.

The Defendants maintain North Dakota's family farm exception does not contain a day-today labor requirement, and it is not necessary for any shareholder to reside on the farm. Specifically, they contend the family farm exception's first requirement that a shareholder be "actively engaged in operating the farm or ranch" can be met by a shareholder performing management activities off-site. The Defendants argue the second requirement that at least one shareholder be "residing on or operating the farm or ranch" can also be satisfied by either residing on the farm or making operational decisions from afar and without a physical presence on the farm. The argument as to both requirements is essentially the same, namely the farm may be managed or operated from a distance or remotely without requiring a physical presence on the farm. For example, a non-resident shareholder living off the farm and outside **[**36]** North Dakota may operate a North Dakota family farm through management decisions made by that individual and the actual planting, harvesting, and

other operations may be contracted out to independent entities which perform custom agriculture services.

The dispute over the operational requirements essentially comes down to whether a physical presence in North Dakota is required to satisfy the statutory language. The Plaintiffs contend a physical presence is required while the Defendants contend no physical presence is required and management from a distance is acceptable. It is undisputed that if the Plaintiffs are correct, the dormant *Commerce Clause* is violated. Both parties have asserted reasonable interpretations of the statutory language which is not defined by the law itself.

The Defendants point to North Dakota Attorney General Opinion 82-25 (April 12, 1982) ("NDAG 82-25"), *NAS I*, and *Crosslands I* to support their interpretation of the operational requirements as not requiring a physical presence in North Dakota. See Docket Nos. 67-10, 67-11, and 67-12. The Plaintiffs contend that making management decisions from afar is a passive activity which does not satisfy the family farm exception's requirement **[**37]** of being actively engaged in the operation of the farm or ranch. See *Bornhorst v. Budzik, No. C8-90-393, 1990 Minn. App. LEXIS 851, 1990 WL 119348 (Minn. Ct. App. Aug. 21, 1990)* (unpublished) (concluding the plaintiffs were not actively engaged in farming under Minnesota law because they were simply investors who did not participate in the planting, cultivating, or harvesting of crops); *Rengstorf v. Richards, 417 N.W.2d 138 (Minn. Ct. App. 1987)* (finding the defendant was actively engaged in farming under Minnesota law because he harvested some hay himself); *7 C.F.R. § 1400.201* (discussing the meaning of actively engaged in farming under Department of Agriculture regulations as including "active personal labor" or "active personal management"). The Plaintiffs also **[*919]** point to the legislative history to support their interpretation.

In 1982, just a year after the family farm exception was enacted, the North Dakota Attorney General issued an opinion regarding the family farm exception that "a natural person who does not reside upon a farm or ranch, but manages the farming or ranching operation through employees, may incorporate that farm or ranch." See Docket No. 67-12. The Attorney General explained that the operational requirements encompass those physically doing daily work "as well those persons who make management decisions or who **[**38]** hire others to perform the physical labor needed in the operation of the farm or ranch." See Docket No. 67-12. ***HN22***[↑] In North Dakota, an Attorney General's opinion, while not binding on North Dakota courts, has "important bearing on the construction and interpretation of a statue." *Hughes v. State Farm Mut. Auto. Ins. Co., 236 N.W.2d 870, 876 (N.D. 1975)*. An Attorney General's opinion which gives contemporaneous construction to a statute is entitled to "special consideration." See *Johnson v. Wells Cty. Water Res. Bd., 410 N.W.2d 525, 529 (N.D. 1987)*; *Hilton v. N.D. Educ. Ass'n, 2002 ND 209, 655 N.W.2d 60, 65 (N.D. 2002)*.

The North Dakota Legislative Assembly has not expressed disagreement with NDAG 82-25 since the opinion was issued over three decades ago. Such legislative acquiescence over time affords an Attorney General's opinion greater weight. *N.D. Fair Hous. Council, Inc. v. Peterson, 2001 ND 81, 625 N.W.2d 551, 563 (N.D. 2001)*; see also *Hilton, 655 N.W.2d at 65* (noting additional weight is due "an attorney general's opinion implicitly approved by the Legislature"). Since the Attorney General's opinion was issued in 1982, state agencies have relied upon NDAG 82-25 in implementing and enforcing the Corporate Farming Law. Because NDAG 82-25 was issued contemporaneously with the enactment of the family farm exception and has been impliedly approved by the North Dakota Legislature's inaction, the Court will afford it considerable weight in assessing the meaning of the operational requirements in *Section 10-06.1-12(6)*.

The family **[**39]** farm exception's operational

requirements have twice been reviewed in state district court in *NAS I* and *Crosslands I*. On both occasions, the state district court analyzed the family farm exception and found the operational requirements did not require a physical presence in North Dakota. See Docket Nos. 67-10 and 67-11. In 2009, the state district court in *Crosslands I* reviewed the family farm exception within Chapter 10-06.1, considered its text, applied principles of statutory construction, analyzed the applicable evidence, and concluded that the family farm exception "does not require persons to reside on the farm as long as there is an actively engaged person operating the farm or ranch." See Docket No. 67-11, p. 29. The state district court consequently concluded that the operational requirements in the family farm exception did not violate the dormant *Commerce Clause*. See Docket No. 67-11, p. 32. In 2011, the state district court in *NAS I* reviewed the family farm exception within Chapter 10-06.1, considered its text, applied principles of statutory construction, analyzed the applicable evidence, and concluded that the family farm exception "does not require a daily physical presence or daily **[**40]** labor to satisfy the 'actively engaged' or 'operating' requirements." See Docket No. 67-10, p. 28. The state district court further concluded that the family farm exception "does not favor North Dakota residents in close enough proximity that a daily commute is economically and physically possible." See Docket No. 67-10, p. 29. Both *NAS I* and *Crosslands I* offer reasoned analysis of the operational requirements and lend **[*920]** support to the interpretation offered by the Defendants.

The Plaintiffs argue the legislative history supports their contention that the family farm exception's operational requirements demand an actual physical presence on the farm or ranch. Specifically, the Plaintiffs rely upon exchanges between Allen Hoberg, Staff Council for the Legislative Council, and Senators Dotzenrod, Barth, Wright, and Sorum during a hearing on a 1979 bill (SB 2280). The 1979 bill, which was passed by the Legislature but vetoed by Governor Link, was similar to the 1981 bill (SB 2233) which forms the core of the current version of the Corporate Farming Law. See Ross H. Espeseth, North Dakota's Corporate Farming Statute: An Analysis of the Recent Change in the Law, 58 N.D. L. Rev. 283, 287 n. 38 (1982). During this exchange, Senator **[**41]** Dotzenrod stated that "there is nothing in this bill that states that an outside corporation with the qualifications of this bill couldn't come into North Dakota and buy land." See Docket No. 67-7, p. 4. Hoberg responded that "the provision in the bill states they must be 'natural' persons and must be related and actively engaged in farming in North Dakota." See Docket No. 67-7, p. 4. Senator Barth wanted it clarified that "in order to be an officer or director of the corporation, they must be actively engaged in farming or ranching" and Hoberg concurred. See Docket No. 67-7, p. 4. Senator Wright expressed concern about "outside corporations coming in to buy farm land." See Docket No. 67-7, p. 16. Senator Sorum "stated the term 'actively engaged' concerns him as it has no restrictions on it and felt it should be defined." See Docket No. 67-7, p. 16.

The Court finds these brief exchanges less than helpful in defining the operational requirements and shedding light on the question of whether an actual physical presence on the farm is required. No mention of defining the operational requirements is made. Indeed, Senator Sorum expressed a desire to define "actively engaged" but no definition **[**42]** was ever added to the bill and no discussion was held as to what a definition should entail. Further, while the 1979 bill may have been similar to the 1981 bill, the 1979 bill never became law and is not the focus of this lawsuit.

To support their interpretation, the Plaintiffs also rely on a discussion between several members of the Senate Agricultural Committee on the 1981 bill. The discussion is as follows:

> Senator Dotzenrod proposed an amendment for page 3, new subsection 10, which would say, "Each shareholder or member of the corporation must be actively engaged in operating the farm or ranch". (sic) Senator

> Sorum suggested instead that it read "the major shareholder be actively engaged in farming"; (sic) Senator Albers indicated that this might eliminate the small farmer and encourage large farms to incorporate only. In the case of off farm heirs: If one decided to sell their stock or share of the land, they could only sell to those who are actively engaged in farming the land, giving these people control of the destiny of the corporation.

See Docket No. 67-9, p. 5. While this discussion referenced the operational requirements several times, there was no mention of a physical presence **[**43]** on the farm being necessary. It would seem the discussion centered on whether some or all of the shareholders must be actively engaged in operating the farm and not on whether being actively engaged in operating the farm required a physical presence on the farm. The Court finds the discussion of little assistance.

The Plaintiffs' citation to comments made by James Marsden, then director of public affairs for the Farm Bureau, regarding **[*921]** the 1979 bill also unavailing. While statements from lawmakers are helpful in determining legislative intent, the Court gives scant weight to comments from witnesses such as Marsden, as statements from non-lawmakers are of little help in determining legislative intent. See *Jones, 470 F.3d at 1269* (noting statement by lawmakers may evidence a discriminatory purpose).

The Plaintiffs' reliance on Minnesota case law is equally unpersuasive as it bears virtually no relation to North Dakota's Corporate Farming Law, NDAG 82-25, *NAS I*, and *Crosslands I*. In addition, the provision of Minnesota law in question in *Rengstorf* and *Bornhorst* has been subject to varying interpretations. See *Federal Land Bank v. Wessels, No. C7-88-2233, 1989 Minn. App. LEXIS 493, 1989 WL 38400 (Minn. Ct. App. Apr. 25, 1989)* (unpublished) (noting a farmer residing in nursing **[**44]** home is actively engaged in operating the family farm if he is still part of the family operation of the farm, and the farmer's daughter is actively engaged in operating that same family farm if she is actively involved in financial or other aspects of the farming operation that do not require her physical presence in the state).

Further, the Plaintiffs' reliance on federal regulations is also unpersuasive. The cited federal regulation defines eligibility for farm program payments. See *7 C.F.R. § 1400.201(b)*. The regulation acknowledges active personal management alone can meet the requirement of being "actively engaged" in farming. Id. "Actively engaged in farming" means, in part, "active personal labor or active personal management, or a combination of active personal labor and active personal management." Id. Active personal management is defined as personally providing and participating in:

> (1) The general supervision and direction of activities and labor involved in the farming operation; or
>
> (2) Services (whether performed on-site or off-site) reasonably related and necessary to the farming operation, including:
>
> (i) Supervision of activities necessary in the farming operation, including activities involved **[**45]** in land preparation, planting, cultivating, harvesting, and marketing of agricultural commodities, as well as activities required to establish and maintain conserving cover crops on CRP acreage and activities required in livestock operations;
> (ii) Business-related actions, which include discretionary decision making;
> (iii) Evaluation of the financial condition and needs of the farming operation;
> (iv) Assistance in the structuring or preparation of financial reports or analyses for the farming operation;
>
> (v) Consultations in or structuring of business-related financing arrangements for the farming operation;

(vi) Marketing and promotion of agricultural commodities produced by the farming operation;
(vii) Acquiring technical information used in the farming operation; and

(viii) Any other management function reasonably necessary to conduct the farming operation and for which service the farming operation would ordinarily be charged a fee.

7 C.F.R. § 1400.3 (emphasis added). These activities do not have a physical presence requirement and would tend to support the position of the Defendants more so than the position of the Plaintiffs. Specifically, this definition acknowledges that management may be performed **[**46]** off-site and still meet the definition of "actively engaged in **[*922]** farming." Mud on the boots is not required.

Unlike North Dakota's family farm exception, both the Nebraska and South Dakota laws at issue in *Jones* and *Hazeltine* included explicit language requiring a physical presence on the farm. *Jones, 470 F.3d at 1265* and *1268* (citing *Neb. Const. art. XII, § 8*); *Hazeltine, 340 F.3d at 587-88* (citing *S.D. Const. art. XVII, § 22, cl. 1*). The Nebraska provision defined a family farm or ranch corporation as engaged in farming and made up of family members "at least one of whom is a person residing on or actively engaged in the day to day labor and management of the farm or ranch." *Jones, 470 F.3d at 1265* (emphasis added). The South Dakota law required that "[d]ay-to-day labor and management shall require both daily or routine substantial physical exertion and administration." *Hazeltine, 340 F.3d at 587-88* (emphasis added). All North Dakota law requires is that the officers and shareholders be "actively engaged in operating the farm or ranch" and one member be a person "residing on or operating the farm or ranch." *N.D.C.C. § 10-06.1-12(6)* (emphasis added). As the Court has explained, these operational requirements do not include day-to-day labor or an actual physical presence on the farm. The North Dakota Attorney General has reached the very same conclusion which has withstood **[**47]** the test of time since 1982.

Based on a careful review of the record, the Court finds NDAG 82-25, combined with the state district court opinions in *NAS I* and *Crosslands I*, to be persuasive. North Dakota's operational requirements do not require a physical presence on the farm or in North Dakota. In this way, the requirements differ substantially from the laws at issue in *Jones* and *Hazeltine*. The acknowledgment that to be actively engaged in the operation of a farm does not necessarily require a physical presence on the farm is especially relevant in the modern internet age we now live in. The availability of the internet and everything that goes along with it, including video-conferencing and drone technology, makes the world a much smaller place. The Plaintiffs' contention in this regard is somewhat antiquated. ***HN23***[⬆] For these reasons the Court finds the operational requirements in *Section 10-06.1-12(6)* do not violate the dormant *Commerce Clause*.[1]

2. DISCRIMINATORY PURPOSE OR INTENT

The Plaintiffs contend the Corporate Farming Law was adopted with a discriminatory purpose, that being a preference for North Dakota family farm corporations to the detriment of out-of-state family farm corporations. In support of their contention, **[**48]** the Plaintiffs cite to the legislative history of the 1979 bill, which never became law, and the 1981 bill which did become law and now forms the core of North Dakota's Corporate Farming Law. The Defendants cite the historical record and the legislative history as not evidencing a discriminatory intent. The Defendants

[1] Despite the Court's finding that the operational requirements do not require a physical presence on the farm, it would be helpful if the Legislature adopted a clarifying definition or otherwise revised the statutory language to make it clear no actual physical presence on the farm is required.

maintain the purpose of the law is to preserve family farms, both in-state and out-of-state alike.

HN24[] To determine whether there was a discriminatory purpose behind a law, courts look to both direct and indirect evidence. *Jones, 470 F.3d at 1269*. Direct evidence includes statements by lawmakers and statements and conduct by drafters. Id. Indirect evidence includes "irregularities **[*923]** in the drafting process" that "hint at such a purpose." *Hazeltine, 340 F.3d at 594*.

The legislative history consists of approximately 160 pages. See Docket Nos. 67-7, 67-9, and 78-2). From this legislative history, Plaintiffs cite to nine statements which they contend offer direct evidence of a discriminatory intent. See Docket No. 72, p. 34. Only four of these statements are from legislators, the balance are from witnesses. *HN25*[] Witness testimony carries little weight in assessing legislative intent as witnesses are not lawmakers. See *Jones, 470 F.3d at 1269* (noting statements **[**49]** by lawmakers may evidence a discriminatory purpose); see also *Premachandra v. Mitts, 753 F.2d 635, 639-40 (8th Cir. 1985)* (discussing witness testimony and legislative history). Most of these statements have been discussed in relation to the operational requirements, and rejected. The Plaintiffs cite to Representative Olafson's statement that "the family farm is vital to ND's standard of living, and the right to incorporate will help in its preservation." See Docket No. 67-9, p. 1. This statement expresses a desire to protect family farms but it makes no mention of out-ofstate or outside interests, and the Court does not see how it can be read as supporting discrimination against out-of-state interests or treating them differently than North Dakotans.

Only two of the legislative comments, from Senators Dotzenrod and Wright, referenced "outside corporations" coming into North Dakota to buy farm land. See Docket No. 67-7, pp. 4 and 16. Senator Dotzenrod stated that "there is nothing in this bill that states that an outside corporation with the qualifications of this bill couldn't come into North Dakota and buy land." See Docket No. 67-7, p. 4. Senator Wright expressed concern about "outside corporations coming in to buy farm land." See Docket **[**50]** No. 67-7, p. 16. However, when carefully examined, these comments do not support the Plaintiffs contention but rather seem to support the position of the Defendants. As these senators apparently read the bill, outside corporations were allowed to come into North Dakota and farm, as long as they met the other requirements of the family farm exception which are not challenged in this case. Such murky comments do not reveal a preference for North Dakota family farms over the interests of out-of-state family farms. See *Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 568, 125 S. Ct. 2611, 162 L. Ed. 2d 502 (2005)* (noting legislative history is often murky, ambiguous, and contradictory). The Court is also mindful of the wise admonition that one friend in a crowd is insufficient to prove legislative intent. See *Baptist Health v. Thompson, 458 F.3d 768, 775 n. 5 (8th Cir. 2006)*.

The Plaintiffs contend there is indirect evidence of a discriminatory intent against out-ofstate interests because no studies appear in the legislative history to support the contention that the family farm exception would benefit family farms. See *Hazeltine, 340 F.3d at 594-95* (noting a lack of evidence that a law will accomplish its stated purpose can be seen as indirect evidence of a discriminatory purpose). However, the legislative history in this case reveals otherwise. The information gathered by **[**51]** the legislature included a statement of support from the Young Farmers and Ranchers, a presentation and report from the North Dakota State Tax Department on the tax consequences of the bill, a written analysis from Iowa State University professor Neil E. Harl regarding the advantages of allowing corporate farming, an analysis from attorney William Guy III of the income tax, estate planning, and other non-tax advantages and disadvantages of allowing farm incorporation, and testimony from a representative of Communicating for Agriculture regarding

[*924] how enacting the family farm exception would help preserve family farms. See Docket No. 67-9, pp. 25-28, 29-38, 39-40, 51-57, 58-61, and 69-71. The consensus from these sources is that considerable tax and estate planning advantages would be available to family farmers if the family farm exception was enacted, and this would help preserve family farming. See *MSM Farms, Inc. v. Spire, 927 F.2d 330, 335 (8th Cir. 1991)* (finding, in the context of an equal protection challenge, that "[t]he people of Nebraska have made a reasonable judgment that prohibiting non-family corporate farming serves the public interest in preserving an agriculture where families own and farm the land").

North Dakota's principle **[**52]** industry is agriculture. See *Coal Harbor Stock Farm v. Meier, 191 N.W.2d 583, 591 (N.D. 1971)*. North Dakota has had a Corporate Farming Law since 1932 when it was adopted via initiated measure. The 1932 law prohibited domestic and foreign corporations from "engaging in the business of farming or agriculture." *Asbury Hosp. v. Cass County, 72 N.D. 359, 7 N.W.2d 438, 443 (N.D. 1943)*. The law also prohibited all corporations from acquiring and holding real estate regardless of its use. The law drew no distinctions between in-state and outof-state corporations. "The public policy underlying the restrictions on corporate ownership of farmland or ranchland is rooted in the desire to preserve availability of rural agricultural land for use by family farmers." *Stenehjem ex rel. State v. Crosslands, Inc., 2010 ND 91, 782 N.W.2d 632, 637 (N.D. 2010)*; *Stenehjem ex rel. State v. Nat'l Audubon Soc'y, Inc., 2014 ND 71, 844 N.W.2d 892, 898 (N.D. 2014)*. The determination to "prohibit corporate farming as a business . . . was necessary to the economy of the State and the welfare of its citizens." *Meier, 191 N.W.2d at 591*. "It was the intent of the legislative assembly in enacting the corporate farming statute to prevent a tendency towards a monopoly by corporations in owning land and conducting farming operations." North Dakota Attorney General Opinion 46-54 (July 15, 1946) ("NDAG 46-54").

In 1981, the Legislative Assembly amended the Corporate Farming Law. The 1981 amendment continued the general prohibition against corporations owning **[**53]** land within the state, but included, for the first time, an exception allowing small family farms to incorporate, engage in farming, and own land. *N.D.C.C. ch. 10-06* (1981). The Corporate Farming Law incorporated by reference the requirements and definitions of the Business Corporation Act in 1983, and the Limited Liability Company Act in 1993. 1983 N.D. S.L. ch. 131, § 4; 1993 N.D. S.L. ch. 54 § 2; 1993 N.D. S.L. ch. 92, § 8. A review of the legislative history shows the family farm exception was intended to help preserve family farms by allowing the use of favorable tax structures, assisting with estate planning, protecting assets, limiting personal liability, making it easier to raise capital, and making it easier to provide employee benefits. See Docket No. 67-9, pp. 25-31, 51-61.

A careful review of the legislative history does not reveal an intent to discriminate against out-of-state interests. Rather, the purpose was to promote and preserve family farms by giving them the ability to use the corporate form, with some limitations, in an increasing complex and connected world. For instance, it was thought the corporate form would offer tax advantages and make it easier to pass the family farm from generation **[**54]** to generation. From the Court's review of the available legislative history, the purpose of enacting the family farm exception was to help keep family farming viable.

HN26[↑] In some sense, every state law is enacted to further state interests. But this does not mean every state law violates the *Commerce Clause*. There must be a showing **[*925]** of discriminatory purpose. There has long been an anti-corporate sentiment in North Dakota as evidenced by the 1932 ban on corporate farming which applied to all corporations, big and small, in-state and out-of-state alike. The *Commerce Clause* does not guarantee access to the corporate form. *State v. J.P. Lamb Co., 401 N.W.2d 713, 717 (N.D. 1987)* (noting a corporation is a creature of statute which

cannot exist without the consent of the state and which is subject to whatever conditions a state may impose). The 1981 family farm exception was intended to help preserve family farms through the limited use of corporations. Economic protectionism was not its intent. Things went somewhat awry in 1983 and 1993 when the Business Corporation Act and the Limited Liability Company Act definitions were incorporated by reference, but this does not change the purpose of the 1981 family farm exception which the Plaintiffs challenge. The Court finds as a matter **[**55]** of law that the family farm exception does not have a discriminatory purpose.

3. DISCRIMINATORY EFFECT

On its face, the family farm exception prevents foreign corporations and foreign limited liability companies from engaging in the business of farming or owning farm land in North Dakota while permitting North Dakota corporations and limited liability companies to do so. This is, by definition, a discriminatory effect. See *SDDS, Inc. v. South Dakota, 47 F.3d 263, 267 (8th Cir. 1995)* (collecting cases discussing and finding discriminatory effects); *Pete's Brewing Co. v. Whitehead, 19 F. Supp. 2d 1004, 1014 (W.D. Mo. 1998)* ("when a statute gives in-state companies an advantage over out-of-state companies, it has a discriminatory effect."). Accordingly, the Court finds the family farm exception has a discriminatory effect.

4. RIGOROUS SCRUTINY

HN27[↑] If a law fails any one of the three first-tier tests for facial discrimination, discriminatory purpose, or discriminatory effect, then the law survives only if the state "can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest." *C & A Carbone, Inc. v. Town of Clarkstown, N.Y., 511 U.S. 383, 392, 114 S. Ct. 1677, 128 L. Ed. 2d 399 (1994)*. The State concedes the family farm exception cannot survive rigorous scrutiny and it has made no attempt to explain why other means are not available to promote the State's interest in protecting family **[**56]** farms. See Docket No. 65, p. 31. In addition, since the Court has determined the family farm exception discriminates both in its effect and on its face, the Court need not address the less rigorous second tier analysis. See *Pike v. Bruce Church Inc., 397 U.S. 137, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970)*.

E. SEVERANCE

Having determined the family farm exception violates the dormant *Commerce Clause*, the Court must address whether the entire law must be enjoined or whether severance of some portion of the law will suffice as a remedy. The Plaintiffs contend Chapter 10-06.1 should be struck down in its entirety. The Defendants contend the offending language in the family farm exception can simply be severed and the remainder of the law allowed to stand. The Court agrees with the Defendants that severing the offending language is the most appropriate remedy.

HN28[↑] Severance is the preferred remedy under both North Dakota and federal law. See *Ayotte v. Planned Parenthood of N. New England, 546 U.S. 320, 328-29, 126 S. Ct. 961, 163 L. Ed. 2d 812 (2006)* (noting the United States Supreme Court's preference for enjoining only the unconstitutional **[*926]** language while leaving the remainder intact); *Tooz v. State, 76 N.D. 599, 38 N.W.2d 285, 291 (N.D. 1949)* (stating severance is preferred and "[i]t would be inconsistent with all just principles of constitutional law to adjudge these enactments void because they are associated in the same act, but not connected with **[**57]** or dependent on others which are unconstitutional"); *First Bank of Buffalo v. Conrad, 350 N.W.2d 580, 584 (N.D. 1984)* ("The declaration of part of a law as being unconstitutional does not require a court to also declare the remainder void, unless all provisions are

so connected and dependent upon each other that it cannot be presumed that the legislature would have enacted the valid sections without the unconstitutional sections."); *Kessler v. Thompson, 75 N.W.2d 172, 189 (N.D. 1956)* ("It is a fundamental principle that a statute may be constitutional in one part and unconstitutional in another part and that if the valid part is severable from the rest, the portion which is constitutional may stand while that which is unconstitutional is stricken out and rejected."). North Dakota law also contains a general savings clause which reinforces the principle of preferring severance to voiding an entire enactment. *N.D. C.C. § 1-02-20* (providing that "[i]n the event that any clause, sentence, paragraph, chapter, or other part of any title, is adjudged by any court of competent or final jurisdiction to be invalid, such judgment does not affect, impair, nor invalidate any other clause, sentence, paragraph, chapter, section, or part of such title, but is confined in its operation to the clause, sentence, paragraph, section, **[**58]** or part thereof directly involved in the controversy in which such judgment has been rendered."); *Montana-Dakota Utilities Co. v. Johanneson, 153 N.W.2d 414, 425 (N.D. 1967)* (noting the applicability of *Section 1-02-20* to the entire North Dakota Century Code).

HN29[] In determining whether severance is permissible, the primary question involves the ascertainment of legislative intent. *Johanneson, 153 N.W.2d at 424*. Phrased another way, would the Legislative Assembly have enacted the law absent the offending provisions? In this case, the answer is clearly yes. North Dakota's Corporate Farming Law and the general prohibition on all corporate land ownership became law in 1932. See 1933 N.D. S. L. ch. 89. The family farm exception was not enacted until 1981. See 1981 N.D. S. L. ch. 134, § 4. The Corporate Farming Law was on the books for nearly fifty years before the family farm exception was added in 1981. The Corporate Farming Law incorporated by reference the requirements and definitions of the Business Corporation Act in 1983 and Limited Liability Company Act in 1993. Since the Corporate Farming Law was originally enacted without the family farm exception there is no reason to believe the Legislature would have preferred to repeal the entire law in 1981 when the family farm exception was added. When Governor **[**59]** Link vetoed a version of the family farm exception in 1979, the Legislature did not push for full scale repeal but again introduced the legislation in 1981, and was successful. Further, the Corporate Farming Law includes other exceptions, which are not challenged in this lawsuit, such as the exception for surface coal mining (*N.D.C.C. § 10-06.1-06*); certain industrial and business purposes (*N.D.C.C. § 10-06.1-07*); cooperatives (*N.D.C.C. § 10-06.1-08*); and certain non-profit organizations (*N.D.C.C. §§ 10-06.1-09* and *10-06.1-10*). These exceptions would be unnecessarily voided if the Court enjoined operation of the entire chapter as suggested by the Plaintiffs. The Court sees no reason to enjoin the Corporate Farming Law in its entirety, a law which operated on its own for nearly fifty years without the family farm exception, and which can clearly stand on its own. Indeed, all that is necessary is to enjoin the enforcement of **[*927]** the offending "domestic corporation" and "domestic limited liability company" language while leaving the remainder of the family farm exception intact. Accordingly, the Court finds severance is the appropriate remedy.

IV. CONCLUSION

For the reasons set forth above, the Defendant Farmers Union's motion to dismiss (Docket No. 104) and its alternative motion for **[**60]** judgment on the pleadings (Docket No. 113) are **DENIED**. The Defendant Dakota Resource Council's motion to strike (Docket No. 93) is **DENIED**. The State's motion for partial summary judgment (Docket No. 64) and the Plaintiffs' motion for summary judgment (Docket No. 71) are **granted in part and denied in part** as explained herein. Count Two of the amended complaint is dismissed.

The Court further **ORDERS** and declares that the State is permanently enjoined from enforcing or seeking to enforce *Section 10-06.1-12 of the North Dakota Century Code* in a manner which limits its application to only North Dakota corporations and limited liability companies, and must permit corporations and limited liability companies organized under the laws of other states to utilize the family farm exception, so long as they meet the other requirements of the current law which are not the subject of this litigation.

IT IS SO ORDERED.

Dated this 21st day of September, 2018.

/s/ Daniel L. Hovland

Daniel L. Hovland, Chief Judge

United States District Court

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TIM GRIFFIN
ATTORNEY GENERAL

October 17, 2023

Northrup King Seed Co.
Syngenta Seeds
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Bay, Arkansas 72411

Syngenta Seeds, LLC
2001 Butterfield Road, Suite 1600
Downers Grove, Illinois 60515

United Agent Group, Inc.
Agent for Service for Syngenta Seeds, LLC
609 SW 8th Street, Suite 600
Bentonville, Arkansas 72712

To Whom it May Concern,

I am writing for two purposes, both of which are related to Northrup King Seed Co. being listed as the owner of the Northeast Quarter of Section 25, Township 13 North, Range 5 East, Craighead County, Arkansas (the "Property").

First, I am placing you on notice that your holding of the Property appears to be in violation of Ark. Code Ann. § 18-11-110. Arkansas law bars a "prohibited foreign-party-controlled business" from acquiring or holding public or private land in the State of Arkansas, either directly or through affiliated parties.[1] The definition of "prohibited foreign party" includes several types of individuals or entities with a connection to a country subject to International Traffic in Arms Regulations ("ITAR").[2] The People's Republic of China is subject to ITAR.[3]

Publicly available information confirms that Northrup King Seed Co. a/k/a NK Seeds is a brand of Syngenta Seeds. Syngenta Seeds, in turn, is a business unit of Syngenta Group. Syngenta Group is registered in Shanghai, China, and is owned by China National Chemical Corporation a/k/a ChemChina, a Chinese state-owned chemical company. These links mean that "a party" is holding the Property "as an agent, trustee, or other fiduciary for a prohibited foreign-party-controlled business" in violation of the law.[4]

[1] A.C.A. § 18-11-110(b)
[2] *See* A.C.A. § 18-11-802(5)
[3] 22 C.F.R. § 126.1(d)(1)
[4] A.C.A. § 18-11-110(b)(2)

The Office of the Attorney General is tasked with enforcing this prohibition. If land held by a "prohibited foreign-party-controlled business" in violation of the statute is not divested within two years,[5] the Attorney General "shall commence an action in the circuit court."[6] If the criteria outlined in the statute are met, the "circuit court shall order that the public or private land be sold through judicial foreclosure."[7]

Please proceed with the divestment of the Property as required by Arkansas law. If you believe that the Property is *not* held in violation of Ark. Code Ann. § 18-11-110, please provide my office with the documentation you are relying on for that determination.

Second, under Ark. Code Ann. § 2-3-111, parties required to file a report with the United States Department of Agriculture ("USDA") under the Agricultural Foreign Investment Disclosure Act ("AFIDA") are also obligated to file a copy of that report with the Secretary of the Arkansas Department of Agriculture "within the time period required under federal law."[8]

Syngenta Seeds is a required reporter under AFIDA, and filed an AFIDA report concerning the Property with the USDA most recently on March 8, 2022. The report stated that "[u]ltimately, the foreign person that holds indirectly a significant interest in the person owning the [Property] is from China." Syngenta Seeds provided a copy of this AFIDA report to Secretary Wes Ward of the Arkansas Department of Agriculture on June 30, 2022. Construing the "time period required under federal law" most favorably to Syngenta Seeds, the filing of the AFIDA report with Secretary Ward was belated.[9]

For failure to file a report as required by Ark. Code Ann. § 2-3-111, the Attorney General "[s]hall impose a civil penalty not to exceed twenty-five percent (25%) of the fair market value" of the Property.[10] I am therefore imposing the maximum civil penalty of $280,000, a figure calculated as 25% of $1,120,000, the estimated current value for the Property provided by Syngenta Seeds on its filing with the USDA.

Please remit payment in this amount to my office within 30 days. Please also be advised that the Attorney General is authorized to "bring an action to collect the civil penalty" imposed.[11]

Thank you for your attention to these matters.

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[5] A.C.A. § 18-11-110(c)(1). Act 636 of 2023 became effective on August 1, 2023; for land held before that date, the violation would run from August 1, 2023, and the land would need to be divested by August 1, 2025.
[6] A.C.A. § 18-11-110(c)(2)
[7] A.C.A. § 18-11-110(c)(3)(A)
[8] A.C.A. § 2-3-111(a)
[9] The longest reporting period provided in 7 U.S.C. § 3501, the federal statute referenced in Arkansas law, is 180 days. This applies to "[a]gricultural land interests presently held by foreign persons… on the day before the effective date of this section." The latest possible date that this period would run from is the effective date of A.C.A. § 2-3-111, which was July 28, 2021. Adding the longest possible reporting period to the latest possible starting date of the reporting period yields a required reporting deadline in January of 2022—well before the report was filed with the Arkansas Department of Agriculture.
[10] A.C.A. § 2-3-111(b)(1)
[11] A.C.A. § 2-3-111(b)(2)

Respectfully,

Tim Griffin
Attorney General

cc: Todd Barlow, Lead State Affairs, Syngenta

(via electronic mail to todd.barlow@syngenta.com)

This form is available electronically. AMENDED ☐ Form Approved - OMB No. 0560-0097

FSA-153 (05-24-01)

U.S. DEPARTMENT OF AGRICULTURE
Farm Service Agency

AGRICULTURAL FOREIGN INVESTMENT DISCLOSURE ACT REPORT

NOTE: Read Instructions on Page 2 Before Filing In Any Date Below. If Additional Space is Needed, Use Page 2

1. TYPE ACTIVITY (See Page 2) *(Check one)*

A. Land Holding ☑ B. Land Acquisition ☐ C. Land Disposition ☐
D. Land Use Change To Agriculture ☐ E. Land Use Change To Non-Agriculture ☐

ITEM	OFFICE USE ONLY
2. Tract Location and Description	
A. LEGAL DESCRIPTION OR FSA TRACT NUMBER: 30795	
B. COUNTY OR PARISH: Craighead	C. NO. OF ACRES: 160
D. STATE: Arkansas	
3. Owner of Tract *(In Item 2A) (See Page 2)*	
A. NAME: Syngenta Seeds, LLC	
B. TAX ID NO. *(Ten digits)*: [redacted]	
C. LEGAL ADDRESS *(Street, City, State/Province, Country)*: 3411 Silverside Road, Suite 100 Wilmington, Delaware 19810	

D. Type of Owner *(If checked, skip Items D2 and D3)*	CHECK
1. Individual *(Including husband/wife). Indicate citizenship of husband and wife, if applicable.*	
a. Citizenship of Individual	
2. Government *(name of country)*	
3. Organization	
a. Type	
1) Corporation	
2) Partnership	
3) Estate	
4) Trust	
5) Institution	
6) Association	
7) Other	✓
b. Gov't. or country under whose law the organization is created: Delaware	
c. Principal place of business *(for organizations only)*: United States of America	
d. List on separate sheet, the Name, Address and Country of all foreign persons who individually or in the aggregate hold significant interest or substantial control 1/ in the person owning the land.	

E. Complete only if Item 1C, Land Disposition, is checked

1. NAME OF PERSON RECEIVING TRACT
2. ADDRESS *(Street, City, State/Province, Country)*
3. CITIZENSHIP USA ☐ FOREIGN ☐ UNKNOWN ☐

4. Representative of Foreign Person *(completing form, if applicable)*

A. NAME: Marisa Bocci

B. ADDRESS *(Street, State, Country)*: 925 Fourth Avenue, #2900
Seattle, WA 98104

C. TELEPHONE NO. *(Area Code)*: (206) 370-7638

D. Relationship of Representative to Foreign Person:	CHECK
1. Attorney	✓
2. Manager	
3. Agent	
4. Other *(Explain on Page 2)*	

ITEM	CHECK
5. Type of Interest Held in the Agricultural Land *(Check One)*	
A. Fee Interest *(ownership)* Whole	✓
B. Fee Interest *(ownership)* Partial WHAT PERCENT %	
C. Life Estate	
D. Trust Beneficiary	
E. Purchase Contract	
F. Other *(explain)*	
6. How was this Tract Acquired or Transferred?	CHECK
A. Cash Transaction	✓
B. Credit or Installment Transaction	
C. Trade	
D. Gift or Inheritance	
E. Foreclosure	
F. Other *(explain)* See "Attachment A"	✓

7. Value of Agricultural Land:	
A. Purchase Price of Land or if a land disposition, the original price paid by seller	$ 500,000.00
B. Non-Purchase, Estimated Value at the Time of Acquisition	$
C. What is the estimated current value or if a land disposition, the selling price of the tract of land?	$ 1,120,000
D. How much of purchase price in Item 7A remains to be paid?	$ 0

8. Date of Acquisition or Transfer *(See Page 2)*	MONTH	DAY	YEAR
	May	18	2017

9. Current Land Use *(Usual use of land. For idle land, report as Other Agriculture.)* **Report in Whole Numbers**	ACRES
A. Crop	150
B. Pasture	0
C. Forest or Timber	0
D. Other Agriculture	0
E. Non-Agriculture	10
F. Total *(Should equal Item 2C)*	160

10. Intended Use as of This Date. *(Check One or More or type "N/A" if Item 1C above is marked)*	CHECK
A. No Change	x
B. Other Agriculture	x
C. Non-Agriculture	

11. Relationship of Owner to Producer (If not applicable, for Items 11A through 11B, type "N/A"). Check one or more or type "N/A" if *Item 1C above is marked.*

A. Producer is:	
1. Owner	x
2. Manager	
3. Tenant or sharecropper (Item 11B *must be completed*)	
B. Rental agreement is: *(Not applicable if Item 1C above is marked)*	
1. A crop share	N/A
2. Cash or fixed rent	

12. The Producer on This Tract is: Check one or more. If not applicable, for Items 11A through 11B, type "N/A" *(Not applicable if Item 1C above is marked)*

A. The same person as when the tract was acquired	x
B. A new person	

13. CERTIFICATION *-I certify that the information entered in this report is complete and correct. I understand that falsification of reporting is subject to a civil penalty not to exceed 25% of the fair market value of the interest held in the tract of land.*

14. SIGNATURE (Owner or legally authorized representative): [signature] TITLE: Assistant Secretary DATE (MM-DD-YYYY): 03-08-2022

NOTE: *The following statement is made in accordance with the Privacy Act of 1974 (5 USC 552a) and the Paperwork Reduction Act of 1995, as amended. The authority for requesting the following information is Pub. L. 95-460. The information will be used to determine the effects of foreign persons acquiring, transferring and holding agricultural land and the effects of such activity on family farms and rural communities. Furnishing the requested information is mandatory. Failure to comply or falsification of reporting is subject to civil penalty, not to exceed 25 percent of the fair market value of the interest held in the tract on the date of the assessment of such penalty.*

According to the Paperwork Reduction Act of 1995, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid OMB control number. The valid OMB control number for this information collection is 0560-0097. The time required to complete this information collection is estimated to average 15 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. ***RETURN THIS COMPLETED FORM TO YOUR COUNTY FSA OFFICE.***

DETERMINATION OF "FOREIGN PERSON" STATUS

DEFINITION: "Person" means any individual, corporation, company, association, firm, partnership, society, joint stock company, trust, estate, or any other legal entity.

You are a "foreign person" under the provisions of Pub. L. 95-460 and must complete the front side of this form (FSA-153) if your answer is "NO" to all the statements in Items 1, 2, and 3 below:	YES	NO
1. I AM a citizen of the United States.		
2. I AM a citizen of the Northern Mariana Islands or the Trust Territories of the Pacific Islands.		
3. I AM lawfully admitted to the United States for permanent residence, or paroled into the United States, under the Immigration and Nationality Act.		
You are a "foreign person" under the provisions of Pub. L. 95-460 and must complete the front side of this form (FSA-153) if your answer is "YES" to any of the statements in Items 4a, 4b, and 5 below:	YES	NO
4. I AM a "person" other than an individual or government, which is created or organized under the laws of:		
a. A foreign government of which has its principal place of business located outside the United States.		✓
b. Any State of the United States, and in which significant interest or substantial control 1/ is held directly or indirectly by any foreign individual, government, or person.	✓	
5. I AM a foreign government.		✓

GENERAL INSTRUCTIONS

Complete this form for each tract of land. Report as a tract all acreages under the same ownership in each county or parish acquired or transferred on the same date. Land in different counties or parishes and land acquired or transferred on different dates must be reported as separate tracts.

Return the original to the County Farm Service Agency (FSA) Office where the tract of land is located. Retain a copy for your records. **DO NOT SEND THIS FORM DIRECTLY TO WASHINGTON, D.C. UNLESS GRANTED PERMISSION BY THE FSA IN WASHINGTON, D.C.**

After the original disclosure on FSA-153 on the tract(s) of land owned by the same person within a county or parish, each subsequent change of ownership or use must be reported by filing another FSA-153.

ITEM INSTRUCTIONS AND REPORTING DATES

ITEM 1. **ONLY ONE BOX MAY BE CHECKED**

If the tract of land to be listed under Item 2 on the front side of this document was:

- Owned on February 1, 1979, check **A. Land Holding** [X]) Reporting Date: This document is required to be completed and returned by August 1, 1979.

If the tract of land to be listed under Item 2 on the front side of this document was, on or after February 2, 1979:

- Acquired, check **B. Land Acquisition** [X]
- Disposed of, check **C. Land Disposition** [X]
- Changed from non-agricultural to agricultural use, check **D. Land Use Change to Agriculture** [X])
- Changed from agricultural to non-agricultural, use check **E. Land Use Change to Non-Agriculture** [X])

REPORTING DATE: If any of these activities are checked in Item 1, return the completed FSA-153 within ninety (90) days from the date of the transaction.

ITEM 8. The date entered would be as follows for the activity checked in Item 1:

Box A or B - Date acquired.
Box C - Date disposed of.
Box D or E - Date land use changed.

ADDITIONAL INFORMATION *(Use additional sheets if more space is needed)*

1/ Significant interest or substantial control as defined in 7 CFR Part 781.2 (k).

The U.S. Department of Agriculture (USDA) prohibits discrimination in all its programs and activities on the basis of race, color, national origin, gender, religion, age, disability, political beliefs, sexual orientation, and marital or family status. (Not all prohibited bases apply to all programs.) Persons with disabilities who require alternative means for communication of program information (Braille, large print, audiotape, etc.) should contact USDA's TARGET Center at (202) 720-2600 (voice and TDD). To file a complaint of discrimination, write USDA, Director, Office of Civil Rights, Room 326-W, Whitten Building, 1400 Independence Avenue, SW, Washington, D.C. 20250-9410 or call (202) 720-5964 (voice or TDD). USDA is an equal opportunity provider and employer.

Attachment A
to
Agricultural Foreign Investment Disclosure Act Report

Syngenta Seeds, LLC

3.D.3.d. List on separate sheet, the Name, Address and Country of all foreign persons who individually or in the aggregate hold significant interest or substantial control in the person owning the land:

Syngenta Corporation, having an address at 3411 Silverside Road, Suite 100, Wilmington, Delaware 19810.

Syngenta Crop Protection AG, having an address at Rosentalstresse 67, Basel Switzerland 4058.

Syngenta AG, having an address at Rosentalstresse 67, Basel Switzerland 4058.

Ultimately, the foreign person that holds indirectly a significant interest in the person owning the land is from China.

6.F. How was this Tract Acquired or Transferred?

This filing is with respect to a change of control transaction that occurred on May 18, 2017 whereby the ultimate beneficial owner entity of the landowner entity changed from Switzerland to China.

7.C. Estimated Current Value of the Land

The estimated current value of the land is reflective of the current median price per acre in the County.

NORTHRUP KING SEED CO

778 CR 680

Basic | Land | Sales | Valuation | Taxes | Receipts | Improvements | Parcel Boundary

Basic Info

Parcel Number:	12-135251-00100
County Name:	Craighead County
Property Address:	NORTHRUP KING SEED CO 778 CR 680 **Map This Address**
Mailing Address:	NORTHRUP KING SEED CO Syngenta Seeds # 778 Cr 680 BAY AR 72411
Collector's Mailing Address:	NORTHRUP KING SEED CO Syngenta Seeds # 778 Cr 680 BAY, AR 72411
Total Acres:	160.00
Timber Acres:	0.00
Sec-Twp-Rng:	25-13-05
Lot/Block:	/
Subdivision:	
Legal Description:	N1/2 NE 80A S1/2 NE 80
School District:	BY BAY RURAL
Improvement Districts:	SFLD,DRAINAGE DISTRICT 29
Homestead Parcel?:	No
Tax Status:	Taxable
Over 65?:	No

NORTHRUP KING SEED CO

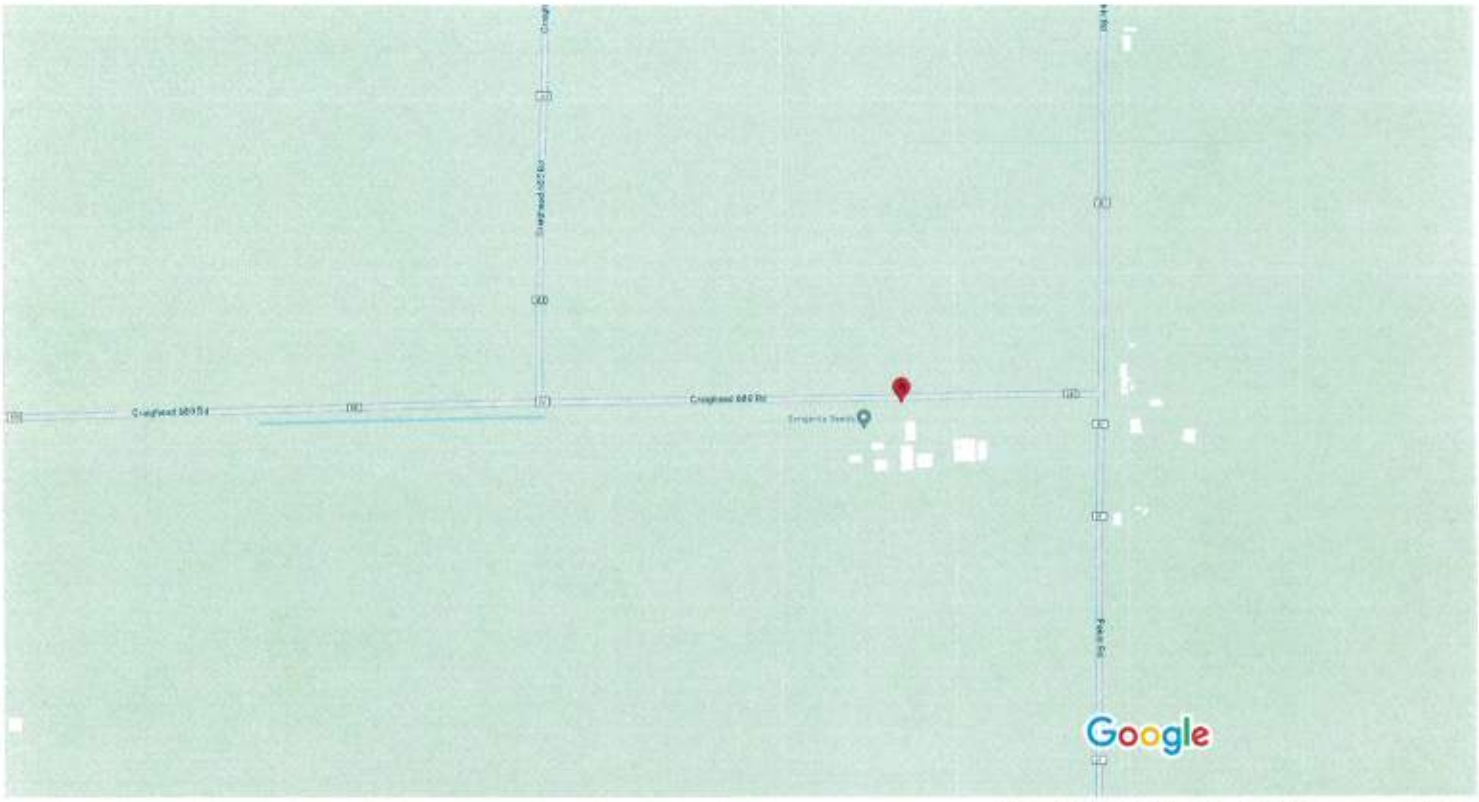
778 CR 680

Basic | Land | Sales | Valuation | Taxes | Receipts | Improvements | Parcel Boundary

Sales History

Filed	Sold	Price	Grantor	Grantee	Book	Page	Deed Type
7/13/1988	7/13/1988	500,000	COKER'S	NORTHRUP	362	335	WD(WARRANTY DEED)
12/30/1986	12/30/1986	315,000	ROHM & HAAS	COKERS	341	519	WD(WARRANTY DEED)

Google Maps 778 Co Rd 680



Map data ©2023 Google 200 ft

778 Co Rd 680

Directions Save Nearby Send to phone Share

778 Co Rd 680, Bay, AR 72411

PFPW+9J Bay, Arkansas

Photos

At this place

Syngenta Seeds
4.9 (7)
Seed supplier
Open · Closes 4 PM

Directions

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT ARKANSAS
NOV 13 2024
TAMMY H. DOWNS, CLERK
By: DEP CLERK

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
CENTRAL DIVISION

JONES EAGLE, LLC *f/k/a* JONES DIGITAL, LLC **PLAINTIFF**

v. **CASE NO.:** 4:24-cv-990-KGB

WES WARD, in his official capacity as the Secretary of the Arkansas Department of Agriculture; TIM GRIFFIN in his official capacity as the Attorney General of Arkansas; and STATE OF ARKANSAS **DEFENDANTS**

COMPLAINT

Plaintiff Jones Eagle, LLC ("Jones Eagle"), formerly known as Jones Digital, LLC, brings this complaint against defendants Wes Ward, in his official capacity as the Secretary of Agriculture of Arkansas, Tim Griffin, in his official capacity as the Attorney General of Arkansas, and the State of Arkansas ("Defendants").

I. INTRODUCTION

1. This action seeks injunctive and declaratory relief against Defendants' imminently threatened enforcement of two unconstitutional laws: Act 636 of 2023 ("Act 636") and Act 174 of 2024 ("Act 174") (jointly, "Acts 636 and 174").

2. Acts 636 and 174 are unconstitutional on their face and as applied to Jones Eagle.

3. Acts 636 and 174 discriminate based on race, alienage, and national origin in violation of Jones Eagle's rights to equal protection.

4. Acts 636 and 174 violate Jones Eagle's rights to due process of law.

5. Acts 636 and 174 discriminate against interstate and foreign commerce in violation of the commerce clause.

This case assigned to District Judge Baker
and to Magistrate Judge Ervin

6. Acts 636 and 174 invite enforcement efforts undertaken in the absence of reasonable suspicion and based on the perceived race, alienage, and national origin of investigative targets, which has resulted in ongoing and foreseeable future harm against Jones Eagle.

7. Acts 636 and 174 are preempted by federal law.

8. Acts 636 and 174 threaten takings of Jones Eagle's private property without just compensation.

II. JURISDICTION, VENUE, AND PARTIES

9. This Court has original jurisdiction under 28 U.S.C. § 1331 because the claims arise under the Constitution, laws, or treaties of the United States.

10. Venue is proper in this Court under 28 U.S.C. § 1391(b).

11. Jones Eagle is a limited liability company which was formed under Delaware law as Jones Digital, LLC. Plaintiff amended its name from Jones Digital, LLC on October 4, 2024, through the submission of an amendment to the Delaware Secretary of State.

12. Wes Ward ("Secretary Ward") is a natural person and citizen of Arkansas and is sued in his official capacity as the Secretary of Arkansas Department of Agriculture ("Department"). Ark. Code Ann. § 25-23-202. Secretary Ward is the chief executive officer of the Department and exercises superintending authority over the activities of its agents, designees, employees, and representatives, including their conduct relating to Acts 636 and 174.

13. Tim Griffin ("Attorney General Griffin") is a natural person and citizen of Arkansas and is sued in his official capacity as the Attorney General of Arkansas. Attorney General Griffin exercises superintending authority over the activities of his agents, designees, employees, and representatives, including their conduct relating to Acts 636 and 174.

14. The State of Arkansas is a constituent political subdivision of the United States of America.

15. Jones Eagle brings federal claims for prospective injunctive relief and declaratory judgment against all Defendants under U.S. Const., amend. V and XIV; Fed. R. Civ. P. 57; 28 U.S.C. §§ 2201 and 2202; 42 U.S.C. §§ 1981 and 1983, and *Ex parte Young*, 209 U.S. 123 (1908).

16. Jones Eagle brings its taking claim for damages against the State of Arkansas, which lacks sovereign immunity applicable to claims for just compensation arising directly under the Fifth and Fourteenth Amendments to the Constitution of the United States in the absence of an adequate and available state cause of action. *DeVillier v. Texas*, 601 U.S. 285, 144 S. Ct. 938 (2024).

III. BACKGROUND

17. In May 1882, the United States passed the Chinese Exclusion Act, which banned all Chinese laborers from immigrating to the United States. The Chinese Exclusion Act was the first and only major U.S. law ever implemented to prevent all members of a specific racial group from immigrating to the United States. The law remained in force until 1943, when China became a wartime ally of the United States against Japan.

18. But Arkansas chose a different path. The Arkansas Constitution provides that "[n]o distinction shall ever be made by law, between resident aliens and citizens, in regard to the possession, enjoyment or descent of property." Ark. Const. Art. 2, § 20.

19. As the Arkansas Constitution makes clear, Arkansas law affords no compelling state interest to discriminate based on race, alienage, or national origin with respect to property rights.

20. In 1927, the Arkansas Supreme Court applied the Arkansas Constitution to strike down a state law called Act 249 of 1925, known as the "Alien Land Act." *Applegate v. Lum Jung Luke*, 173 Ark. 93, 291 S.W. 978 (1927).

21. The Arkansas Alien Land Act attempted to prohibit certain aliens from acquiring, possessing, enjoying, using, cultivating, occupying, or transferring real estate. *Id.*, at 979.

22. The Arkansas Supreme Court struck down the Arkansas Alien Land Act by applying Ark. Const. Art. 2, § 20. *Id.*, at 979 ("The manifest and only intent which can be extracted from the language is that all resident aliens in Arkansas, whether eligible to naturalization and citizenship under the laws of the United States, have the same right to acquire and enjoy the possession of property in this state, either by purchase or descent, that any natural citizen has.").

23. However, equal justice under law has not always been enjoyed by Asian-Americans in Arkansas.

24. During World War II, the United States War Relocation Authority established two internment camps in Arkansas: Jerome and Rohwer.

25. The Rowher internment camp was located in Desha County, Arkansas, less than 50 miles south from Jones Eagle's data center in Arkansas County, Arkansas.

26. In *Korematsu v. United States*, the Supreme Court found that certain wartime powers of the ***federal*** government allowed Congress and the President "to exclude those of Japanese ancestry from the West Coast war area at the time they did." 323 U.S. 214, 217, 65 S. Ct. 193, 194 (1944).

27. However, in 1948, the U.S. Supreme Court held that the 14th Amendment rights of Fred Oyama, a U.S. citizen and the son of Japanese immigrants, had been violated when the State of California moved to repossess land purchased by Oyama's non-citizen father in Oyama's name

while the family was incarcerated in an internment camp. *Oyama v. California*, 332 U.S. 633, 68 S. Ct. 269 (1948).

28. As a result of the *Oyama* decision and other developments in equal protection case law, most of the country's Alien Land Laws were repealed or struck down in the 1950s.

29. On August 10, 1988, President Reagan signed into law the Civil Liberties Act of 1988, which provided monetary restitution to surviving victims of Japanese-American internment camps during World War II. 50 U.S.C. §§ 4201, *et seq.*

30. At the signing ceremony, President Reagan recalled, "America stands unique in the world—the only country not founded on race but on a way, on an ideal. Not in spite of, but because of our polyglot background, we have had all the strength in the world. That is the American way. And yes, the idea of liberty and justice for all, that is still the American way."

31. On March 24, 2023, Jones Eagle, through its predecessor-in-interest, entered a commercial lease for real property in Arkansas County, Arkansas for the purpose of engaging in the business of operating a data center, including mining digital assets such as cryptocurrency.

32. Since entering into that lease agreement, Jones Eagle has taken concrete steps and expended considerable funds to plan and build a facility and conducts ongoing operations of its data center on the parcel.

33. Jones Eagle's data center operations on the parcel are lawful business operations that comply with facially non-discriminatory Arkansas laws. *See* Ark. Code Ann. § 14-1-602.

34. Thus, as to non-discriminatory legal requirements, Jones Eagle has complied "with every requisite deemed by the law, or by the public officers charged with its administration[.]" *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886).

35. Through government overreach, Defendants now seek to interfere with Jones Eagle's continued business operations and deprive Jones Eagle of its lawful business expectancies.

36. Defendants have launched a prolonged, pretextual investigation under a facially discriminatory statute that does not apply to Jones Eagle's leasehold interest.

37. Defendants have no reasonable likelihood of success in any proceedings that could be initiated under Act 636.

38. Act 636 does not apply to Jones Eagle's real property interest in Arkansas County, Arkansas because it is not "agricultural land" as defined by Act 636.

39. Qimin "Jimmy" Chen ("Mr. Chen") is an American citizen who exercises control over Jones Eagle as the sole owner of Eagle Asset Holding, Inc.

40. Mr. Chen was born in China and immigrated to the United States as a child.

41. Mr. Chen exercises control over the operations of Jones Eagle through his ownership of its majority interest-holding member, Eagle Asset Holding, Inc.

42. Despite actual notice of these facts, Defendants continue to threaten enforcement actions against Jones Eagle under Act 636 of 2023 and, potentially, Act 174 of 2024.

43. However, both Act 636 and 174 are unconstitutional.

44. Therefore, through this action, Jones Eagle requests that the Court enter judgment declaring that Acts 636 and 174 violate the U.S. Constitution and federal statutory law, and an injunction to restrain Defendants from efforts to enforce these discriminatory and unconstitutional laws against Jones Eagle.

A. The legislative history of Act 636 of 2023

45. On March 14, 2023, the Arkansas Senate Agriculture, Forestry, and Economic Development Committee first considered SB 383 of 2023 ("SB 383"), which ultimately became enacted into law as Act 636 of 2023 ("Act 636").

46. SB 383 was sponsored by Arkansas State Senator Blake Johnson.

47. Within the first minute of Senator Johnson's committee speech in support of SB 383, Senator Johnson specified that the legislation was intended to apply to citizens and residents of China, stating "this prohibition is for those ITAR nations, and I'm gonna give you a few of those that are on the list: China, Cuba, Iran, North Korea, Syria, Venezuela, Afghanistan, Haiti, Iraq, Lebanon, Libya, Russia, Somalia, that's just a piece—there's 24 of those nations that are on the ITAR list that we don't do defense secrets or trading with."

48. Senator Johnson made clear that the real purpose of Act 636 was to discriminate against persons believed to be Chinese, stating, "we have recently seen a balloon fly over our land and there is great concern over that, and I think the concern as well should be on the land that's below where that balloon was that's in Arkansas, and I feel like it's a defense—I mean if we can't feed or clothe ourselves as a nation, it's a defense issue for our nation and for Arkansas."

49. Senator Johnson's reference to a "balloon" was a reference to a Chinese high-altitude surveillance balloon that was shot down by the U.S. Air Force off the coast of South Carolina on February 4, 2023. F-22 Safely Shoots Down Chinese Spy Balloon Off South Carolina Coast. U.S. Department of Defense, *available at* https://www.defense.gov/News/News-Stories/Article/Article/3288543/f-22-safely-shoots-down-chinese-spy-balloon-off-south-carolina-coast/

50. After Senator Johnson's comments in support of SB 383, the Arkansas Senate Agriculture, Forestry, and Economic Development Committee passed SB 383 by voice vote to be submitted for consideration on the floor of the Arkansas Senate.

51. On March 27, 2023, Senator Johnson introduced SB 383 on the floor of the Arkansas Senate.

52. In support of the bill, Senator Johnson stated, "I'm gonna read a few of those nations: China, Iran, North Korea, Syria, Venezuela, Afghanistan, Haiti, Iraq, Lebanon, Libya, Russia, Somalia, that's just a few of those nations, there's 24 in all. This limits those nations. We had a balloon fly over. And everybody was worried about the balloon taking pictures of the land below it. If we don't want a balloon flying over our nation, we shouldn't want them owning land. We can't go over there and buy property, so this is what this bill does."

53. Following Senator Johnson's floor speech, the Arkansas Senate passed SB 383, which was transmitted to the Arkansas House.

54. On April 5, 2023, the Arkansas House considered SB 383 and passed it with a minor amendment.

55. On April 6, 2023, the Arkansas Senate reconsidered the House's amendment to SB 383 and passed it for approval by the governor.

56. On April 11, 2023, SB 383 was enacted as Act 636, which is codified as Ark. Code Ann. §§ 18-11-110 and 18-11-801, *et seq.*

B. The text of Act 636 of 2023

57. Through the enactment of Act 636, Subchapter 8 of Title 18 of the Arkansas Code became entitled "Foreign Ownership of Agricultural Land."

58. Act 636 purports to criminalize foreign ownership of an "interest in agricultural land," defined by Ark. Code Ann. § 18-11-802(1)(A).

59. Act 636 criminalizes ownership of agricultural land by a "prohibited foreign party," and defines "prohibited foreign party" in a manner intended to facially discriminate against persons perceived to be citizens or residents of China, by incorporating the International Traffic in Arms Regulations ("ITAR"). 22 C.F.R. § 126.1.

60. Act 636 facially discriminates against persons based on race, alienage, and national origin. Ark. Code Ann. § 18-11-802(5).

61. Act 636 purports to prohibit any "prohibited foreign party" from holding "significant interest" or "substantial control" in any "party other than an individual or government," to include corporations, limited liability companies, and other business organizations. Ark. Code Ann. § 18-11-802(8)(A)(i).

62. Criminal sanctions under Act 636 include imposition of a conviction of "a felony punishable by not more than two (2) years' imprisonment in the custody of the Division of Correction or a fine of fifteen thousand dollars ($15,000), or both." Ark. Code Ann. § 18-11-804(e).

63. Act 636 creates the Office of Agricultural Intelligence within the Arkansas Department of Agriculture, which is "authorized and directed to collect and analyze information concerning the unlawful sale or possession of agricultural land by prohibited foreign parties; and administer and enforce the provisions of this subchapter, including without limitation the reporting of a violation of this subchapter to the Attorney General under 18-11-804(c)." Ark. Code Ann. § 18-11-805.

64. Act 636 provides that "the office shall operate under the direction of" the Arkansas Secretary of Agriculture. Ark. Code Ann. § 18-11-805(d).

65. Act 636 provides no constraint or limitation on the discretion of the Secretary of Agriculture when "reporting of a violation of this subchapter to the Attorney General." Ark. Code Ann. § 18-11-805(b)(2).

66. Act 636 contains no limitations or guidelines to govern a finding of reasonable suspicion sufficient to sustain a referral by the Secretary of Agriculture for a criminal investigation by the Attorney General.

67. Act 636 invites and has caused harmful disparate treatment to Mr. Chen and Jones Eagle based on their perceived race, alienage, and national origin, including discrimination based on the perceived national origin of the names of persons affiliated with businesses and companies, such as Mr. Chen and Jones Eagle, many of whom have been subjected to criminal investigations in the absence of reasonable suspicion.

68. Acts 636 and 174 threaten substantial risk of persistent and recurring criminal investigations without reasonable suspicion or probable cause as against persons such as Mr. Chen, Jones Eagle, and others similarly situated.

69. Act 636 provides an affirmative defense for "a prohibited foreign party" that "is a resident alien of the State of Arkansas," which facially discriminates against resident aliens outside Arkansas. Ark. Code Ann. § 18-11-804(f).

70. Defendants have improperly exercised perceived statutory authority under Act 636 to target Jones Eagle, and others, on the basis of perceived race, alienage, and/or national origin of Jones Eagle and its affiliates.

71. Act 636 confers to the Attorney General a power to cause a taking of Jones Eagle's property rights through judicial foreclosure to be "disbursed to lien holders" without providing just

compensation to Jones Eagle as the original owner of the taken property. Ark. Code Ann. § 18-11-804(d)(1).

C. The legislative history of Act 174

72. On April 18, 2024, the Arkansas Senate City, County – Local Affairs committee first considered SB 78 and SB 79, which were sponsored by Arkansas State Senators Josh Bryant and Missy Irvin, respectively.

73. During his comments at the committee hearing, Senators Bryant and Irvin repeatedly emphasized the prohibition on "foreign ownership" to be imposed by SB 78 and SB 79.

74. During the legislative process, multiple state senators and witnesses, including local public officials, asserted that data asset mining businesses operating in Arkansas were controlled in whole or in part by the government of the People's Republic of China.

75. The Arkansas Senate City, County – Local Affairs committee passed SB 78 and 79 by voice vote to be submitted for consideration on the floor of the Arkansas Senate.

76. On April 24, 2024, SB 78 and SB 79 were submitted to the full Arkansas Senate after certain minor amendments.

77. Legislative discussion on SB 78 and SB 79 focused specifically on China.

78. Discussing SB 78 before the full Senate, Senator Bryant stated, "The last piece deals with foreign ownership. I think a commonality of the industry that is not playing well in Arkansas is the fact that they are not Arkansas-owned or American-owned.

79. Senator Bryant stated, "[t]hose that do not, we're going to ask them to leave our state and that includes all foreign adversarially-owned facilities and business models for this crypto-mining industry."

80. Senator Bryant continued, "On those particular examples, if they're foreign-owned, they'll have to divest to become American-owned at least and hopefully Arkansan-owned."

81. In directing a question to Senator Bryant on the Senate floor, Arkansas State Senator Bryan King stated, "I mean, to me it's almost like, on this foreign-ownership, ten months after Pearl Harbor, well we may need to look into the Japanese Navy."

82. Senator King stated, "Harrison was Pearl Harbored," in reference to a proposed crypto-mining development that was intended to be constructed in Harrison, Arkansas.

D. The text of Act 174

83. On or about May 3, 2024, the Arkansas General Assembly passed Act 174 of 2024 ("Act 174"), which effectuated amendments to Act 851 of 2023, known as the Arkansas Data Centers Act of 2023 ("Act 851").

84. Act 174 created a new section, 14-1-606, which is entitled "Ownership of digital asset mining business by prohibited foreign-party-controlled business prohibited—Definitions—Penalty—Reporting." Ark. Code Ann. § 14-1-606.

85. Act 174 defines "interest" as "an ownership interest of greater than zero percent (0%). Ark. Code Ann. § 14-1-606(a)(1).

86. Act 174 prohibits ***any*** interest in a "digital asset mining business" being held by a "prohibited foreign party." Ark. Code Ann. § 14-1-606(a)(2).

87. By virtue of ownership—even *de minimis* ownership—by a "prohibited foreign party," an otherwise lawful digital asset mining business is transformed into a "prohibited foreign-party-controlled business." *See id.*

88. Ark. Code Ann. § 14-1-606 provides a four-part definition of "prohibited foreign party," which is in turn defined "subject to § 126.1 of the International Traffic in Arms Regulations ("ITAR"), 22 C.F.R. § 120.1 et seq., as existing on January 1, 2024."

89. However, Act 174's definitions of "interest" and "foreign party" are inconsistent with the federal definitions under the ITAR.

90. The Attorney General has essentially boundless discretion to "conduct an investigation" under Act 174, provided that "a person" makes a "request" or "upon receipt of information that leads the Attorney General to believe that a violation of this section may exist[.]. Ark. Code Ann. § 14-1-606.

91. Act 174 purports to give the Attorney General the power to "order" a "prohibited foreign party to divest all interest in the digital asset mining business." Ark. Code Ann. § 14-1-606(e)(1).

92. If the prohibited foreign party "fails to divest all interest in the digital asset mining business within three hundred sixty five (365) calendar days," then the Attorney General has a right of action to seek judicial foreclosure.

93. Proceeds of such a judicial foreclosure "shall be disbursed to the lienholders, in order of priority, except for liens that under the terms of the sale are to remain." Ark. Code Ann. 14-1-606(e)(B).

94. Act 174 makes no provision for any compensation to a "prohibited foreign party" whose property is actually taken by the government and sold by forced judicial foreclosure.

E. History of discriminatory enforcement efforts under Act 636

95. The short history of enforcement attempts under Act 636 is a history of failure due to the recurring absence of reasonable suspicion and probable cause.

96. On numerous occasions, Defendants' Act 636 referrals and investigations have been undertaken in the absence of reasonable suspicion. *See e.g.*, State's Investigation Determines Ownership of Property Near Ebbing Air National Base Doesn't Have Illegal Ties to Chinese

Government, Snyder, Josh, *Arkansas Democrat-Gazette*, Aug. 13, 2024, *available at* https://www.arkansasonline.com/news/2024/aug/13/states-investigation-determines-ownership-of/; China-based Company Risever Machinery's Jonesboro Factory Found Not to Be In Violation of Law on Land Ownership, Earley, Neal, *Arkansas Democrat-Gazette*, Dec. 26, 2023, *available at https://www.arkansasonline.com/news/2023/dec/26/china-based-companys-jonesboro-factory-found-not/*.

97. The Attorney General's investigation of 4811 S. Zero Street, LLC revealed that the principal of that Arkansas limited liability company had Taiwanese heritage, not Chinese heritage.

98. Filings by that company with the Arkansas Secretary of State contained a listed individual whose name appears to be of Chinese origin.

99. The Attorney General has not publicly disclosed any basis for reasonable suspicion of a violation of Act 636 by 4811 S. Zero Street, LLC.

100. As a staunch American ally, the Republic of China (Taiwan) is not a foreign nation listed on the ITAR.

101. The Attorney General's investigation of Risever Machinery LLC ("Risever") was an investigation into a company that Governor Asa Hutchinson had personally recruited from China.

102. Governor Hutchinson attended Risever's grand opening in Jonesboro, Arkansas on October 23, 2019, where Governor Hutchinson stated, "We're thrilled that the Risever plant is in production. It is one of several Chinese companies that are choosing to locate in Arkansas thanks in large part to our skilled workforce and low business costs." Risever to Begin Trial Operations in Jonesboro, *Talk Business & Politics*, October 23, 2019, *available at https://talkbusiness.net/2019/10/risever-to-begin-trial-operations-in-jonesboro/*.

103. To secure Risever's investment in Arkansas, Governor Hutchinson offered $1 million from the Governor's Quick Action Closing Fund, which was the culmination of a ten-month negotiation with the Arkansas Economic Development Commission and Jonesboro Unlimited, a private partnership organization that focuses on economic development in Jonesboro. *Id.*

F. Defendants' pretextual Act 636 investigation of Jones Eagle

104. On December 13, 2023, Governor Sarah Huckabee Sanders issued a press release entitled "Sanders Administration Holds China Accountable." *See https://governor.arkansas.gov/news_post/sanders-administration-holds-china-accountable/.*

105. That press release stated that Governor Sanders's "Administration today alerted Attorney General Tim Griffin's office of two companies that may be in violation of Act 636, which prohibits foreign-party-controlled businesses from owning Arkansas land." *Id.*

106. That press release announced an investigation under Act 636 into Risever, and also an otherwise wholly unrelated entity: Jones Digital, LLC, Jones Eagle's predecessor-in-interest.

107. Secretary Ward wrote, "A review of Jones Digital's ownership indicates that the entity may have significant ties to China." *Id.*

108. However, upon information and belief, Secretary Ward had done no "review of Jones Digital's ownership" on December 13, 2023.

109. Secretary Ward referred "potential violations" of Act 636 to Attorney General Griffin's office and requested that Attorney General Griffin "utilize the authority granted under

A.C.A. 18-11-704(c)(2) to determine if a violation of Act 636 has in fact occurred, and if so, commence appropriate legal action." *Id.*

110. Jones Eagle's real property interest is not "agricultural land" as defined under Ark. Code Ann. § 18-11-802(1)(A).

111. Therefore, Act 636 does not apply to Jones Eagle.

112. Since January 2, 2024, Jones Eagle and its predecessor-in-interest has been in frequent correspondence with the Attorney General's Office seeking to conclude that office's investigation based on Secretary Ward's referral under Act 636.

113. Jones Eagle has made numerous requests to meet and confer with the Attorney General's Office, but all those requests have been refused.

114. On January 12, 2024, Jones Eagle's predecessor-in-interest provided evidence, including specific third-party land surveys, which showed its leasehold interest was less than 10 acres and therefore could not meet the statutory definition of "agricultural land." Ark. Code Ann. § 18-11-802(1)(A).

115. Jones Eagle provided that evidence in response to the Attorney General's specific request for "documentation that shows Jones Digital is in compliance with Act 636 – specifically that its leasehold is less than 10 acres."

116. Despite actual knowledge that Jones Eagle's leasehold interest is not "agricultural land" as defined under Act 636, the Attorney General has refused to conclude the investigation under Act 636.

117. The Attorney General has refused to protect Jones Eagle's confidential business records from public disclosure, and the Attorney General has refused to a clawback request of Jones Eagle's privileged materials obtained from a third party without Jones Eagle's consent.

118. Jones Eagle's controlling interest is held by Mr. Chen, who is a U.S. citizen and domiciliary of Brooklyn, New York.

119. Mr. Chen's exercise of control over Jones Eagle extends back to its predecessor-in-interest, Jones Digital.

120. Mr. Chen is a naturalized American citizen with Chinese ancestry.

121. Defendants' coordinated efforts under Act 636 have been pretextual and discriminatory.

122. Defendants have no reasonable expectation of obtaining a valid conviction under Act 636 against Jones Eagle. *Lewellen v. Raff*, 843 F.2d 1103 (8th Cir. 1988) (citing *Kugler v. Helfant*, 421 U.S. 117, 126 n.6, 95 S. Ct. 1524, 1531 n. 6 (1975)).

123. Jones Eagle is suffering present and foreseeably compounding prejudice caused by Defendants' pretextual and discriminatory investigative efforts.

124. Jones Eagle will sustain irreparable harm if Defendants' unconstitutional activities are allowed to continue.

F. The Federal Government's role in foreign affairs, foreign investment, and national security

125. At the time of the Revolution, "the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America." *United States v. Curtis-Wright Export Corp.*, 299 U.S. 304, 316, 57 S. Ct. 216, 219 (1936).

126. The federal government manages foreign affairs, foreign investment, and national security in the United States, including through two systematic federal regimes: (i) the Committee on Foreign Investment in the United States ("CFIUS"), which has been empowered to review foreign investment transactions, and (ii) the Office of Foreign Assets Control ("OFAC") within the

U.S. Treasury Department, which administers and enforces economic regulations and trade sanctions.

127. The U.S. Department of State occupies the field of regulating the International Traffic in Arms Regulations ("ITAR"), based on Congressional statutory delegation to the President, consistent with the supremacy of federal power in the arena of national defense policy in exercise of "the powers of external sovereignty." *Curtis-Wright*, 299 U.S. at 316.

128. Acts 636 and 174 intrude on fields occupied by Congress and the President in violation of the Supremacy Clause.

i. History of CFIUS

129. CFIUS was established on May 7, 1975, by President Ford through an executive order. E.O. 11858, 40 F.R. 20263. CFIUS became the interagency body of the federal executive branch responsible for overseeing issues of national security with respect to direct foreign investment, including real estate transactions. CFIUS was directed to, *inter alia*, monitor trends and developments in foreign investment in the United States, prepare guidance for foreign governments and consult regarding prospective major foreign governmental investments in the United States, review foreign investments that could have major implications for the national security interests of the United States, and consider proposals for new legislation or regulations relating to foreign investment as necessary.

130. Later, Congress enacted the Exon-Florio amendment to the Defense Production Act, included in the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 5021, 102 Stat. 1107, 1425-26. It established a mechanism for the federal executive branch to engage in a retrospective review of foreign investments. On December 27, 1988, President Reagan delegated that power to CFIUS by executive order, empowering it to conduct reviews, undertake

investigations, and make recommendations with respect to foreign investment data and policies. E.O. 12661, 54 F.R. 779. By 1991, the U.S. Treasury Department promulgated federal regulations implementing the Exon-Florio amendment, which were codified at 31 C.F.R. Part 800.

131. The next year, Congress amended the Exon-Florio provision with the Byrd Amendment to the National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 837, 106 Stat. 2315, 2463-65 (1992). The Byrd Amendment broadened CFIUS's duties to investigate certain foreign investments, in particular, those in which the acquirer was controlled or acting on behalf of a foreign government, and those in which the acquisition would result in the control of a person engaged in interstate commerce within the United States that could affect national security.

132. Eventually, Congress passed, and President Bush signed, the Foreign Investment and National Security Act of 2007 ("FINSA"), Pub. L. No. 110-49, 121 Stat. 246, giving Congress further oversight of CFIUS. FINSA also expanded the national security prerogatives within CFIUS's purview and required CFIUS to engage in even greater scrutiny of foreign direct investments. It also concretized CFIUS's position as a permanent federal agency by codifying it and granting it statutory authority, including certifying to Congress that a transaction that had been reviewed had no unresolved national security issues and providing Congress with confidential briefings, as well as annual classified and unclassified reports.

133. Most recently, Congress passed the Foreign Investment Risk Review Modernization Act of 2018 ("FIRRMA"), Pub. L. No. 115-232, §§ 1701-28, 132 Stat. 2174-2207, which President Trump signed into law. The impetus for FIRRMA was the concern by many members of Congress over Chinese companies' growing investment in the United States. In response, Congress significantly expanded CFIUS's authority to investigate and review foreign

investments. Most notably, CFIUS was granted jurisdiction to review certain real estate transactions by foreign persons, specifically, those in close proximity to a military installation, or to a U.S. government facility, or property sensitive to national security. Congress also empowered CFIUS to review changes in foreign investor rights regarding U.S. businesses, as well as transactions in which a foreign government has a direct or indirect substantial interest. FIRRMA further authorized CFIUS to designate some countries as "countries of special concern" based on CFIUS's assessment as to whether that country has demonstrated or declared a strategic goal of acquiring a type of critical technology or critical infrastructure that would affect U.S. national security interests. In that regard, FIRRMA also formalized CFIUS's use of risk-based assessments to determine whether certain transaction pose threats to national security.

134. At the same time, Congress carefully calibrated the regulation of real estate purchases. For example, Congress constrained the President's power to prohibit transactions by exempting those involving only "a single 'housing unit.'" 50 U.S.C. § 4565(a)(4)(C)(i); *see* 31 C.F.R. §§ 802.223 (defining term), 802.216 (includes "adjacent land" incidental to use as housing unit.). That exception reflects the marginal national security implications of such transactions. In addition, the federal process is individualized, with the government reviewing particular transactions and purchasers to assess whether they pose any national security threat. 50 U.S.C. § 4565(d)(4). Penalties are narrowly tailored. Criminal liability attaches only where a person has made a false statement to CFIUS. 31 C.F.R. § 802.901(a)-(c), (g).

ii. History of OFAC

135. In addition to the CFIUS regime, the Treasury Department, through OFAC, is heavily involved with administering and enforcing economic and trade sanctions in support of U.S. national security and foreign policy objectives, including those authorized by Congress and the

President pursuant to the International Emergency Economic Powers Act of 1977 ("IEEPA"), Pub. L. No 95-223, §§ 201-08, 91 Stat. 1625, 1626-29. The Division of Foreign Assets Control, OFAC's immediate predecessor, was established under the Treasury Department in 1950. OFAC derives its authority from a variety of federal laws regarding economic sanctions and embargoes, particularly IEEPA.

136. OFAC is intended to prevent "prohibited transactions," which it defines as "trade or financial transactions and other dealings in which U.S. persons may not engage unless authorized by OFAC or expressly exempted by statute." OFAC administers and enforces economic sanctions programs against countries, businesses, and groups of individuals, using the blocking of assets and trade restrictions to accomplish foreign policy and national security goals. It maintains and regularly updates several sanction lists identifying countries, entities, and individuals considered to be threats to national security.

iii. History of ITAR

137. The International Traffic in Arms Regulations ("ITAR") are regulations promulgated by the State Department pursuant to authority vested in the President by the Arms Export Control Act of 1976 ("AECA"), Pub. L. 90-629, 90 Stat. 729, codified at 22 U.S.C. §§ 2278, *et seq.*

138. On March 8, 2013, President Obama delegated via executive order that statutory authority to the Secretary of State to oversee the export and temporary import of certain defense articles and services. E.O. 13637, 78 F.R. 16129.

139. The ITAR strikes a deliberate, delicate balance as to the application of federal criminal statutes and regulatory controls over an assortment of federal agencies.

140. The ITAR contains its own definitions of foreign ownership and foreign control over firms "owned by one or more foreign persons," and "foreign control is presumed to exist where foreign persons own 25 percent or more of the outstanding voting securities unless one U.S. person controls an equal or larger percentage." 22 C.F.R. § 120.65.

141. 22 C.F.R. § 126.1(d)(1) contains specific prohibitions "for defense articles and defense services," which presently includes the foreign states of Belarus, Burma, China, Cuba, Iran, North Korea, Syria, and Venezuela.

142. But the State Department has chosen to distinguish between foreign states for which "defense articles and defense services" "have a policy of denial," without limitation, and those foreign states which have "a policy of denial" "as specified." 22 C.F.R. § 126.1(d)(2).

143. The latter category includes 16 separate foreign states, including Cyprus.

144. No member of the General Assembly mentioned Cyprus at any point during consideration of Acts 636 and 174, nor any interest in regulating any conduct by Cypriots.

145. In sum, the federal government—through statutes, executive orders, executive agencies, and inherent powers—occupies the fields of foreign affairs, foreign investment, national security, and the intersection thereof.

146. Acts 636 and 174 conflict with the deliberate, delicate balance that the federal government has struck with respect to these matters.

Count One: Violation of Equal Protection

147. The Equal Protection Clause of the 14th Amendment to the U.S. Constitution provides that: "No State shall [...] deny to any person within its jurisdiction the equal protection of the laws."

148. The Equal Protection Clause protects all persons in the United States, regardless of their race, alienage, or national origin, including Jones Eagle and its affiliates.

149. The Equal Protection Clause prohibits the States from denying any person equal protection of the laws based on the person's race, alienage, or national origin. This includes laws that appear neutral on their face but are motivated by discriminatory intent and result in discriminatory practices or disparate treatment due to race, alienage, or national origin.

150. Acts 636 and 174 target Jones Digital and its affiliates based on their perceived race, alienage, and national origin.

151. Defendants have undertaken discriminatory and pretextual efforts to target Jones Eagle with investigations under Act 636 in the absence of reasonable suspicion.

152. Acts 636 and 174 were enacted with the purpose and intent to discriminate against persons based on race, alienage, and national origin, in particular, Chinese nationals and naturalized U.S. Citizens of Chinese heritage, such as Mr. Chen.

153. Acts 636 and 174 make impermissible classifications based on race, alienage, and national origin that are not justified by a compelling state interest.

154. Acts 636 and 174 are not narrowly tailored to meet a compelling state interest.

155. As a matter of Arkansas constitutional law, discriminatory classifications regulating property rights based on race, alienage, or national origin are not a legitimate governmental interest. Ark. Const. Art. 2, § 20; *Applegate v. Lum Jung Luke*, 173 Ark. 93, 291 S.W. 978 (1927).

156. Intentional discrimination against out-of-state business is not a legitimate state purpose. *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 880 (1985).

157. Acts 636 and 174, and Defendants' history of enforcement efforts, invidiously target Jones Digital, and persons similarly situated, based on their perceived race, alienage, and national origin, which has resulted in Defendants' discriminatory practices and disparate treatment.

158. Acts 636 and 174 deprive Chinese persons, naturalized U.S. Citizens of Chinese heritage, and persons perceived to be Chinese, from the equal protection of the laws, including laws relating to their fundamental rights.

159. No action to enforce either Act 636 or 174 has yet been commenced; however, Jones Eagle believes such enforcement efforts are imminent.

160. The imminent enforcement efforts of Acts 636 and 174 will cause ongoing and irreparable harm to Jones Eagle.

161. Acts 636 and 174 have caused Jones Eagle to be discriminated against and subject to disparate treatment by Defendants and others based on Jones Eagle and its affiliates' perceived race, alienage, and national origin.

162. Acts 636 and 174 deprive Jones Eagle of the opportunity to grow business expectancies by limiting their ability to attract capital investment and reducing the value of Jones Eagle's business expectancies and current and potential real property interests, causing irreparable harm to Jones Eagle's goodwill.

163. In implementing and enforcing the provisions of these laws, Defendants are acting under color of state law to deprive Jones Eagles, its affiliates, and other individuals of their rights, privileges, and immunities granted under the U.S. Constitution and federal law.

Count Two: Violation of the Right to Procedural Due Process

164. The Due Process Clause of the 14th Amendment provides: "No State shall [...] deprive any person of life, liberty, or property, without due process of law[.]"

165. The protections of the Due Process Clause apply to all persons in the United States, regardless of their race, alienage, and national origin, including Jones Eagle.

166. The Due Process Clause protects the fundamental rights and liberty interests of all persons in the United States from unreasonable governmental interference through state action, including that which is arbitrary, irrational, oppressive, discriminatory, and egregious. This entails the right to procedural due process, which consists, at a minimum, of the right to fair notice and an opportunity to be heard.

167. The new prohibitions imposed under Acts 636 and 174 target Jones Eagle and other persons based on their perceived race, alienage, or national origin by attempting to prevent Jones Eagle from owning its leasehold interest and operating its lawful business operations.

168. Acts 636 and 174 violate the Due Process Clause under the 14th Amendment to the U.S. Constitution, both facially and as applied to Jones Eagle, on the following grounds:

a. Act 636 is impermissibly vague, indefinite, and ambiguous because it fails to clearly define "agricultural land"; and it therefore fails to provide sufficient notice about which properties and persons are subject to its classifications, prohibitions, penalties, and requirements.

b. Acts 636 and 174 are impermissibly vague, indefinite, and ambiguous because they do not state whether they have retroactive application to existing interests in land or business expectancies; and they therefore fail to provide sufficient notice about which properties and persons are subject to their classifications, prohibitions, penalties, and requirements.

c. Acts 636 and 174 set no standards to define "reasonable suspicion," "probable cause," or any other guardrails against arbitrary and discriminatory enforcement efforts, many of which have already been undertaken.

169. The vagueness and lack of adequate guidelines under Acts 636 and 174 authorizes and encourages arbitrary and discriminatory enforcement across Arkansas, including with respect to Jones Eagle.

170. The enactment and enforcement of Acts 636 and 174 have caused and will continue to cause ongoing and irreparable harm to Jones Eagle.

171. In implementing and enforcing the provisions of this law, Defendants are acting under color of state law to deprive Jones Eagle, its affiliates, and other individuals of their rights, privileges, and immunities granted under the U.S. Constitution and federal law.

Count Three: Violation of the Commerce Clause

172. The commerce clause prohibits the enforcement of state laws driven by economic protectionism.

173. Acts 636 and 174 facially discriminate against out-of-state commerce in favor of in-state commerce.

174. Ark. Code Ann. § 18-11-804(a) expressly discriminates against resident aliens of the United States who reside outside Arkansas.

175. Conversely, Ark. Code Ann. § 18-11-804(a) expressly favors resident aliens of the United States who reside within Arkansas.

176. Act 636 provides an affirmative defense to resident aliens who reside in Arkansas but withholds that affirmative defense from resident aliens who reside outside Arkansas. Ark. Code Ann. § 18-11-804(f).

Count Four: Violation of the Supremacy Clause of the U.S. Constitution Preemption of Acts 636 and 174 by Federal Regimes Governing Foreign Affairs, Foreign Investment, and National Security

177. The Supremacy Clause of the U.S. Constitution states: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., Art. VI, Para. 2.

178. The Supremacy Clause establishes the doctrine of federal preemption, which mandates that federal law preempts state law in any area over which Congress has expressly or impliedly reserved exclusive authority or which is constitutionally reserved to the federal government, or where state law conflicts or interferes with federal alw or objectives.

179. Acts 636 and 174 are preempted by federal regimes governing foreign affairs, foreign investment, and national security, including CFIUS, OFAC, and ITAR. Under federal law, CFIUS is authorized, *inter alia*, to review foreign investment transactions with respect to national security concerns, as well as to review real estate transactions by foreign persons, specifically, those pertaining to properties in close proximity to military installations, U.S. government facilities, or properties of national security sensitivity. OFAC is responsible for administering and enforcing economic regulations. And the ITAR sets carefully crafted restrictions on transactions with foreign parties with sensitive implications for national security and foreign affairs.

180. Foreign relations, the power to deal with national security threats posed by foreign countries, and foreign commerce are the exclusive powers of the federal government. The U.S. Constitution vests the federal government the primary powers to manage foreign affairs and to

regulate foreign commerce. *See, e.g.*, U.S. Const., Art. I, Sec. 10, Cl. 1, 3 (foreign affairs); U.S. Const., Art. I, Sec. 8, Cl. 3 (commerce with foreign nations).

181. The federal government has long occupied the fields of foreign affairs, foreign investment, national security, and the intersection thereof, especially with respect to foreign relations with China.

182. Given the comprehensiveness of federal statutory, regulatory, and administrative schemes, federal law has "occupied" the entire field, thus precluding any state regulation such as attempted under Acts 636 and 174.

183. The State of Arkansas has explicitly stated its intent to regulate in these areas of foreign affairs and foreign investment, as they bear on national security, when enacting Acts 636 and 174.

184. The Governor of Arkansas and members of the Arkansas General Assembly have repeatedly emphasized the need to legislate based on "the defense issue for our nation" and to "hold China accountable."

185. In so doing, Acts 636 and 174 attempt to regulate through state law a field exclusively occupied by the federal government, specifically, the intersection between foreign affairs, national security, and foreign investment, including foreign real estate transactions and interstate and foreign commerce.

186. The prohibitions and penalties imposed under Acts 636 and 174 usurp the power vested by the Constitution and by Congress in the federal government to investigate, review, and take action with respect to foreign investments, including real estate transactions, that implicate national security policy.

187. Acts 636 and 174 intrude upon the federal government's power to govern foreign affairs generally.

188. Act 174 locks its definition of "prohibited foreign party" to the ITAR's classification list under 22 C.F.R. § 120.1 as to a specific date: January 1, 2024, even as Act 174 attempts to supplant the ITAR's definition of "foreign party," as defined by the ITAR. Ark. Code Ann. § 14-1-606(a)(3).

189. In so doing, Act 174 would continue to apply to a foreign nation, even if that nation is removed from the ITAR by the State Department; conversely, Act 174 could not apply to a foreign nation that the State Department later adds to the ITAR, resulting in foreseeable inconsistency between state and federal law.

190. Thus, Act 174 seeks to establish Arkansas's own foreign policy, thereby intruding upon the federal government's exclusive power to govern foreign affairs. *See Zschering v. Miller*, 389 U.S. 429 (1968).

191. Acts 636 and 174 intrude upon the federal government's power to govern foreign commerce, generally. By prohibiting "prohibited foreign parties" from specific countries from owning and acquiring agricultural land and business interests in Arkansas, both laws discriminate against out-of-state individuals and entities based on race, alienage, and national origin, in particular, Chinese persons. They therefore burden international commerce, especially with respect to foreign investment.

192. Acts 636 and 174 unavoidably conflict with the deliberate, delicate balance that the federal government has struck with respect to foreign affairs, foreign investment, and national security, and accordingly, they are preempted by federal law.

193. By their plain text, Acts 636 and 174 would punish a non-resident Cypriot for acquiring an interest in "agriculture land" in Arkansas, or for buying even a single share in a public company that conducts data asset mining activities in Arkansas.

Count Five: Taking Without Just Compensation

194. Acts 636 and 174 threaten to take Jones Eagle's property without just compensation.

195. "The Takings Clause of the Fifth Amendment provides that private property shall not 'be taken for public use, without just compensation.'" *Murr v. Wisconsin*, 582 U.S. 383, 392, 137 S. Ct. 1933, 1942 (2017) (citing U.S. Const. amend. V.).

196. A property owner has the right to bring a taking claim against a State directly under the Fifth Amendment in the absence of an adequate and available state cause of action. *See DeVillier v. Texas*, 601 U.S. 285, 144 S. Ct. 938 (2024).

197. There is no adequate and available cause of action available to Jones Eagle under Arkansas law to bring a taking claim against the State of Arkansas.

198. Jones Eagle's acquisition and use of its real property was lawful when it was established.

199. Acts 636 and 174 attempt to criminalize Jones Eagle's pre-existing lawful use of its property, which constitutes a taking of Jones Eagle's property without compensation in violation of due process of law. *Blundell v. City of West Memphis*, 258 Ark. 123, 522 S.W.2d 661 (1975).

200. Acts 636 and 174 intentionally, discriminatorily, and specifically interferes with Jones Eagle's distinct investment-backed expectations.

201. Acts 636 and 174 provide for forced divestiture of private property with no requirement to make just compensation to the owner.

202. The State of Arkansas has given no compensation to Jones Eagle, and neither Act 636 nor Act 174 obligates the State of Arkansas to do so.

203. In the absence of just compensation, all Defendants must be enjoined from proceeding with any enforcement measures under Acts 636 and 174 that would deprive Jones Eagle of its private property or its distinct investment-backed expectations.

204. Jones Eagle has already expended substantial capital investments to construct and operate its data center facility in Arkansas County, Arkansas.

205. If either Act 636 or Act 174 is allowed to be enforced, then Jones Eagle is entitled to recover from the State of Arkansas just compensation in the amount of its past capital expenditures and the anticipated net revenue from its distinct investment-backed expectations for the reasonable duration of its anticipated business expectancies.

REQUESTS FOR RELIEF

WHEREFORE, plaintiff Jones Eagle, LLC requests that the Court enter judgment in its favor and:

A. Declare Acts 636 and 174 unconstitutional under the 14th Amendment to the U.S. Constitution because they violate Jones Eagle's rights to equal protection.

B. Declare Acts 636 and 174 unconstitutional under the 14th Amendment to the U.S. Constitution, facially and as applied, because they violate Jones Eagle's rights to due process.

C. Declare Acts 636 and 174 unconstitutional under the commerce clause as they facially discriminate in favor of in-state commerce to the detriment of interstate commerce.

D. Declare Acts 636 and 174 unconstitutional under the Supremacy Clause of the U.S. Constitution as preempted by federal law.

E. Declare Acts 636 and 174 unconstitutional as takings without just compensation under the 5th and 14th Amendments to the U.S. Constitution.

F. Preliminarily and permanently enjoin Defendants from implementing and enforcing Acts 636 and 174 against Jones Eagle.

G. Order Defendants to destroy all records obtained concerning Jones Eagle, including affidavits and registrations, that Defendants have acquired pursuant to Acts 636 and 174.

H. Award Jones Eagle their reasonable attorneys' fees, costs, and expenses.

I. Grant all other relief this Court deems just and proper.

Dated: November 13, 2024

KUTAK ROCK LLP

By: _____

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Attorneys for Plaintiff Jones Eagle, LLC

JS 44 (Rev. 03/24)

CIVIL COVER SHEET

4:24-cv-990-KGB

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. *(SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)*

I. (a) PLAINTIFFS Jones Eagle, LLC

(b) County of Residence of First Listed Plaintiff Kent, Delaware
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys *(Firm Name, Address, and Telephone Number)*
Kutak Rock LLP 501-975-3000
124 W. Capitol Ave. Ste. 2000 LR, AR 72201

DEFENDANTS Wes Ward; Tim Griffin; State of Arkansas

County of Residence of First Listed Defendant
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys *(If Known)*

II. BASIS OF JURISDICTION *(Place an "X" in One Box Only)*

- ☐ 1 U.S. Government Plaintiff
- ☒ 3 Federal Question *(U.S. Government Not a Party)*
- ☐ 2 U.S. Government Defendant
- ☐ 4 Diversity *(Indicate Citizenship of Parties in Item III)*

III. CITIZENSHIP OF PRINCIPAL PARTIES *(Place an "X" in One Box for Plaintiff and One Box for Defendant)*
(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated *or* Principal Place of Business In This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated *and* Principal Place of Business In Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT *(Place an "X" in One Box Only)*

Click here for: Nature of Suit Code Descriptions.

CONTRACT
- ☐ 110 Insurance
- ☐ 120 Marine
- ☐ 130 Miller Act
- ☐ 140 Negotiable Instrument
- ☐ 150 Recovery of Overpayment & Enforcement of Judgment
- ☐ 151 Medicare Act
- ☐ 152 Recovery of Defaulted Student Loans (Excludes Veterans)
- ☐ 153 Recovery of Overpayment of Veteran's Benefits
- ☐ 160 Stockholders' Suits
- ☐ 190 Other Contract
- ☐ 195 Contract Product Liability
- ☐ 196 Franchise

REAL PROPERTY
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

TORTS

PERSONAL INJURY
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers' Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury
- ☐ 362 Personal Injury - Medical Malpractice

PERSONAL INJURY
- ☐ 365 Personal Injury - Product Liability
- ☐ 367 Health Care/ Pharmaceutical Personal Injury Product Liability
- ☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

CIVIL RIGHTS
- ☒ 440 Other Civil Rights
- ☐ 441 Voting
- ☐ 442 Employment
- ☐ 443 Housing/ Accommodations
- ☐ 445 Amer. w/Disabilities - Employment
- ☐ 446 Amer. w/Disabilities - Other
- ☐ 448 Education

PRISONER PETITIONS

Habeas Corpus:
- ☐ 463 Alien Detainee
- ☐ 510 Motions to Vacate Sentence
- ☐ 530 General
- ☐ 535 Death Penalty

Other:
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Condition
- ☐ 560 Civil Detainee - Conditions of Confinement

FORFEITURE/PENALTY
- ☐ 625 Drug Related Seizure of Property 21 USC 881
- ☐ 690 Other

LABOR
- ☐ 710 Fair Labor Standards Act
- ☐ 720 Labor/Management Relations
- ☐ 740 Railway Labor Act
- ☐ 751 Family and Medical Leave Act
- ☐ 790 Other Labor Litigation
- ☐ 791 Employee Retirement Income Security Act

IMMIGRATION
- ☐ 462 Naturalization Application
- ☐ 465 Other Immigration Actions

BANKRUPTCY
- ☐ 422 Appeal 28 USC 158
- ☐ 423 Withdrawal 28 USC 157

INTELLECTUAL PROPERTY RIGHTS
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 835 Patent - Abbreviated New Drug Application
- ☐ 840 Trademark
- ☐ 880 Defend Trade Secrets Act of 2016

SOCIAL SECURITY
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

FEDERAL TAX SUITS
- ☐ 870 Taxes (U.S. Plaintiff or Defendant)
- ☐ 871 IRS—Third Party 26 USC 7609

OTHER STATUTES
- ☐ 375 False Claims Act
- ☐ 376 Qui Tam (31 USC 3729(a))
- ☐ 400 State Reapportionment
- ☐ 410 Antitrust
- ☐ 430 Banks and Banking
- ☐ 450 Commerce
- ☐ 460 Deportation
- ☐ 470 Racketeer Influenced and Corrupt Organizations
- ☐ 480 Consumer Credit (15 USC 1681 or 1692)
- ☐ 485 Telephone Consumer Protection Act
- ☐ 490 Cable/Sat TV
- ☐ 850 Securities/Commodities/ Exchange
- ☐ 890 Other Statutory Actions
- ☐ 891 Agricultural Acts
- ☐ 893 Environmental Matters
- ☐ 895 Freedom of Information Act
- ☐ 896 Arbitration
- ☐ 899 Administrative Procedure Act/Review or Appeal of Agency Decision
- ☐ 950 Constitutionality of State Statutes

V. ORIGIN *(Place an "X" in One Box Only)*

☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from Another District *(specify)* ☐ 6 Multidistrict Litigation - Transfer ☐ 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing *(Do not cite jurisdictional statutes unless diversity)*:
42 USC §1983; Ex Parte Young

Brief description of cause:
Action for declaratory and injunctive relief

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

DEMAND $

CHECK YES only if demanded in complaint:
JURY DEMAND: ☐ Yes ☒ No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE _____ DOCKET NUMBER _____

DATE November 13, 2024

SIGNATURE OF ATTORNEY OF RECORD Alexander Jones

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
CENTRAL DIVISION

JONES EAGLE LLC **PLAINTIFF**

v. **Case No. 4:24-cv-00990-KGB**

WES WARD, in his official capacity as Secretary of the Arkansas Department of Agriculture, *et al.* **DEFENDANTS**

REDACTED PRELIMINARY INJUNCTION ORDER

Before the Court are two pending motions. First, there is a motion for temporary restraining order and preliminary injunction filed by plaintiff Jones Eagle, LLC ("Jones Eagle") (Dkt. No. 7). Jones Eagle requests that the Court enjoin defendants Wes Ward ("Secretary Ward"), in his official capacity as Secretary of the Arkansas Department of Agriculture, Tim Griffin ("Attorney General Griffin"), in his official capacity as Attorney General of Arkansas, and the State of Arkansas (collectively "Defendants"), from enforcing Arkansas Act 636 of 2023 ("Act 636"), Arkansas Code Annotated §§ 18-11-110 and 18-11-801, *et seq.*, and Arkansas Act 174 of 2024 ("Act 174"), Arkansas Code Annotated § 14-1-606. Second, there is a motion to dismiss filed by Defendants (Dkt. No. 16). This Court has jurisdiction pursuant to 28 U.S.C. § 1331, and venue is proper in this Court pursuant to 28 U.S.C. § 1391(b).

On November 21, 2024, the Court held a hearing on the pending motion for temporary restraining order and preliminary injunction at which counsel for all parties were present. Although the November 21, 2024, hearing was adversarial rather than *ex parte*, the Court concluded that it was not the sort of adversarial hearing that included an opportunity to present sufficient evidence, testimony, and argument so as to allow the basis of the relief requested to be strongly challenged. Therefore, the Court considered only Jones Eagle's request for a temporary restraining order at that time. On the basis of evidence and arguments presented at the November

21, 2024, hearing, the Court issued a temporary restraining order on November 25, 2024, enjoining Defendants, and all those acting in concert with them, from enforcing any provision of Act 636 or Act 174 against Jones Eagle or its principal Qimin "Jimmy" Chen within the time permitted by Federal Rule of Civil Procedure 65(b)(2) (Dkt. No. 20).

On December 4, 2024, the Court held a contested evidentiary hearing on Jones Eagle's request for a preliminary injunction and Defendants' motion to dismiss at which counsel for all parties were present. The parties presented evidence and arguments at the hearing, and the issues have been fully briefed. The pending motions are ripe for adjudication.

Accordingly, for the following reasons, the Court grants Jones Eagle's request for a preliminary injunction (Dkt. No. 7) and denies Defendants' motion to dismiss (Dkt. No. 16). The Court enjoins defendant Secretary Ward and defendant Attorney General Griffin, and all those acting in concert with them, from enforcing any provision of Act 636 or Act 174 against Jones Eagle until further Order from this Court.

I. Factual Background

These facts are taken from the testimony and exhibits presented at the November 21, 2024, and December 4, 2024, hearings, as well as the other exhibits in the record.

Arkansas Act 636 Of 2023

1. On or about March 14, 2023, the Arkansas Senate Agriculture, Forestry, and Economic Development Committee first considered SB 383 of 2003 ("SB 383"), which ultimately became enacted into law as Act 636 of 2023 ("Act 636") (*See* Dkt. No. 1, ¶ 45).

2. SB 383 was sponsored by Arkansas State Senator Blake Johnson who spoke in support of the bill, saying in part, "[W]e have recently seen a balloon fly over our land and there is great concern over that, and I think the concern as well should be on the land that's below where

that balloon was that's in Arkansas, and I feel like it's a defense—I mean if we can't feed or clothe ourselves as a nation, it's a defense issue for our nation and for Arkansas." (Dkt. No. 30-2; *see also* Dkt. No. 1, ¶ 46).

3. The Arkansas Senate Agriculture, Forestry, and Economic Development Committee passed SB 383 by voice vote to be submitted for consideration on the floor of the Arkansas Senate (*See* Dkt. No. 1, ¶ 50).

4. On March 27, 2023, Senator Johnson introduced SB 383 on the floor of the Arkansas Senate and spoke in support of the bill, stating: "I'm gonna read a few of those nations: China, Iran, North Korea, Syria, Venezuela, Afghanistan, Haiti, Iraq, Lebanon, Libya, Russia, Somalia, that's just a few of those nations, there's 24 in all. This limits those nations. We had a balloon fly over. And everybody was worried about the balloon taking pictures of the land below it. If we don't want a balloon flying over our nation, we shouldn't want them owning land. We can't go over there and buy property, so this is what this bill does" (Dkt. No. 30-2).

5. On April 11, 2023, SB 383, which included certain previously made amendments, was enacted as Act 636, codified as Arkansas Code Annotated §§ 18-11-110 and 18-11-801, *et seq.* (*See* Dkt. No. 1, ¶ 56).

6. In pertinent part, Act 636:

(a) Prohibits a "prohibited foreign-party-controlled business" from acquiring any interest in public or private land in Arkansas pursuant to Arkansas Code Annotated § 18-11-110, with certain exceptions as set forth in Arkansas Code Annotated § 18-11-110(e), and subjects those violating the statute to penalties pursuant to Arkansas Code Annotated § 18-11-110(c)(2)-(4) and criminal penalties pursuant to Arkansas Code Annotated § 18-11-110(d).

(b) Prohibits foreign ownership of an "interest in agricultural land," as defined by Arkansas Code Annotated § 18-11-802(1)(A).

(c) Criminalizes ownership of agricultural land by a "prohibited foreign party," as defined by Arkansas Code Annotated § 18-11-802(5), with reference to the International Traffic in Arms Regulations ("ITAR"), 22 C.F.R. § 126.1.

(d) Prohibits any "prohibited foreign party," with certain exceptions set forth in Arkansas Code Annotated § 18-11-804(f), from holding "significant interest" or "substantial control" in an interest as set forth in the statute. Ark. Code Ann. § 18-11-802(8).

(e) Subjects those violating the statute with respect to agricultural lands to penalties pursuant to Arkansas Code Annotated § 18-11-804(b)(2), (b)(3), (c)(3), (c)(4), and (d), and criminal penalties pursuant to Arkansas Code Annotated § 18-11-804(e).

7. Act 636 creates the Office of Agricultural Intelligence within the Arkansas Department of Agriculture, which is "authorized and directed to collect and analyze information concerning the unlawful sale or possession of agricultural land by prohibited foreign parties; and administer and enforce the provisions of this subchapter, including without limitation the reporting of a violation of this subchapter to the Attorney General under § 18-11-804(c)." Ark. Code Ann. § 18-11-805.

8. Act 636 provides that "the office shall operate under the direction of" the Arkansas Secretary of Agriculture. Ark. Code Ann. § 18-11-805(d).

9. Defendant Secretary Ward testified at the preliminary injunction hearing and described his understanding that, if his agency receives inquiries related to potential violations of Act 636 and his agency feels like there is something there, he refers the matter to the Arkansas

Attorney General to make the Arkansas Attorney General aware or for the Arkansas Attorney General to take a closer look.

10. Act 636 provides the Arkansas Attorney General, if led to believe a violation of Act 636 may exist at least as to agricultural lands, shall have subpoena power. Ark. Code Ann. § 18-11-804(c)(2).

11. Act 636 contemplates enforcement action by the Arkansas Attorney General. Ark. Code Ann. §§ 18-11-110(c)(2); 18-11-804(c)(3).

Arkansas Act 174 Of 2024

12. On April 18, 2024, the Arkansas Senate City, County – Local Affairs committee first considered SB 78 and SB 79, which were sponsored by Arkansas State Senators Josh Bryant and Missy Irvin, respectively (*See* Dkt. No. 1, ¶ 72).

13. During discussions regarding SB 78 and SB 79, Senator Bryant made the following comments: "The last piece deals with foreign ownership. I think a commonality of the industry that is not playing well in Arkansas is the fact that they are not Arkansas-owned or American-owned. . . . Those that do not, we're going to ask them to leave our state and that includes all foreign adversarially owned facilities and business models for this crypto-mining industry. . . . On those particular examples, if they're foreign-owned, they'll have to divest to become American-owned at least and hopefully Arkansan-owned" (Dkt. No. 30-3).

14. On or about May 3, 2024, the Arkansas General Assembly passed Act 174, which effectuated amendments to Act 851 of 2023, known as the Arkansas Data Centers Act of 2023 ("Act 851") (*See* Dkt. No. 1, ¶ 83).

15. Act 174, in pertinent part:

(a) Created a new section entitled "Ownership of digital asset mining business by prohibited foreign-party-controlled business prohibited—Definitions—Penalty—Reporting." Ark. Code Ann. § 14-1-606.

(b) Defines "interest" as "an ownership interest of greater than zero percent (0%)." Ark. Code Ann. § 14-1-606(a)(1).

(c) Prohibits any interest in a "digital asset mining business" being held by a "prohibited foreign party." Ark. Code Ann. § 14-1-606(a)(2).

(d) Provides that an otherwise lawful digital asset mining business is transformed by virtue of any ownership by a "prohibited foreign party" into a "prohibited foreign-party-controlled business." Ark. Code Ann. §§ 14-1-606(a)(2); 14-1-606(a)(3).

(e) Sets out a four-part definition of "prohibited foreign party," which in turn is defined "subject to § 126.1 of the International Traffic in Arms Regulations ('ITAR'), 22 C.F.R. § 120.1 et seq., as existing on January 1, 2024." Ark. Code Ann. § 14-1-606(a)(2).

(f) Grants the Arkansas Attorney General discretion to "conduct an investigation" provided that "a person" makes a "request" or "upon receipt of information that leads the Attorney General to believe that a violation of this section may exist." Ark. Code Ann. § 14-1-606(d).

(g) Authorizes the Arkansas Attorney General to "order" a "prohibited foreign party to divest all interest in the digital asset mining business within three hundred sixty-five (365) calendar days." Ark. Code Ann. § 14-1-606(e)(1).

(h) Provides that, if the "prohibited foreign party: "fails to divest all interest in the digital asset mining business within three hundred sixty five (365) calendar days," then

the Arkansas Attorney General has a right of action to proceed in circuit court. Ark. Code Ann. § 14-1-606(e)(2).

(i) Subjects those violating the statute to penalties pursuant to Arkansas Code Annotated § 14-1-606(e)(3), (e)(4), and (e)(5).

16. Arkansas Act 174's definitions of "interest" and "foreign party" are inconsistent with the federal definitions under ITAR.

Investigation Into Jones Eagle

17. On December 13, 2023, the Arkansas Governor issued a press release entitled "Sanders Administration Holds China Accountable." (Dkt. No. 30-1). That press release publicly identified Jones Eagle's predecessor, Jones Digital, and another Arkansas entity and stated that the Arkansas Governor's "Administration today alerted Attorney General Tim Griffin's office of two companies that may be in violation of Act 636, which prohibits foreign-party-controlled businesses from owning Arkansas land." (Dkt. No. 30-1).

18. In December 2023, defendant Secretary Ward sent a letter to defendant Attorney General Griffin making a referral for an investigation under Act 636 of 2023 (Dkt. No. 30-24). That letter was directed to Jones Eagle's predecessor-in-interest, stating "[a] review of Jones Digital's ownership indicates that the entity may have significant ties to China." (Dkt. No. 30-24). Defendant Secretary Ward stated, "[t]he Arkansas Department of Agriculture believes that Jones Digital LLC and potentially other similarly situated digital asset or crypto-mining operations may be operating in violation of Act 636." (Dkt. No. 30-24). Defendant Secretary Ward referred "potential violations" of Act 636 and requested that defendant Attorney General Griffin "utilize the authority granted under A.C.A. 18-11-704(c)(2) to determine if a violation of Act 636 has in fact occurred, and if so, commence appropriate legal action." (Dkt. No. 30-24).

19. Defendant Secretary Ward testified that his agency wanted to announce and make public the referral of Jones Eagle to the Arkansas Attorney General; his agency was not trying to hide that referral.

20. Defendant Secretary Ward acknowledged that his referral letter to the Arkansas Attorney General was a part of the Arkansas Governor's press release regarding the referral of Jones Eagle to the Arkansas Attorney General.

21. Jones Eagle sought information from Defendants about the reasonable suspicion or probable cause that would show a violation of Act 636 and specifically on what Defendants relied to state that Jones Eagle "may have significant ties to China" (Dkt. Nos. 19-4; 30-4).

22. Defendant Attorney General Griffin requested documentation from Jones Eagle to show that its parcel was less than 10 acres, as relevant to the statutory definition of "agricultural land" under Act 636 (Dkt. Nos. 19-7; 30-7).

23. Jones Eagle voluntarily provided that proof the next day (Dkt. Nos. 19-8; 30-8). According to Mr. Chen, Jones Eagle's lease occupies around two acres of land based on a lease with its landlord (Dkt. No. 7-1, ¶ 12). Mr. Chen voluntarily provided copies of publicly available records to defendant Attorney General Griffin to show the acreage of the lease, including a third-party survey (Dkt. No. 7-1, ¶ 13). Based on that showing, Jones Eagle requested that Defendants conclude their investigation under Act 636, but Defendants refused to conclude the investigation (Dkt. Nos. 19-8; 30-8).

24. On September 10, 2024, defendant Attorney General Griffin issued an investigative subpoena seeking documents from Jones Eagle (Dkt. Nos. 17-1; 30-9). Jones Eagle received service of the subpoena on September 24, 2024 (*Id.*). The subpoena directed a response deadline of September 25, 2024 (*Id.*). Jones Eagle sought to meet and confer with defendant Attorney

General Griffin about the scope of the investigation, but defendant Attorney General Griffin refused (Dkt. Nos. 19-10; 19-11; 30-10; 30-11).

25. Defendant Attorney General Griffin filed a petition for citation of contempt and order to appear and show cause in Baxter County, Arkansas, Circuit Court on November 8, 2024, concerning the investigative subpoena that remains pending in Baxter County, Arkansas, state court (Dkt. No. 17-1).

26. Jones Eagle filed this lawsuit on November 13, 2024 (Dkt. No. 1).

Jimmy Chen

27. Jimmy Chen is a United States citizen currently residing in New York who was born in China, immigrated to the United States in 2003 as a child, and became a United States citizen (Dkt. Nos. 7-1, ¶¶ 2-3; 30-13). He graduated from the University of Illinois and worked for Wal-Mart in Bentonville, Arkansas, for several years after graduating (Dkt. No. 7-1, ¶¶ 4-5).

28. Mr. Chen is the manager of Jones Eagle and the sole owner of Eagle Asset Holding, Inc., which has a controlling interest in Jones Eagle (Dkt. No. 7-1, ¶¶ 6-7).

Jones Eagle

29. Arkansas passed Act 851 known as the Arkansas Data Centers Act of 2023, Ark. Code Ann. § 14-1-601, *et seq.*, in April 2023, which aims to regulate the digital asset mining business and which Mr. Chen understood as the State of Arkansas welcoming investment in the state for crypto mining businesses.

30. From November 1, 2023, to on or about May 20, 2024, Jones Digital, LLC, was involved in prior litigation in the United States District Court of the Eastern District of Arkansas with Arkansas County, Arkansas, and officials associated with Arkansas County, in Case No. 2:23-cv-00220-LPR, resulting in the court in that case granting, in part, and denying, in part, a motion

for temporary restraining order and preliminary injunction on November 20, 2023, and entering on May 1, 2024, an amended consent decree based on the parties' joint proposal for a consent decree. Mr. Chen testified that, after Jones Digital began operating in Arkansas County, amendments were made to ordinances that Jones Digital filed suit to challenge.

31. On October 12, 2023, Jones Digital, LLC, entered into an Operating Agreement (Defs.' Ex. 2, JE Subpoena 183-212). Mr. Chen testified that he has no documentation reflecting ownership of Jones Digital, LLC, prior to developing the operating agreement.

32. On December 27, 2023, Jones Digital, LLC, amended its operating agreement (Dkt. No. 30-17).

33. According to Mr. Chen, the December 27, 2023, amended operating agreement reflects the ownership of Jones Eagle, and there are no other members of Jones Eagle other than those reflected on the document (Dkt. No. 30-17).

34. Mr. Chen testified that, prior to this December 27, 2023, amendment, [redacted] Mr. Chen believed at the time of this December 27, 2023, amendment that [redacted]

35. However, Mr. Chen testified that [redacted] Based on the December 27, 2023, operating agreement, Alpha Digital One, LLC has a [redacted] ownership interest in Jones Eagle; Mr. Chen's company, Eagle Asset Holding, Inc., has a [redacted] ownership interest in Jones Eagle; and Taoyi Maintenance, LLC, another minority member, has a [redacted] interest in Jones Eagle (*Id.*).

36. [redacted]

37. On October 4, 2024, Jones Eagle formally changed its name from Jones Digital, LLC, by a filing submitted to the Delaware Secretary of State (Dkt. No. 1, ¶ 9). Jones Eagle is a limited liability company formed under Delaware law as Jones Digital, LLC (Dkt. No. 1, ¶ 11).

38. On March 24, 2023, Jones Eagle, through its predecessor-in-interest, entered into a commercial lease for real property in Arkansas County, Arkansas, for the purpose of engaging in the business of operating a data center, including mining digital assets such as cryptocurrency (Dkt. Nos. 1, ¶ 31; 30-44). The commercial lease included two amendments (Dkt. No. 30-44).

39. Jones Eagle is in the business of providing crypto mining hosting services to its upstream customers (Dkt. Nos. 7-1, ¶ 27; 30-16).

40. Jones Eagle has a written contract with [redacted] that was executed in December 2023 (Dkt. No. 30-16). [redacted].

41. [redacted]

42. According to Mr. Chen's testimony, Jones Eagle pays county, state, and federal taxes, paying over $10,000.00 monthly for the state and local taxes with federal taxes to be assessed after the first of the calendar year.

43. Along with the lease, and among other investments for the business, Jones Eagle made construction investments, asset investments, energy construction fee sharing, and hired a general contractor to handle the construction, presenting proof of these arrangements and the payments for them (Dkt. No. 30-14).

44. Jones Eagle is required to provide, among other things, physical space, heating and cooling, water, stable electric service, and stable internet service to its customer to ensure its customer's computers are operational, as its business model essentially entails hosting computers that are owned by the customer.

45. Jones Eagle has a written contract with Entergy for the power capacity Jones Eagle requires and uses, which includes Jones Eagle keeping a monetary deposit with Entergy (Dkt. No. 30-15).

46. Mr. Chen testified as to how Jones Eagle generates a profit from its customer contract and as to the anticipated profit.

47. Mr. Chen testified that investigation into Jones Eagle related to Acts 636 and 174 has been all over the news; has impacted Jones Eagle's clients and potential clients and impacted investors and potential investors; and a lot of individuals have inquired as to the investigation.

48. Mr. Chen maintains that enforcement of Acts 636 and 174 could threaten Jones Eagle from being able to operate and service its customers at its data center in Arkansas County, Arkansas (Dkt. No. 7-1, ¶¶ 29-30).

49. Mr. Chen testified that Jones Eagle has no other use for the facility it leases other than as a data center.

50. Mr. Chen testified that the investigation has caused individuals not to want to purchase Jones Eagle and the Arkansas County site or to offer a much lower than market price for Jones Eagle and the Arkansas County site, upwards of 50 to 60% less than the market price.

51. Mr. Chen maintains that Acts 636 and 174 limit his ability to grow his business; make it harder to attract investors, customers, and other business partners; and cause loss of goodwill to an incalculable but substantial degree (Dkt. No. 7-1, ¶¶ 24-26, 31).

52. Mr. Chen avers that Jones Eagle's relationships with its customers are critical for the company to thrive (Dkt. No. 7-1, ¶ 28).

53. Currently, Jones Eagle contracts with a dominant customer in this market, and if Jones Eagle were required to cease operations, Jones Eagle would lose its reputation and goodwill. Jones Eagle's current contracts would be broken; existing customers would leave and not be expected to return at future sites; potential future customers would be chilled from hiring Jones Eagle; Jones Eagle's ability to expand its business would suffer; and Jones Eagle would be unable to bid on larger service contracts or to accept projects on short notice, all of which would impact Jones Eagle's reputation, goodwill, and commercial viability (Dkt. No. 7-1, ¶¶ 32-36).

II. Motion To Dismiss

Defendants move to dismiss Jones Eagle's complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) for lack of jurisdiction and failure to state a claim (Dkt. No. 16). Further, Defendants assert that dismissal is warranted because the case is unripe for judicial review (*Id.*). Alternatively, Defendants seek to have the case dismissed on *Younger* abstention grounds (*Id.*). Jones Eagle responded in opposition to Defendants' motion (Dkt. No. 25). The Court examines each of Defendants' arguments for dismissal.

A. Legal Standard

A Rule 12(b)(6) motion tests the legal sufficiency of the claim or claims stated in the complaint. *See Peck v. Hoff*, 660 F.2d 371, 374 (8th Cir. 1981). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable

for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). Although a complaint "does not need detailed factual allegations" to survive a Rule 12(b)(6) motion to dismiss, the "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. Stated differently, the allegations pleaded must show "more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678.

A court considering a motion to dismiss must accept as true all well-pleaded facts in the complaint and draw all reasonable inferences from those facts in favor of the non-moving party. *See Farm Credit Servs. of Am., FLCA v. Haun*, 734 F.3d 800, 804 (8th Cir. 2013); *Coons v. Mineta*, 410 F.3d 1036, 1039 (8th Cir. 2005); *Abels v. Farmers Commodities Corp.*, 259 F.3d 910, 914 (8th Cir. 2001). However, a court need not credit conclusory allegations or "naked assertion[s] devoid of further factual enhancement." *Retro Television Network, Inc. v. Luken Commc'ns, LLC*, 696 F.3d 766, 768 (8th Cir. 2012) (alteration in original) (quoting *Iqbal*, 556 U.S. at 678).

B. Standing

Article III of the United States Constitution limits the jurisdiction of federal courts to "Cases" and "Controversies." U.S. Const. art. III, § 2, cl. 1; *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 559 (1992). Standing doctrine includes both prudential and constitutional considerations, but "the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan*, 504 U.S. at 560. A party invoking federal jurisdiction must "demonstrate standing . . . for each form of relief that they seek," *Becker v. N.D. Univ. Sys.*, 112 F.4th 592, 595 (8th Cir. 2024) (alteration in original) (quoting *TransUnion LLC v. Ramirez*, 594 U.S. 413, 431 (2021)), and each claim brought, *TransUnion*, 594 U.S. at 431. As such, the burden lies with the plaintiff to establish every element of the Article III standing inquiry. *Animal Legal*

Def. Fund v. Reynolds, 89 F.4th 1071, 1077 (8th Cir. 2024) (quoting *Animal Legal Def. Fund v. Vaught*, 8 F.4th 714, 720 (8th Cir. 2021)).

Where, as here, an injunction is sought:

> [T]o seek injunctive relief, a plaintiff must show that he is under threat of suffering 'injury in fact' that is concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical; it must be fairly traceable to the challenged action of the defendant; and it must be likely that a favorable judicial decision will prevent or redress the injury.

Missourians for Fiscal Accountability v. Klahr, 830 F.3d 789, 794 (8th Cir. 2016) (alteration in original) (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009)). This mirrors the requirements for Article III standing more generally. *See, e.g.*, *Becker*, 112 F.4th at 595. The Supreme Court has emphasized that "a person exposed to a risk of future harm may pursue forward-looking, injunctive relief to prevent the harm from occurring, at least so long as the risk of harm is sufficiently imminent and substantial." *Arc of Iowa v. Reynolds*, 94 F.4th 707, 710 (8th Cir. 2024) (quoting *TransUnion*, 594 U.S. at 435)). "If the risk is too speculative, Article III standing is lacking." *Id.* at 11.

When it comes to prudential standing—that is, the aspects of standing doctrine that go beyond Article III's requirements—the Eighth Circuit has expressly declined to decide whether it is a jurisdictional issue, *Lucas v. Jerusalem Cafe, LLC*, 721 F.3d 927, 938–39 (8th Cir. 2013), and, following the Supreme Court, seems to question the continued viability of the doctrine. *See Carson v. Simon*, 978 F.3d 1051, 1058 (8th Cir. 2020). The Supreme Court has provided no clear articulation of the requirements for prudential standing, but has stated that it encompasses at least three broad principles: (1) the general prohibition on a litigant's raising another person's legal rights; (2) the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches; and (3) the requirement that a plaintiff's complaint fall within the zone

of interests protected by the law invoked. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126 (2014).

In the present case, Defendants argue that Jones Eagle has suffered no injury in fact because "there has been no enforcement action taken against Plaintiff" under Act 636 or Act 174 (Dkt. No. 17, at 6). Defendants emphasize that "there has been no determination as to whether Plaintiff is a 'prohibited foreign party' as defined in the statutes, and therefore, there has been no action taken by any government actor . . . to commence an action against Plaintiff for violating either act," and that "this is not a case where the plaintiff argues an intention to engage in conduct that would be prohibited" (*Id.*, at 9). Defendants liken this case to *Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2013), in which the Supreme Court found that no injury in fact existed in a challenge to the Foreign Intelligence Surveillance Act of 1978 because the plaintiffs' belief that they would be targeted for surveillance under the Act was too speculative for Article III purposes. *Id.* at 410–20.

On the factual record before the Court at this stage, Defendants' argument is unconvincing. As Defendants themselves note, for purposes of establishing an Article III injury in fact, "[a]n allegation of future injury may suffice if the threatened injury is certainly impending, or there is a substantial risk that the harm will occur" (Dkt. No. 17, at 6). *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (quoting *Clapper*, 568 U.S. at 409, 414 n.5). Supreme Court and Eighth Circuit precedent make clear that "a plaintiff satisfies the injury-in-fact requirement where he alleges 'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder.'" *Id.* at 159 (quoting *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979)); *Christian Action League of Minn. v. Freeman*, 31 F.4th 1068, 1072 (8th Cir.), *cert. denied*, 143 S. Ct. 304 (2022) (quoting *Susan B. Anthony List*, 573 U.S. at 159). The Eighth Circuit has further emphasized that this is a

"forgiving standard" for plaintiffs. *L.H. v. Indep. Sch. Dist.*, 111 F.4th 886, 893 (8th Cir. 2024) (quoting *Turtle Island Foods, SPC v. Thompson*, 992 F.3d 694, 699 (8th Cir. 2021)). As such, so long as Jones Eagle's conduct is *arguably* proscribed by the challenged statutes and Jones Eagle faces a "credible threat of prosecution," it has suffered an injury in fact sufficient for constitutional purposes.

First, with respect to Act 636, it strains credulity to characterize this action as merely anticipating a future injury. Defendant Secretary Ward publicly referred Jones Eagle to the Attorney General's Office for investigation for potential violation of Act 636, and Jones Eagle has been under public investigation by the Attorney General Griffin ever since (Dkt. Nos. 1, ¶¶ 104–09, 112–18; 30-1). The Attorney General brought an action against Jones Eagle in Baxter County Circuit Court to enforce a subpoena issued as a part of that investigation (Dkt. No. 17-1). The subpoena covers a wide range of sensitive business documents, including virtually any communication between anyone associated with Jones Eagle and any person or entity associated with China or a whole host of other countries (Dkt. Nos. 17-1, at 7–8; 30-9). Under these circumstances, whether or not Jones Eagle is actually in violation of Act 636's terms, it has suffered real, concrete harm under the enforcement regime created by the statute. Defendants' contention that being publicly singled out and subjected to a broad, indefinite government investigation backed by court-enforced subpoenas is insufficient to establish an injury in fact for Article III purposes with respect to the authorizing statute is simply irreconcilable with longstanding precedent. Indeed, even if this action is regarded as a pre-enforcement challenge, Jones Eagle has shown that it faces a credible threat of prosecution, and the actions of Defendants sufficiently indicate that Jones Eagle's land at least arguably falls under the statute's terms—whether or not Jones Eagle is correct in arguing that the statute should not apply to it. This is a

far cry from the speculation about potential future application of the statute in *Clapper*; Jones Eagle has been publicly targeted for investigation and subjected to a subpoena and legal proceedings. *See Clapper*, 568 U.S. at 411–14; *cf. Alexis Bailly Vineyard, Inc. v. Harrington*, 931 F.3d 774, 778 (8th Cir. 2019) (finding a sufficiently "credible threat of enforcement" if wineries disregarded a state statute prohibiting use of out-of-state ingredients). The Court finds that Jones Eagle has suffered a sufficient injury in fact so as to challenge Act 636.

Second, with respect to Act 174, [redacted] it is at least arguable that the statute applies to Jones Eagle. In any case, the threat of enforcement is far from speculative.

Further, it is Defendants who state unequivocally in this action that "violations of Act 636 may constitute violations under [Act 174] as well" and that Defendants have initiated a state court proceeding against Jones Eagle "pursuant to an investigation into . . . potential violations of Act 636 of 2023 and Act 174 of 2024" (Dkt. No. 17, at 3, 12). Given that Jones Eagle is actively under investigation for potential violations of both Act 174 and Act 636—which Defendants admit

overlaps with Act 174—and faces subpoena enforcement proceedings related to this investigation, Jones Eagle has shown that it faces a more-than-credible threat of enforcement with respect to Act 174. For these reasons, the Court finds that Jones Eagle has suffered a sufficient injury in fact so as to challenge Act 174.

Defendants make no argument that Jones Eagle fails to satisfy the other elements of the standing analysis. Jones Eagle's injury is fairly traceable to Defendants, who are responsible for enforcing the challenged statutes and have initiated an investigation and state court proceedings against Jones Eagle. Likewise, a favorable judicial decision would provide Jones Eagle with sufficient redress in the form of an injunction prohibiting enforcement of the allegedly unconstitutional statutes and a declaratory judgment that the statutes are unconstitutional. None of the prudential standing factors counsel against allowing Jones Eagle to proceed in this action. The Court therefore finds that Jones Eagle has established that it has Article III and prudential standing at this stage to seek a preliminary injunction against Defendants.

For the foregoing reasons, the Court determines at this stage of the litigation that Jones Eagle has standing to proceed with this action and seek a preliminary injunction against Defendants and that the matter is ripe for adjudication.[1]

C. *Younger* Abstention

A federal district court with jurisdiction "has a virtually unflagging obligation to hear and resolve questions properly before it." *FBI v. Fikre*, 601 U.S. 234, 240 (2024) (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)). However, in *Younger*

[1] For purposes of their ripeness challenge, Defendants state that "[i]n this case, the standing and ripeness issues 'essentially boil down to the same question,' so the analysis collapses together" (Dkt. No. 17, at 10 (quoting *Religious Sisters of Mercy v. Becerra*, 55 F.4th 583, 608 (8th Cir. 2022))). As such, the Court finds ripeness for the reasons explained in the Court's standing analysis.

v. Harris, 401 U.S. 37 (1971), the Supreme Court recognized a limited exception—grounded in the principles of comity and federalism—to this general obligation for cases in which there is a "parallel, pending state criminal proceeding." *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 69–70 (2013). Specifically, *Younger* held that "the possible unconstitutionality of a statute 'on its face' does not in itself justify an injunction against good-faith attempts to enforce it." *Younger*, 401 U.S. at 55. The Court later expanded the application of *Younger* beyond criminal proceedings to two categories of state civil proceedings: (1) civil enforcement proceedings; and (2) civil proceedings "involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions," such as civil contempt orders and requirements for posting of bond pending appeal. *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 368 (1989) ("*NOPSI*"). *Younger* abstention does not apply outside these categories of cases. *Sprint*, 571 U.S. at 70.

In determining whether *Younger* applies, the Supreme Court has identified three factors that district courts should consider: (1) whether there is an "ongoing state judicial proceeding"; (2) whether the proceedings "implicate important state interests"; and (3) whether there is "an adequate opportunity in the state proceedings to raise constitutional challenges." *Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982). These are "additional" factors that are to be considered only if the case fits into one of the categories identified in *NOPSI*. *Sprint*, 571 U.S. at 81.

The Eighth Circuit has distilled the entire *Younger* analysis into a three-part inquiry:

> First, does the underlying state proceeding fall within one of the three "exceptional circumstances" where *Younger* abstention is appropriate? Second, if the underlying proceeding fits within a *Younger* category, does the state proceeding satisfy what are known as the "*Middlesex*" factors? And third, even if the underlying state proceeding satisfies the first two inquiries, is abstention nevertheless inappropriate because an exception to abstention applies?

Wassef v. Tibben, 68 F.4th 1083, 1087 (8th Cir. 2023) (quoting *375 Slane Chapel Rd., LLC v. Stone Cnty., Mo.*, 53 F.4th 1122, 1127 (8th Cir. 2022)).

There are at least four potential "exceptions" to *Younger*. The first, outlined in *Younger* itself, is where there is a showing of "bad faith, harassment, or any other unusual circumstance that would call for equitable relief" in the state court proceeding. *Younger*, 401 U.S. at 55. Second, there is an exception for the rare circumstance in which the plaintiff does not have the opportunity to press the federal claim in the state court proceeding. *See Moore v. Sims*, 442 U.S. 415, 432 (1979) (discussing the holding of *Gerstein v. Pugh*, 420 U.S. 103 (1975)). Third, there is an "extremely narrow" exception for statutes that are "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it." *Oglala Sioux Tribe v. Fleming*, 904 F.3d 603, 613–14 (8th Cir. 2018) (first quoting *Plouffe v. Ligon*, 606 F.3d 890, 894 (8th Cir. 2010); then quoting *Younger*, 401 U.S. at 53–54); *see also Wassef*, 68 F.4th at 1087 (quoting *Younger*, 401 U.S. at 53–54) (noting *Younger* exception where a criminal statute is "flagrantly and patently" unconstitutional on its face). Finally, a number of courts have recognized a fourth exception for "facially conclusive" federal preemption claims. *Minn. Living Assistance, Inc. v. Peterson*, 899 F.3d 548, 554–55 (8th Cir. 2018). Although the Eighth Circuit has declined to decide whether such an exception is a "required part of the abstention analysis," *see id.* at 554 n.5, at least three circuits apply this exception as part of their abstention analysis. *See Colonial Life & Accident Ins. Co. v. Medley*, 572 F.3d 22, 27–28 (1st Cir. 2009); *Woodfeathers, Inc. v. Washington Cnty.*, 180 F.3d 1017, 1021–22 (9th Cir. 1999); *GTE Mobilnet of Ohio v. Johnson*, 111 F.3d 469, 478 (6th Cir. 1997).

Defendants argue that the Attorney General's petition for citation of contempt and order to appear and show cause, filed in Baxter County, Arkansas, Circuit Court on November 8, 2024, falls within the category of "civil enforcement proceedings" to which *Younger* applies under *NOPSI* (Dkt. Nos. 17, at 11–12; 17-1, at 1–3). In *Sprint*, the Supreme Court emphasized that this category refers to enforcement actions that are "'akin to a criminal prosecution' in 'important respects.'" *Sprint*, 571 U.S. at 79 (quoting *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 604 (1975)). For purposes of determining whether a civil proceeding is sufficiently "akin to a criminal prosecution," the Eighth Circuit, following *Sprint*, has pointed to three factors: (1) whether the action was commenced by the State in its sovereign capacity; (2) whether the proceeding was initiated to sanction the federal plaintiff for some wrongful act; and (3) whether there are other similarities to criminal actions, such as a preliminary investigation culminating in the filing of formal charges. *375 Slane Chapel Rd.*, 53 F.4th at 1128. Defendants argue that the Baxter County proceeding satisfies all of these factors (Dkt. No. 17, at 12).

There is no binding precedent in the Eighth Circuit as to whether a petition to enforce a subpoena filed before the initiation of formal criminal proceedings qualifies as a civil enforcement proceeding "akin to a criminal prosecution" for purposes of *Younger* abstention. On the one hand, a line of cases from the Southern District of New York holds that the issuance of investigative subpoenas by a state attorney general pursuant to an investigation into potentially illegal activities qualifies for abstention under *Younger* and *NOPSI*. *See Cuomo v. Dreamland Amusements, Inc.*, Nos. 08 Civ. 7100(JGK), 08 Civ. 6321(JGK), 2008 WL 4369270, at *9 (S.D.N.Y. Sept. 22, 2008) (quoting *J. & W. Seligman & Co. Inc. v. Spitzer*, No. 05 Civ. 7781(KMW), 2007 WL 2822208, at *5 (S.D.N.Y. Sept. 27, 2007)). The Southern District of New York has continued to use this standard even after the Supreme Court's most recent articulation of the *Younger* doctrine in *Sprint*.

See Trump v. Vance, 395 F. Supp. 3d 283, 295 (S.D.N.Y.), *aff'd in part, vacated in part on other grounds, remanded*, 941 F.3d 631 (2d Cir. 2019), *aff'd and remanded*, 591 U.S. 786 (2020). The Second Circuit itself has made no definitive pronouncement on the matter. *See id.*

However, the weight of authority indicates otherwise. Other circuits that have examined similar issues have concluded that mere investigations and civil investigative proceedings, including subpoenas issued before the grand jury or prosecutorial information stage, categorically do not qualify for *Younger* abstention. *See Google, Inc. v. Hood*, 822 F.3d 212, 223–24 & n.7 (5th Cir. 2016); *Guillemard–Ginorio v. Contreras–Gomez*, 585 F.3d 508, 519 (1st Cir. 2009); *Telco Commc'ns, Inc. v. Carbaugh*, 885 F.2d 1225, 1227 (4th Cir. 1989). More to the point in this case, however, is a pair of recent Third Circuit cases holding that petitions to enforce subpoenas filed by a state in state court are not qualifying civil enforcement proceedings under *Sprint* and *NOPSI*.

In *TitleMax of Delaware, Inc. v. Weissmann*, 24 F.4th 230, 235–37 (3d Cir.), *cert. denied sub nom. TitleMax of Delaware, Inc. v. Vague*, 142 S. Ct. 2870 (2022), the Third Circuit found that a petition filed by the Pennsylvania Department of Banking and Securities in Pennsylvania Commonwealth Court to enforce an investigative subpoena did not qualify under *Younger* because it failed the second *Sprint* factor—it was filed to "enforce a subpoena, not to sanction TitleMax." The petition action was "'not retributive in nature' or 'imposed to punish . . . some wrongful act.'" *Id.* at 237 (alteration in original) (quoting *ACRA Turf Club, LLC v. Zanzuccki*, 748 F.3d 127, 140 (3d Cir. 2014)). The Third Circuit went on to emphasize that "threat of contempt for noncompliance with an order that the state court may enter in the future is insufficient to convert the Petition Action as it currently stands into a quasi-criminal case." *Id.*

The Third Circuit expanded on its holding in *TitleMax* in *Smith & Wesson Brands, Inc. v. Attorney General of New Jersey*, 27 F.4th 886 (3d Cir. 2022). In *Smith & Wesson*, the New Jersey

Attorney General issued a subpoena seeking documents from Smith & Wesson as part of an investigation into potential violations of the New Jersey Consumer Fraud Act. *Id.* at 889. Instead of complying with the subpoena, Smith & Wesson filed a complaint in federal court alleging the subpoena violated its constitutional rights. *Id.*. The New Jersey Attorney General subsequently filed a petition in state court to enforce the subpoena, and the state court issued a show cause order and threatened Smith & Wesson with contempt. *Id.* at 890. The state court, as well as the New Jersey Supreme Court on appeal, rejected Smith & Wesson's constitutional objections and forced Smith & Wesson to produce the documents. *Id.* Smith & Wesson then amended its federal complaint to include a First Amendment retaliation claim. *Id.*

The Third Circuit found that *Younger* abstention was not appropriate. *Id.* at 893. Specifically, it found that the petition action did not fall into the *Younger* category of civil enforcement proceedings "akin to a criminal prosecution" because the second and third *Sprint* factors were not satisfied. *Id.* at 892. The petition action did not implicate the second *Sprint* factor because the subpoena enforcement action did not concern a violation of the underlying law, the New Jersey Consumer Fraud Act. *Id.*. The petition action alleged a violation of a "procedural rule" rather than a substantive duty. *Id.* Likewise, the third *Sprint* factor was not implicated because there was no "preliminary investigation culminating in the filing of a formal complaint or charges," because the state court petition did not arise from the substantive investigation but rather from the failure to comply with the subpoena. *Id.* at 892–93. The Third Circuit also emphasized that the penalties for failure to comply with a subpoena are not "self-executing; a court will impose them only after the subpoenaed party violates a court order," which, in this case, never happened. *Id.* at 893.

The Third Circuit likewise found that the subpoena enforcement action did not fall into the final *Younger* category of "orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions" because "no substantive outcome had occurred" in the form of a court order. *Id.* at 893–94. In the case at issue there was only "a possibility of contempt." *Id.* at 894–95. As such, *Younger* abstention categorically did not apply to the subpoena enforcement proceeding. Two district courts outside of the Third Circuit have adopted the reasoning in *Smith & Wesson*. *See Media Matters for Am. v. Bailey*, Case No. 24-cv-147 (APM), 2024 WL3924573, at *5–7 (D.D.C. Aug. 23, 2024); *Trump v. James*, Case No. 1:21-cv-1352 (BKS/CFH), 2022 WL 1718951, at *9 (N.D.N.Y. May 27, 2022).

Notably, in *Kaylor v. Fields*, 661 F.2d 1177 (8th Cir. 1981), the Eighth Circuit found that subpoenas issued by an Arkansas prosecuting attorney who was acting in place of a grand jury pursuant to Arkansas law qualified for *Younger* abstention. *Id.* at 1182. However, as the Fifth Circuit noted in *Google*, *Kaylor* is distinguishable from subpoenas issued pursuant to civil investigations because the *Kaylor* subpoenas were issued pursuant to an ongoing criminal proceeding—the prosecutor's investigation was the legal equivalent of a grand jury proceeding under Arkansas law.[2] *Google*, 822 F.2d at 224 n.7. The Fifth Circuit also emphasized that *Kaylor* was decided before the Supreme Court clearly delimited *Younger*'s scope in *Sprint*, a case which notably overturned the Eighth Circuit's hitherto more expansive application of abstention doctrine. *Id.*

[2] It is likewise worth noting that the prosecutorial subpoena power under Arkansas law applies specifically to criminal proceedings and is codified at Arkansas Code Annotated § 16-43-212. *See Anderson v. State*, 163 S.W.3d 333, 349–50 (Ark. 2004) (describing prosecutorial subpoena power under Arkansas law). By contrast, the subpoena power upon which Defendants rely in this case applies more broadly to civil and criminal investigations and is not tethered to the formal criminal process. *See* Ark. Code Ann. §§ 14-1-606(d); 18-11-804(c)(2); 25-16-705.

For all of these reasons, this Court determines that the Baxter County case does not fall into one of the *Younger* categories and therefore categorically does not qualify for abstention.

D. Conclusion On Motion To Dismiss

Based on this analysis, having considered the arguments of the parties, the Court denies Defendants' motion to dismiss (Dkt. No. 16).

III. Preliminary Injunction

A. Legal Standard

District courts in the Eighth Circuit must consider four factors in deciding whether to grant a preliminary injunction:

> (1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that the movant will succeed on the merits; and (4) the public interest.

Wilbur-Ellis Co., LLC v. Erikson, 103 F.4th 1352, 1355–56 (8th Cir. 2024) (quoting *Home Instead, Inc. v. Florance*, 721 F.3d 494, 497 (8th Cir. 2013)). "While 'no single factor is determinative,' the probability of success factor is the most significant." *Id.* at 1356 (quoting *Home Instead*, 721 F.3d at 497). Furthermore, in the Eighth Circuit, laws passed through the democratic process are entitled to a "higher degree of deference." *Libertarian Party of Ark. v. Thurston*, 962 F.3d 390, 299 (8th Cir. 2020) (quoting *Rodgers v. Bryant*, 942 F.3d 451, 455–56 (8th Cir. 2019)). In such cases, it is never sufficient for the moving party to establish that there is a "fair chance" of success. *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 732 (8th Cir. 2008). Instead, the appropriate standard, and threshold showing that must be made by the movant, is "likely to prevail on the merits." *Firearms Regul. Accountability Coal., Inc. v. Garland*, 112 F.4th 507, 517 (8th Cir. 2024) (quoting *id.*). Only if the movant has demonstrated that it is likely to prevail on the merits should the Court consider the remaining factors. *Rounds*, 530 F.3d at 732.

A preliminary injunction "is an extraordinary remedy, and the burden of establishing the propriety of an injunction is on the movant," here, Jones Eagle. *See Turtle Island Foods, SPC v. Thompson*, 992 F.3d 694, 699 (8th Cir. 2021) (quoting *Watkins Inc. v. Lewis*, 346 F.3d 841, 844 (8th Cir. 2003)). The Eighth Circuit has noted that a movant carries a "heavier" burden when the granting of a preliminary injunction "has the effect of awarding the movant substantially the relief it could obtain after a trial on the merits." *H&R Block, Inc. v. Block, Inc.*, 58 F.4th 939, 946 (8th Cir. 2023). At the end of the day, however, "[a] district court has broad discretion when ruling on a request for preliminary injunction." *GLBT Youth in Iowa Sch. Task Force v. Reynolds*, 114 F.4th 660, 669 (8th Cir. 2024) (quoting *Novus Franchising, Inc. v. Dawson*, 725 F.3d 885, 893 (8th Cir. 2013)).

B. Likelihood Of Success On The Merits

1. Facial Versus As-Applied Challenge

Jones Eagle attacks Acts 636 and 174 both facially and as applied (Dkt. Nos. 1, ¶ 2; 7, ¶ 3). Facial challenges are "to be discouraged." *United States v. Stephens*, 594 F.3d 1033, 1037 (8th Cir. 2010) (quoting *Sabri v. United States*, 541 U.S. 600, 608–09 (2004)). This is because they "'threaten to short circuit the democratic process' by preventing duly enacted laws from being implemented in constitutional ways." *Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2397 (2024) (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 451 (2008)). As such, facial challenges are "hard to win," *id.*, and indeed are "the most difficult challenge to mount successfully" against a statute. *Stephens*, 594 F.3d at 1037 (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). When it comes to the legal standard to be applied, "[a] facial challenge is really just a claim that the law or policy at issue is unconstitutional in all its applications. So classifying a lawsuit as facial or as-applied affects the extent to which the invalidity of the

challenged law must be demonstrated and the corresponding 'breadth of the remedy.'" *Bucklew v. Precythe*, 587 U.S. 119, 138 (2019) (quoting *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 331 (2010)). To succeed on a facial challenge, a plaintiff must "establish that no set of circumstances exists under which the [law] would be valid." *Moody*, 144 S. Ct. at 2397 (alteration in original) (quoting *Salerno*, 481 U.S. at 745). For these reasons and given the preliminary nature of the record, the Court considers only Jones Eagle's as-applied challenge to Acts 636 and 174 at this time.

2. *Ex Parte Young* Analysis

The Court finds that Jones Eagle's suit is proper under the *Ex Parte Young*, 209 U.S. 123 (1908), exception to Eleventh Amendment immunity and rejects Defendants' argument on this point. The Eleventh Amendment establishes a general prohibition of suits in federal court by a citizen of a state against his state or an officer or agency of that state. *Pennhurst State Sch. & Hosp. v. Halderman,* 465 U.S. 89, 100 (1984). However, there are exceptions to this rule. Relevant here, a suit against a state official may go forward in the limited circumstances identified by the Supreme Court in *Ex Parte Young.* Under the *Ex Parte Young* doctrine, a private party can sue a state officer in his official capacity to enjoin a prospective action that would violate federal law. In determining whether this exception applies, a court conducts "a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.,* 535 U.S. 635, 645 (2002) (alteration in original) (quoting *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 296 (1997) (O'Connor, J., concurring in part)). Here, there is no dispute that the relief Jones Eagle seeks is prospective.

Further, to be amenable for suit challenging a particular statute, the state actor must have "some connection with the enforcement of the act." *Reprod. Health Servs. v. Nixon,* 428 F.3d 1139, 1145–46 (8th Cir.2005). Here, Jones Eagle has demonstrated a sufficient connection between Defendants and the enforcement of Acts 636 and 174 to satisfy this standard.

To the extent Defendants maintain that the Supremacy Clause alters this analysis, the Court rejects that position in reliance on *Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320, 327 (2015). The *Armstrong* Court observed that, based upon precedents, "in a proper case, relief may be given in a court of equity. . . to prevent an injurious act by a public officer." *Id.* (quoting *Carroll v. Safford,* 44 U.S. 441, 463 (1845)). The Court explained:

> The ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England. *See Jaffe & Henderson, Judicial Review and the Rule of Law: Historical Origins*, 72 L.Q. Rev. 345 (1956). It is a judge-made remedy, and we have never held or even suggested that, in its application to state officers, it rests upon an implied right of action contained in the Supremacy Clause.

Id.

3. Avoidance Of Constitutional Adjudications

Jones Eagle attacks Acts 636 and 174 as preempted by federal law and as violative of the Equal Protection Clause, the Fourteenth Amendment Due Process Clause, the Commerce Clause, and the Takings Clause of the United States Constitution (Dkt. No. 1, ¶¶ 2–8, 147–205). The allegations also seem to hint at a Fourth Amendment claim (*See* Dkt. Nos. 1, ¶¶ 6, 66–68, 95–99, 168; 8, at 25–26; 27, at 38–39). Although the constitutional issues presented in this case are serious, the Court notes that the Supreme Court has "'often stressed' that it is 'importan[t to] avoi[d] the premature adjudication of constitutional questions.'" *Matal v. Tam*, 582 U.S. 218, 230–31 (2017) (alterations in original) (quoting *Clinton v. Jones*, 520 U.S. 681, 690 (1997)). Thus,

federal courts "ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Id.* at 231 (alteration in original) (quoting *Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944)); *see also Clinton*, 520 U.S. at 690, n.11 (noting that this requirement applies to the "entire Federal Judiciary" and listing cases in footnote). The Supreme Court has further stated that, although "basically constitutional in nature" because they "deriv[e their] force from the operation of the Supremacy Clause," federal preemption claims are "'statutory' for purposes of our practice of deciding statutory claims first to avoid unnecessary constitutional adjudications." *Douglas v. Seacoast Prod., Inc.*, 431 U.S. 265, 272, n.6 (1977); *see also North Dakota v. Heydinger*, 825 F.3d 912, 927 (8th Cir. 2016) (Colloton, J., concurring in the judgment); *Ariz. Dream Act Coalition v. Brewer*, 855 F.3d 957, 971, n.5 (9th Cir. 2017); *Colo. Dep't of Pub. Health & Env't, Hazardous Materials & Waste Mgmt. Div. v. United States*, 693 F.3d 1214, 1222 (10th Cir. 2012); *C.E.R. 1988, Inc. v. Aetna Casualty & Surety Co.*, 386 F.3d 263, 272 n.13 (3d Cir. 2004). The Court will therefore examine Jones Eagle's federal preemption claims first as a threshold issue before turning to its constitutional claims.

4. Foreign Affairs Preemption

Two fundamental constitutional issues underlie the federal preemption issues presented in this case. The first is the Supremacy Clause of Article VI, which undergirds federal preemption doctrine generally. It provides that the "Constitution," "Laws," and "Treaties" of the United States "shall be the supreme Law of the Land . . . any thing in the Constitution or Laws of any State notwithstanding." U.S. Const. art. VI, cl. 2. As such, under federal preemption doctrine, any "state law that conflicts with federal law is 'without effect,'" whether that conflict be express or implied. *Pharm. Rsch. & Mfrs. of Am. v. McClain*, 95 F.4th 1136, 1140 (8th Cir. 2024) (quoting *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992)). In this regard, "'[t]he purpose of

Congress is the ultimate touchstone' of pre-emption analysis." *Id.* (alteration in original) (quoting *Cipollone*, 505 U.S. at 516). The moving party has the burden of showing preemption. *Pharm. Care Mgmt. Ass' n v. Wehbi*, 18 F.4th 956, 967 (8th Cir. 2021).[3]

The second issue is the exclusive authority over foreign affairs that the Constitution vests in the federal government, evinced in an array of constitutional provisions. *See* U.S. Const. art. I, § 8, cl. 3 (power to regulate foreign commerce); *id.* cl. 4 (power over naturalization); *id.* cl. 10 (power to define offenses against the law of nations); *id.* cl. 11 (power to declare war); *id.* § 10 (placing various restrictions on state actions that implicate foreign affairs); *id.* art. II, § 2, cl. 2 (power to negotiate treaties, appoint ambassadors, ministers, and consuls). The Supreme Court accordingly has long recognized that "[n]o State can rewrite our foreign policy to conform to its own domestic policies. Power over external affairs is not shared by the States; it is vested in the national government exclusively." *United States v. Pink*, 315 U.S. 203, 233 (1942). "[F]or national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power." *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941) (quoting *Ping v. United States*, 130 U.S. 581, 606 (1889)). The legal implications of this federal exclusivity are straightforward. In the words of the Supreme Court, "[o]ur system of government . . . imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference." *Id.* "[C]omplete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states." *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 418 (2003) (alteration in original) (quoting *United States v. Belmont*, 301 U.S. 324, 331 (1937)). The Founders themselves were emphatic on this point. *See Nat'l*

[3] Defendants make the offhanded observation that "the Supremacy Clause does not provide a cause of action" (Dkt. No. 24, at 31). As noted above, Jones Eagle brings its claims pursuant to *Ex Parte Young*, not an implied right of action under the Supremacy Clause.

Foreign Trade Council v. Natsios, 181 F.3d 38, 49 (1st Cir. 1999), *aff'd sub nom. Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000) (quoting *The Federalist* Nos. 22, 42, and 45); *Hines*, 312 U.S. at 63 n.11 (quoting Thomas Jefferson).

At the intersection of these two constitutional issues is the foreign affairs doctrine. "Under the foreign affairs doctrine, state laws that intrude on this exclusively federal power are preempted." *Mayor & City Council of Baltimore v. BP P.L.C.*, 31 F.4th 178, 213 (4th Cir. 2022), *cert. denied*, 143 S. Ct. 1795 (2023) (quoting *Movsesian v. Victoria Versicherung AG*, 670 F.3d 1067, 1071 (9th Cir. 2012)); *see Gingery v. City of Glendale*, 831 F.3d 1222, 1228 (9th Cir. 2016). This may occur through either conflict preemption or field preemption. *Mayor & City Council of Baltimore*, 31 F.4th at 213; *Gingery*, 831 F.3d at 1228; *A.O.A. v. Rennert*, Case No. 4:11-cv-44-CDP, 2023 WL 346001, at *28 (E.D. Mo. Jan. 20, 2023), *aff'd sub nom. Reid v. Doe Run Res. Corp.*, 110 F.4th 1049 (8th Cir. 2024). Jones Eagle argues that Acts 636 and 174 fall afoul of both foreign affairs conflict preemption and field preemption (Dkt. No. 27, at 8–19).[4] The Court will examine each in turn.

a. Conflict Preemption

Foreign affairs conflict preemption occurs when there is a "'sufficiently clear conflict' between the state law and an express foreign policy" of the federal government. *Mayor & City Council of Baltimore*, 31 F.4th at 213 (quoting *Garamendi*, 539 U.S. at 420–24); *Gingery*, 831 F.3d at 1229 ("[A] state action must yield to federal executive authority where 'there is clear evidence of conflict between the policies adopted by the two.'") (quoting *Garamendi*, 539 U.S. at

[4] Although Jones Eagle does not invoke the foreign affairs doctrine by name, its conflict and field preemption arguments rely almost entirely on the body of Supreme Court case law associated with the doctrine (*See* Dkt. Nos. 8, at 27–36; 27, at 4–19). The Court therefore examines the preemption issues raised by Jones Eagle under the rubric of the foreign affairs doctrine.

421); *Museum of Fine Arts, Boston v. Seger-Thomschitz*, 623 F.3d 1, 11 (1st Cir. 2010) (noting the Supreme Court's holding in *Garamendi*). Notably for present purposes, such conflicts may occur when the basic policy objectives of the state and federal regimes are the same. As the Supreme Court emphasized in *Garamendi*, "the fact of a common end hardly neutralizes conflicting means." *Garamendi*, 539 U.S. at 399; *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 379 (2000). Simply put, where state and federal policy differ in their "means," the state policy inevitably compromises the federal government's ability to "to speak for the Nation with one voice in dealing with other governments." *Crosby*, 530 U.S. at 381.

Jones Eagle points to the comprehensive and complex federal regulatory regime governing foreign investment evinced in support of its conflict preemption arguments. Jones Eagle argues that Acts 636 and 174 conflict with at least two sets of federal regulations in this regard. First, there is the regime for screening foreign investment transactions associated with the interagency Committee on Foreign Investment in the United States ("CFIUS"), as statutorily codified by the Foreign Investment Risk Review Modernization Act of 2018 ("FIRRMA"), Pub. L. 115-232, 132 Stat. 2174, and the Office of Foreign Assets Control of the United States Department of the Treasury (Dkt. No. 8, at 27–34). Second, Jones Eagle argues that the classifications made by Acts 636 and 174 also conflict with the statutory definitions of foreign ownership and foreign control set forth in the International Traffic in Arms Regulations ("ITAR"), 22 C.F.R. § 120.1 *et seq.*, issued by the United States Department of State pursuant to the Arms Export Control Act of 1976 ("AECA"), 22 U.S.C. § 2278, *et seq.*, and by the President of the United States through executive order, Executive Order Number 13637, 78 Fed. Reg. 16129 (*Id.*, at 34).

The Court turns first to FIRRMA. FIRRMA's regulatory regime subjects a wide array of private business transactions involving "foreign persons" to national security review,

investigation, and approval or disapproval at the discretion of the President, acting through CFIUS. 50 U.S.C. § 4565. Among these, the CFIUS regime specifically covers "the purchase or lease by, or a concession to, a foreign person of private or public real estate" that is sensitive for national security reasons with respect to federal installations, facilities, or properties. *Id.* § 4565(a)(4)(B)(ii). Real estate transactions in urbanized areas and involving single housing units are specifically exempted from review. *Id.* § 4565(a)(4)(C)(i).

Arkansas law takes a different view as to what sort of foreign investment ought to be prohibited. Act 636 provides that "prohibited foreign parties"—defined to include, among others, any citizen, resident, or entity of a country subject to ITAR, Arkansas Code Annotated § 18-11-802(5)—shall not acquire "any interest in agricultural land in this state." Ark. Code Ann. § 18-11-804. Act 174 provides that "prohibited foreign parties" shall not acquire or hold by grant "any interest in a digital asset mining business in this state." Ark. Code Ann. § 14-1-606. Acts 636 and 174 thus appear on their face to conflict with FIRRMA's comprehensive regulatory scheme for security review of foreign investment. Not only do Acts 636 and 174 infringe upon Congress's carefully considered calibration as to when foreign ownership interests in American real estate and businesses ought or ought not to be subject to scrutiny, they also purport to deprive the President of the discretion to approve or deny specific foreign investments based on the criteria that Congress judged to be relevant in making such determinations—the very discretion which lies at the heart of the CFIUS regime. Arkansas's blanket ban on certain categories of foreign ownership in Acts 636 and 174 thus clearly conflicts with the cautious, transaction-specific approach taken by Congress to foreign investment in FIRRMA.

Beyond the conflict in their regulatory approaches, Acts 636 and 174 also conflict with FIRRMA's regime in terms of how they define foreign ownership. FIRRMA subjects to review

transactions involving the acquisition of certain interests by "foreign persons." A "foreign person" is defined as: "(1) Any foreign national, foreign government, or foreign entity; or (2) Any entity over which control is exercised or exercisable by a foreign national, foreign government, or foreign entity." 31 C.F.R . § 800.224. By contrast, a "prohibited foreign party" under Acts 636 and 174 would include by their terms a United States citizen who is a resident of an ITAR country, such as, for instance, an American citizen who is a resident of Hong Kong or Cyprus. Ark. Code Ann. §§ 14-1-606, 18-11-802. The foreign investment restrictions of FIRRMA and Acts 636 and 174 are thus in conflict both in terms of what investments they prohibit and to whom their prohibitions apply. Even leaving aside the fact that Congress has deliberately chosen not to subject the categories of foreign investment prohibited by Acts 636 and 174 to special scrutiny, it is not hard to imagine a scenario in which a foreign investment transaction specifically approved by the President through the CFIUS review process would nevertheless run afoul of Act 636 or Act 174, rendering the President's express approval nugatory.[5] This would conflict with federal foreign affairs policy—and the same conflict occurs here, where the foreign investment regime carefully crafted by Congress and the President has deliberately excluded the sorts of transactions and interests at issue in this case from even the possibility of heightened security review. *See Yifan Shen, et al. v. Comm'r, Fla. Dep't of Agric., et al.*, Case No. 23-12737, 2024 U.S. App. LEXIS 2346 (11th Cir. Feb. 1, 2024) (enjoining pending appeal Florida's restrictions on real estate ownership by Chinese domiciliaries on grounds of FIRRMA preemption).

ITAR adds another wrinkle to the regulatory puzzle, given that Acts 636 and 174 piggyback off its list of countries for which the United States has a policy "to deny licenses and other

[5] This could happen, for instance, if the President were to approve after CFIUS review the purchase of Arkansas farmland (or a digital asset mining business) adjacent to a military facility by a "prohibited foreign party" under Act 636 or Act 174.

approvals for exports and imports of defense articles and defense services, destined for or originating in certain countries." 22 C.F.R. § 126.1. The ITAR list of countries has no apparent legal import for federal policy outside of this specific defense export-control context. Acts 636 and 174's attempt to expand the list of prohibitions against these countries is thus plainly in conflict with the determination of Congress and the State Department as to the breadth and depth of restrictions to be placed upon them. Even were this not the case, as Jones Eagle points out (Dkt. No. 7, at 14), the requisite levels of foreign ownership and control that trigger Acts 636 and 174 conflict with the relevant thresholds for foreign ownership and foreign control employed by the State Department for ITAR purposes. *Compare* Ark. Code Ann. §§ 18-11-110(a), 803(a), 14-1-606(a), *with* 22 C.F.R. § 120.65. This, of course, is entirely aside from the abovementioned conflict between the State Department's definition of "foreign person" for ITAR purposes and Acts 636 and 174's definitions of "prohibited foreign party."

To add one final layer of conflict to this regulatory maze, Act 636 and Act 174 do not even employ consistent definitions of "prohibited foreign party," since the definition in Act 636 is pegged to 22 C.F.R. § 126.1, whereas Act 174's definition is pegged to 22 C.F.R. § 126.1 "as existing on January 1, 2024." *Compare* Ark. Code Ann. § 18-11-802(5) *with* § 14-1-606(a)(2). Thus, a situation could easily arise where the list of countries to which ITAR (and Act 636) applies differs from the list of countries to which Act 174 applies. In any case, on the record before the Court, no aspect of Jones Eagle's business runs afoul of ITAR, so Act 636 and Act 174's imposition of restrictions on Jones Eagle based upon a tenuous link with an ITAR country is plainly in conflict with federal policy as to the purpose and scope of the ITAR list and its associated restrictions.

In the face of these rather straightforward conflicts between federal policy and Acts 636 and 174, Defendants point to general presumption against preemption where states are legislating in areas within their "historic police powers." *Pharm. Rsch. & Mfrs.*, 95 F.4th at 1140. However, Defendants fail to note that, on the contrary, "when Congress legislates in an area of foreign relations, there is a strong presumption that it intended to preempt the field, in particular where the federal legislation does not touch on a traditional area of state concern." *Natsios*, 181 F.3d at 76; *Nat'l Foreign Trade Council, Inc. v. Giannoulias*, 523 F. Supp. 2d 731, 740 (N.D. Ill. 2007) (accord). Indeed, even in areas traditionally regulated by the state, the Supreme Court has indicated that "[t]he conflict with federal policy need not be as sharp as that which must exist for ordinary pre-emption." *Garamendi*, 539 U.S. at 419 n.11 (alteration in original) (quoting *Boyle v. United Technologies Corp.*, 487 U.S. 500, 507–508 (1988)). This is particularly the case where the state regulation targets specific foreign countries. *See id.* at 399 (noting the "weakness of the State's interest, when evaluated in terms of traditional state legislative subject matter, in regulating disclosure of European Holocaust-era insurance policies"). Even in areas at the core of state police power, "regulations must give way if they impair the effective exercise of the Nation's foreign policy." *Zschernig v. Miller*, 389 U.S. 429, 441 (1968).

Even assuming that both Act 636 and Act 174 lie within the scope of Arkansas's "historic police powers," the Supreme Court's decision in *Zschernig* is controlling here. In that case, the Court dealt with an Oregon statute providing for escheat in cases where a nonresident alien claimed real or personal property unless three requirements were satisfied:

> (1) the existence of a reciprocal right of a United States citizen to take property on the same terms as a citizen or inhabitant of the foreign country; (2) the right of United States citizens to receive payment here of funds from estates in the foreign country; and (3) the right of the foreign heirs to receive the proceeds of Oregon estates "without confiscation."

Id. at 430. The Court found the statute was preempted despite the fact that "[t]he several States, of course, have traditionally regulated the descent and distribution of estates," *id.* at 440, and that the Solicitor General of the United States, acting as *amicus curiae*, "d[id] not contend that the application of the Oregon escheat statute in the circumstances of this case unduly interferes with the United States' conduct of foreign relations." *Id.* at 434. The statute was preempted, even in the absence of a conflicting treaty or statute, *see id.* at 441, because it "affect[ed] international relations in a persistent and subtle way" by inviting Oregon courts to scrutinize foreign regimes in its application. *Id.* at 435–40. The Supreme Court found that this carried "more than 'some incidental or indirect effect in foreign countries'" for purposes of foreign affairs field preemption. *Id.* at 434. The reasoning of *Zschernig* applies even more strongly in this case, where Acts 636 and 174 go so far as to target specific foreign countries for economic restrictions and conflict with the express foreign policy of the federal government as represented by the FIRRMA and ITAR regimes.

For these reasons, the Court finds that Jones Eagle is likely to prevail on its conflict preemption claim with respect to both Acts 636 and 174.

b. Field Preemption

Foreign affairs field preemption applies when a "state law or policy 'disturb[s] foreign relations' or if a State attempts to 'establish its own foreign policy.'" *Mayor & City Council of Baltimore*, 31 F.4th at 213 (quoting *Zschernig*, 389 U.S. at 441); *A.O.A.*, 23 WL at *28 (accord). This occurs when two elements are met: (1) the "real purpose" of the state policy at issue does not concern an area of traditional state responsibility; and (2) it intrudes on the federal government's foreign affairs power. *Gingery*, 831 F.3d at 1229 (quoting *Movsesian*, 670 F.3d at 1229). The fundamental question with respect to the second element is whether "the state law 'has more than

some incidental or indirect effect in foreign countries.'" *Mayor & City Council of Balt.*, 31 F.4th at 213 (alteration in original) (quoting *Zschernig*, 389 U.S. at 434); *A.O.A.*, 23 WL at *28 (accord). There need not be any showing of conflict between state and federal policy in this regard. *Kyocera Document Sols. Am., Inc. v. Div. of Admin.*, 708 F. Supp. 3d 531, 545 (D.N.J. 2023) (quoting *Zschernig*, 389 U.S. at 418).

For the reasons stated above in its analysis of Jones Eagle's conflict preemption claim, the Court also finds that Jones Eagle is likely to succeed on its field preemption claim under the foreign affairs doctrine with respect to both Acts 636 and 174. *See Crosby*, 530 U.S. at 387–88 (affirming injunction against Massachusetts's Burma Act); *Shen*, 2024 U.S. App. LEXIS at *3 (enjoining pending appeal Florida's restrictions on real estate ownership by Chinese domiciliaries); *Odebrecht Const., Inc. v. Sec'y, Fla. Dep't of Transp.*, 715 F.3d 1268, 1290 (11th Cir. 2013) (affirming injunction against Florida's Cuba Amendment); *Kyocera*, 708 F. Supp. 3d at 561 (enjoining New Jersey's Russia Act); *Alario v. Knudsen*, 704 F. Supp. 3d 1061, 1088 (D. Mont. 2023) (enjoining Montana's TikTok ban); *Giannoulias*, 523 F. Supp. 2d at 750–51 (enjoining Illinois's Sudan Act).

5. Constitutional Claims

Because the Court determines that Jones Eagle is likely to prevail on its federal preemption claims, the Court, in accordance with the long-established judicial policy of avoiding premature adjudication of constitutional claims, declines to make any ruling on Jones Eagle's other constitutional claims at this time. The Court notes, however, that, on the limited record before it, Jones Eagle has the better of the argument with respect to all of its remaining claims.

For these reasons, the Court finds as a threshold matter that Jones Eagle is likely to succeed on the merits of its as-applied challenge to Acts 636 and 174. The Court now turns to the other preliminary injunction factors.

C. Irreparable Harm

To be entitled to a preliminary injunction, the movant must show it is "likely to suffer irreparable harm in the absence of preliminary relief." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Thus, "[s]peculative harm does not support a preliminary injunction." *S.J.W. ex rel. Wilson v. Lee's Summit R-7 Sch. Dist.*, 696 F.3d 771, 779 (8th Cir. 2012); *see also Novus Franchising, Inc. v. Dawson*, 725 F.3d 885, 895 (8th Cir. 2013) ("[T]o demonstrate irreparable harm, a party must show that the harm is certain and great and of such imminence that there is a clear and present need for equitable relief.") (quoting *Iowa Utils. Bd. v. FCC*, 109 F.3d 418, 425 (8th Cir. 1996))). "Irreparable harm occurs when a party has no adequate remedy at law, typically because its injuries cannot be fully compensated through an award of damages." *Cigna Corp. v. Bricker*, 103 F.4th 1336, 1342 (8th Cir. 2024). Jones Eagle "is not required to prove with certainty the threat of irreparable harm, but it must prove that 'irreparable injury is likely in the absence of an injunction.'" *Sleep No. Corp. v. Young*, 33 F.4th 1012, 1018 (8th Cir. 2022) (quoting *Winter*, 555 U.S. at 22). "The failure to show irreparable harm is, by itself, a sufficient ground upon which to deny a preliminary injunction[.]" *Gelco Corp. v. Coniston Partners*, 811 F.2d 414, 418 (8th Cir. 1987).

Jones Eagle has been publicly targeted by name and subjected to investigation by Defendants for almost a year. Jones Eagle faces irreparable harm from the public investigation and threatened enforcement actions under Acts 636 and 174 in the form of damage to reputation and goodwill. *See Rogers Group, Inc. v. City of Fayetteville, Ark.*, 629 F.3d 784, 789–90 (8th Cir.

2010) (finding loss of goodwill among customers sufficient to establish a threat of irreparable harm) (citing *Med. Shoppe Int'l, Inc. v. S.B.S. Bill Dr., Inc.*, 336 F.3d 801, 805 (8th Cir. 2003)). Moreover, Jones Eagle and Mr. Chen risk imprisonment, fines, and judicial foreclosure. Jones Eagle has shown that it is likely to sustain irreparable harm absent entry of the preliminary injunction.

Defendants claim that Jones Eagle "delay[ed] in filing" its lawsuit, undermining evidence of irreparable harm (Dkt. No. 24, at 36 (citing *Beame v. Friends of the Earth*, 434 U.S. 1310, 1313 (1977))). The Court finds persuasive Jones Eagle's argument that it attempted cooperation with Defendants and that the public investigation recently escalated through a "burst of prosecutorial alacrity." *See Netflix, Inc. v. Babin*, 88 F.4th 1080, 1092 (5th Cir. 2023) (finding "inflection point" of assertions of constitutional rights "difficult to overlook"). The injuries to goodwill and reputational harms associated with prolonged investigation and potential enforcement actions are irreparable injuries. For all of these reasons, Jones Eagle has shown it is likely to sustain irreparable harm absent entry of a preliminary injunction.

D. Balance Of Harms

This Court "has broad discretion when ruling on a request for preliminary injunction" to balance the four factors to achieve the most equitable result. *Richland/Wilkin Joint Powers Auth. v. U.S. Army Corps of Eng'rs*, 826 F.3d 1030, 1035 (8th Cir. 2016) (quoting *Novus Franchising*, 725 F.3d at 893). Compared to the likely prospect of irreparable harm to Jones Eagle, Defendants will sustain no appreciable harm by entry of a preliminary injunction. Given the Court's preemption analysis, the Court determines Jones Eagle is likely to prevail on its argument that Defendants have no interest in regulating matters of foreign affairs. To the extent Defendants argue that "the State's presumptively reasoned democratic processes" "are entitled to a higher

degree of deference and should not enjoined lightly," (Dkt. No. 24, at 37), the Court agrees with Jones Eagle that this interest is what is protected by the requirement of *Rounds* that Jones Eagle show it is likely to succeed on the merits of this dispute. The balance of the equities factor favors Jones Eagle.

E. Public Interest

Defendants are correct that the Court should preserve the status quo. Entry of the preliminary injunction does that by preserving "the relative positions of the parties." *Benisek v. Lamone*, 585 U.S. 155, 161 (2018) (quoting *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981)). Allowing the temporary restraining order to expire would upend the status quo by allowing Defendants to commence enforcement activities when Defendants have no constitutional interest in regulating matters of foreign affairs, foreign relations, or national security. The public interest factor weighs in favor of Jones Eagle.

F. Security

Under Federal Rule of Civil Procedure 65(c), a district court may grant a preliminary injunction "only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." Fed. R. Civ. P. 65(c). In these proceedings, Defendants have neither requested security in the event this Court grants a preliminary injunction nor presented any evidence that Defendants will be financially harmed if they are wrongfully enjoined. For these reasons, the Court declines to require security from Jones Eagle.

G. Conclusion On Motion For Preliminary Injunction

For the foregoing reasons, the Court grants Jones Eagle's motion for preliminary injunction (Dkt. No. 7) and enjoins defendant Secretary Ward and defendant Attorney General Griffin, and

all those acting in concert with them, from enforcing any provision of Act 636 or Act 174 against Jones Eagle until further Order from this Court.

IV. Severability

Given this Court's analysis and the statutory scheme of Act 636 and Act 174, severability is not appropriate.

V. Conclusion

For the foregoing reasons, the Court denies Defendants' motion to dismiss (Dkt. No. 16). The Court grants Jones Eagle's motion for preliminary injunction (Dkt. No. 7) and enjoins defendant Secretary Ward and defendant Attorney General Griffin, and all those acting in concert with them, from enforcing any provision of Act 636 or Act 174 against Jones Eagle until further Order from this Court.

It is so ordered this 9th day of December, 2024.

Kristine G. Baker
Chief United States District Judge

Table F-2.
U.S. Bankruptcy Courts—Business and Nonbusiness Cases Commenced, by Chapter of the Bankruptcy Code, During the 12-Month Period Ending December 31, 2024

Circuit and District	Total All Chapters	Total Chapter 7	Total Chapter 11	Total Chapter 13	Total Other Chapters [1]	Predominant Nature of Debt								
						Business					Nonbusiness			
						All Chapters	Chapter 7	Chapter 11	Chapter 13	Other Chapters [1]	All Chapters	Chapter 7	Chapter 11	Chapter 13
Total	**517,308**	**310,631**	**8,884**	**197,244**	**549**	**23,107**	**12,582**	**8,456**	**1,520**	**549**	**494,201**	**298,049**	**428**	**195,724**
DC	**443**	**268**	**66**	**108**	**1**	**86**	**19**	**63**	**3**	**1**	**357**	**249**	**3**	**105**
1st	**13,080**	**6,616**	**226**	**6,220**	**18**	**616**	**327**	**205**	**66**	**18**	**12,464**	**6,289**	**21**	**6,154**
ME	638	472	29	134	3	70	34	28	5	3	568	438	1	129
MA	4,706	2,952	108	1,645	1	297	168	103	25	1	4,409	2,784	5	1,620
NH	952	647	11	292	2	64	39	9	14	2	888	608	2	278
RI	968	672	8	288	0	41	31	8	2	0	927	641	0	286
PR	5,816	1,873	70	3,861	12	144	55	57	20	12	5,672	1,818	13	3,841
2nd	**24,939**	**16,577**	**975**	**7,343**	**44**	**2,039**	**1,052**	**889**	**54**	**44**	**22,900**	**15,525**	**86**	**7,289**
CT	3,337	2,747	18	572	0	114	96	12	6	0	3,223	2,651	6	566
NY,N	3,688	2,732	35	913	8	107	51	33	15	8	3,581	2,681	2	898
NY,E	10,357	6,023	496	3,838	0	1,046	606	440	0	0	9,311	5,417	56	3,838
NY,S	4,962	3,364	401	1,164	33	650	220	379	18	33	4,312	3,144	22	1,146
NY,W	2,333	1,501	24	806	2	100	60	24	14	2	2,233	1,441	0	792
VT	262	210	1	50	1	22	19	1	1	1	240	191	0	49
3rd	**28,774**	**15,224**	**2,032**	**11,352**	**166**	**3,013**	**745**	**1,992**	**110**	**166**	**25,761**	**14,479**	**40**	**11,242**
DE	2,891	945	1,242	546	158	1,586	183	1,242	3	158	1,305	762	0	543
NJ	13,199	7,564	529	5,102	4	798	249	499	46	4	12,401	7,315	30	5,056
PA,E	4,687	2,146	72	2,469	0	236	133	70	33	0	4,451	2,013	2	2,436
PA,M	3,469	1,745	32	1,691	1	122	74	31	16	1	3,347	1,671	1	1,675
PA,W	4,510	2,820	146	1,541	3	259	105	139	12	3	4,251	2,715	7	1,529
VI	18	4	11	3	0	12	1	11	0	0	6	3	0	3
4th	**40,777**	**20,956**	**385**	**19,424**	**12**	**1,375**	**811**	**370**	**182**	**12**	**39,402**	**20,145**	**15**	**19,242**
MD	11,108	6,907	85	4,114	2	363	229	80	52	2	10,745	6,678	5	4,062
NC,E	4,604	1,101	87	3,414	2	203	74	84	43	2	4,401	1,027	3	3,371
NC,M	2,068	947	13	1,108	0	68	45	13	10	0	2,000	902	0	1,098
NC,W	2,187	910	28	1,248	1	106	55	27	23	1	2,081	855	1	1,225
SC	4,651	1,486	38	3,127	0	138	93	36	9	0	4,513	1,393	2	3,118
VA,E	11,353	6,409	87	4,855	2	308	195	83	28	2	11,045	6,214	4	4,827
VA,W	3,171	1,883	23	1,260	5	91	55	23	8	5	3,080	1,828	0	1,252
WV,N	693	532	9	152	0	31	18	9	4	0	662	514	0	148
WV,S	942	781	15	146	0	67	47	15	5	0	875	734	0	141

Table F-2. (December 31, 2024—Continued)

Circuit and District	Total All Chapters	Total Chapter 7	Total Chapter 11	Total Chapter 13	Total Other Chapters [1]	Predominant Nature of Debt								
						Business					Nonbusiness			
						All Chapters	Chapter 7	Chapter 11	Chapter 13	Other Chapters [1]	All Chapters	Chapter 7	Chapter 11	Chapter 13
5th	**50,075**	**23,801**	**1,536**	**24,679**	**59**	**3,592**	**1,850**	**1,511**	**172**	**59**	**46,483**	**21,951**	**25**	**24,507**
LA,E	2,558	582	49	1,927	0	111	50	46	15	0	2,447	532	3	1,912
LA,M	1,152	535	12	605	0	32	19	12	1	0	1,120	516	0	604
LA,W	5,716	1,036	44	4,623	13	103	42	42	6	13	5,613	994	2	4,617
MS,N	4,178	1,453	18	2,704	3	62	27	18	14	3	4,116	1,426	0	2,690
MS,S	4,951	2,516	24	2,409	2	108	73	24	9	2	4,843	2,443	0	2,400
TX,N	10,925	6,054	374	4,472	25	950	528	369	28	25	9,975	5,526	5	4,444
TX,E	5,250	2,890	86	2,274	0	371	259	81	31	0	4,879	2,631	5	2,243
TX,S	8,302	4,287	784	3,215	16	1,252	422	777	37	16	7,050	3,865	7	3,178
TX,W	7,043	4,448	145	2,450	0	603	430	142	31	0	6,440	4,018	3	2,419
6th	**76,389**	**46,431**	**312**	**29,627**	**19**	**1,328**	**865**	**296**	**148**	**19**	**75,061**	**45,566**	**16**	**29,479**
KY,E	5,326	3,312	23	1,989	2	72	43	23	4	2	5,254	3,269	0	1,985
KY,W	5,764	2,604	22	3,138	0	66	38	22	6	0	5,698	2,566	0	3,132
MI,E	16,830	11,316	48	5,461	5	203	117	45	36	5	16,627	11,199	3	5,425
MI,W	3,566	2,477	14	1,068	7	110	73	14	16	7	3,456	2,404	0	1,052
OH,N	13,723	10,718	44	2,957	4	246	179	42	21	4	13,477	10,539	2	2,936
OH,S	11,046	7,642	24	3,379	1	216	168	22	25	1	10,830	7,474	2	3,354
TN,E	6,817	3,668	27	3,122	0	127	91	26	10	0	6,690	3,577	1	3,112
TN,M	5,077	2,565	83	2,429	0	217	122	77	18	0	4,860	2,443	6	2,411
TN,W	8,240	2,129	27	6,084	0	71	34	25	12	0	8,169	2,095	2	6,072
7th	**52,032**	**30,375**	**317**	**21,303**	**37**	**1,272**	**826**	**304**	**105**	**37**	**50,760**	**29,549**	**13**	**21,198**
IL,N	21,582	12,151	200	9,207	24	754	501	193	36	24	20,828	11,650	7	9,171
IL,C	2,690	1,882	9	794	5	73	45	9	14	5	2,617	1,837	0	780
IL,S	1,726	918	11	795	2	36	13	11	10	2	1,690	905	0	785
IN,N	6,416	3,668	24	2,724	0	90	58	22	10	0	6,326	3,610	2	2,714
IN,S	9,903	5,587	42	4,273	1	143	92	38	12	1	9,760	5,495	4	4,261
WI,E	7,058	4,339	18	2,697	4	118	83	18	13	4	6,940	4,256	0	2,684
WI,W	2,657	1,830	13	813	1	58	34	13	10	1	2,599	1,796	0	803

Table F-2. (December 31, 2024—Continued)

Circuit and District	Total All Chapters	Total Chapter 7	Total Chapter 11	Total Chapter 13	Total Other Chapters [1]	Predominant Nature of Debt								
						Business					Nonbusiness			
						All Chapters	Chapter 7	Chapter 11	Chapter 13	Other Chapters [1]	All Chapters	Chapter 7	Chapter 11	Chapter 13
8th	**31,913**	**19,587**	**197**	**12,073**	**56**	**895**	**540**	**188**	**111**	**56**	**31,018**	**19,047**	**9**	**11,962**
AR [2]	6,654	2,624	48	3,965	17	185	87	43	38	17	6,469	2,537	5	3,927
IA,N	1,314	1,156	11	144	3	64	49	9	3	3	1,250	1,107	2	141
IA,S	1,888	1,530	12	340	6	59	35	12	6	6	1,829	1,495	0	334
MN	8,574	6,268	24	2,278	4	209	166	23	16	4	8,365	6,102	1	2,262
MO,E	5,802	3,440	42	2,317	3	121	70	42	6	3	5,681	3,370	0	2,311
MO,W	3,970	1,951	21	1,994	4	84	49	20	11	4	3,886	1,902	1	1,983
NE	2,533	1,672	21	824	16	104	53	21	14	16	2,429	1,619	0	810
ND	554	482	12	58	2	45	24	12	7	2	509	458	0	51
SD	624	464	6	153	1	24	7	6	10	1	600	457	0	143
9th	**86,666**	**69,016**	**1,126**	**16,466**	**58**	**4,424**	**3,074**	**992**	**300**	**58**	**82,242**	**65,942**	**134**	**16,166**
AK	211	146	9	54	2	29	17	9	1	2	182	129	0	53
AZ	11,335	9,221	131	1,973	10	434	285	117	22	10	10,901	8,936	14	1,951
CA,N	5,965	3,675	237	2,053	0	593	325	203	65	0	5,372	3,350	34	1,988
CA,E	10,677	8,415	84	2,164	14	494	330	83	67	14	10,183	8,085	1	2,097
CA,C	25,911	21,526	385	3,989	11	1,633	1,248	320	54	11	24,278	20,278	65	3,935
CA,S	5,068	4,363	40	665	0	255	205	40	10	0	4,813	4,158	0	655
HI	1,200	748	8	443	1	55	41	7	6	1	1,145	707	1	437
ID	2,145	1,879	28	237	1	91	61	25	4	1	2,054	1,818	3	233
MT	736	616	11	105	4	38	19	11	4	4	698	597	0	101
NV	8,302	6,789	84	1,428	1	267	183	77	6	1	8,035	6,606	7	1,422
OR	6,594	4,983	28	1,578	5	203	138	26	34	5	6,391	4,845	2	1,544
WA,E	2,122	1,723	20	375	4	70	41	19	6	4	2,052	1,682	1	369
WA,W	6,372	4,916	60	1,391	5	259	181	54	19	5	6,113	4,735	6	1,372
GU	28	16	1	11	0	3	0	1	2	0	25	16	0	9
NMI	0	-	-	-	-	-	-	-	-	-	-	-	-	-
10th	**26,986**	**19,444**	**217**	**7,308**	**17**	**1,042**	**747**	**208**	**70**	**17**	**25,944**	**18,697**	**9**	**7,238**
CO	7,761	6,094	103	1,560	4	465	334	97	30	4	7,296	5,760	6	1,530
KS	3,868	1,953	44	1,861	10	132	68	43	11	10	3,736	1,885	1	1,850
NM	1,420	1,213	7	199	1	62	52	6	3	1	1,358	1,161	1	196
OK,N	1,763	1,574	4	184	1	59	48	4	6	1	1,704	1,526	0	178
OK,E	1,064	951	6	107	0	38	32	6	0	0	1,026	919	0	107
OK,W	3,782	2,913	10	858	1	124	105	10	8	1	3,658	2,808	0	850
UT	6,802	4,306	29	2,467	0	124	85	28	11	0	6,678	4,221	1	2,456
WY	526	440	14	72	0	38	23	14	1	0	488	417	0	71

Table F-2. (December 31, 2024—Continued)

Circuit and District	Total All Chapters	Total Chapter 7	Total Chapter 11	Total Chapter 13	Total Other Chapters [1]	Predominant Nature of Debt								
						Business					Nonbusiness			
						All Chapters	Chapter 7	Chapter 11	Chapter 13	Other Chapters [1]	All Chapters	Chapter 7	Chapter 11	Chapter 13
11th	**85,234**	**42,336**	**1,495**	**41,341**	**62**	**3,425**	**1,726**	**1,438**	**199**	**62**	**81,809**	**40,610**	**57**	**41,142**
AL,N	9,827	3,937	31	5,856	3	157	113	30	11	3	9,670	3,824	1	5,845
AL,M	5,995	1,061	28	4,904	2	70	35	28	5	2	5,925	1,026	0	4,899
AL,S	3,573	779	17	2,776	1	48	27	17	3	1	3,525	752	0	2,773
FL,N	2,099	1,535	49	515	0	115	60	47	8	0	1,984	1,475	2	507
FL,M	21,094	15,761	469	4,858	6	1,179	664	446	63	6	19,915	15,097	23	4,795
FL,S	13,963	7,387	290	6,268	18	701	358	265	60	18	13,262	7,029	25	6,208
GA,N	19,082	9,637	571	8,852	22	1,026	409	565	30	22	18,056	9,228	6	8,822
GA,M	5,981	1,710	31	4,233	7	91	40	31	13	7	5,890	1,670	0	4,220
GA,S	3,620	529	9	3,079	3	38	20	9	6	3	3,582	509	0	3,073

NOTE: The nature of debt is business if the debtor is a corporation or partnership, or if debt related to the operation of a business predominates. Nonbusiness debt includes consumer debt, as defined in Section 101 of the U.S. Bankruptcy code, or other debt that the debtor indicates is not consumer debt or business debt. Because the bankruptcy database is continually updated, the numbers in this table may not match those in previously published tables. The United States territorial courts assume the jurisdiction of United States bankruptcy courts within their respective territories, which do not have separate bankruptcy courts.

[1] Other Chapters includes cases filed under chapters 9 (3), 12 (216) and 15 (330) as well as Section 304 (0).

[2] The United States Bankruptcy Court for Arkansas (AR) includes both the Eastern and Western Districts of Arkansas.

Table F-2.
U.S. Bankruptcy Courts—Bankruptcy Cases Commenced, by Chapter of the Bankruptcy Code, During the 12-Month Period Ending December 31, 2024

Circuit and District	Total All Chapters	Total Chapter 9	Total Chapter 12	Total Chapter 15 [1]	All Other Chapters
Total	**517,308**	**3**	**216**	**330**	**516,759**
DC	**443**	**0**	**1**	**0**	**442**
1st	**13,080**	**0**	**17**	**1**	**13,062**
ME	638	0	3	0	635
MA	4,706	0	1	0	4,705
NH	952	0	1	1	950
RI	968	0	0	0	968
PR	5,816	0	12	0	5,804
2nd	**24,939**	**0**	**10**	**34**	**24,895**
CT	3,337	0	0	0	3,337
NY,N	3,688	0	8	0	3,680
NY,E	10,357	0	0	0	10,357
NY,S	4,962	0	0	33	4,929
NY,W	2,333	0	2	0	2,331
VT	262	0	0	1	261
3rd	**28,774**	**0**	**4**	**162**	**28,608**
DE	2,891	0	0	158	2,733
NJ	13,199	0	2	2	13,195
PA,E	4,687	0	0	0	4,687
PA,M	3,469	0	1	0	3,468
PA,W	4,510	0	1	2	4,507
VI	18	0	0	0	18
4th	**40,777**	**0**	**12**	**0**	**40,765**
MD	11,108	0	2	0	11,106
NC,E	4,604	0	2	0	4,602
NC,M	2,068	0	0	0	2,068
NC,W	2,187	0	1	0	2,186
SC	4,651	0	0	0	4,651
VA,E	11,353	0	2	0	11,351
VA,W	3,171	0	5	0	3,166
WV,N	693	0	0	0	693
WV,S	942	0	0	0	942

Table F-2. (December 31, 2024—Continued)

Circuit and District	Total All Chapters	Total Chapter 9	Total Chapter 12	Total Chapter 15 [1]	All Other Chapters
5th	**50,075**	**1**	**24**	**34**	**50,016**
LA,E	2,558	0	0	0	2,558
LA,M	1,152	0	0	0	1,152
LA,W	5,716	0	13	0	5,703
MS,N	4,178	0	3	0	4,175
MS,S	4,951	0	2	0	4,949
TX,N	10,925	1	6	18	10,900
TX,E	5,250	0	0	0	5,250
TX,S	8,302	0	0	16	8,286
TX,W	7,043	0	0	0	7,043
6th	**76,389**	**0**	**19**	**0**	**76,370**
KY,E	5,326	0	2	0	5,324
KY,W	5,764	0	0	0	5,764
MI,E	16,830	0	5	0	16,825
MI,W	3,566	0	7	0	3,559
OH,N	13,723	0	4	0	13,719
OH,S	11,046	0	1	0	11,045
TN,E	6,817	0	0	0	6,817
TN,M	5,077	0	0	0	5,077
TN,W	8,240	0	0	0	8,240
7th	**52,032**	**0**	**7**	**30**	**51,995**
IL,N	21,582	0	0	24	21,558
IL,C	2,690	0	2	3	2,685
IL,S	1,726	0	2	0	1,724
IN,N	6,416	0	0	0	6,416
IN,S	9,903	0	1	0	9,902
WI,E	7,058	0	2	2	7,054
WI,W	2,657	0	0	1	2,656

Table F-2. (December 31, 2024—Continued)

Circuit and District	Total All Chapters	Total Chapter 9	Total Chapter 12	Total Chapter 15 [1]	All Other Chapters
8th	**31,913**	**2**	**51**	**3**	**31,857**
AR [2]	6,654	0	16	1	6,637
IA,N	1,314	0	3	0	1,311
IA,S	1,888	0	4	2	1,882
MN	8,574	0	4	0	8,570
MO,E	5,802	1	2	0	5,799
MO,W	3,970	0	4	0	3,966
NE	2,533	1	15	0	2,517
ND	554	0	2	0	552
SD	624	0	1	0	623
9th	**86,666**	**0**	**32**	**26**	**86,608**
AK	211	0	1	1	209
AZ	11,335	0	2	8	11,325
CA,N	5,965	0	0	0	5,965
CA,E	10,677	0	14	0	10,663
CA,C	25,911	0	3	8	25,900
CA,S	5,068	0	0	0	5,068
HI	1,200	0	0	1	1,199
ID	2,145	0	1	0	2,144
MT	736	0	4	0	732
NV	8,302	0	0	1	8,301
OR	6,594	0	5	0	6,589
WA,E	2,122	0	1	3	2,118
WA,W	6,372	0	1	4	6,367
GU	28	0	0	0	28
NMI	0	-	-	-	-
10th	**26,986**	**0**	**14**	**3**	**26,969**
CO	7,761	0	2	2	7,757
KS	3,868	0	10	0	3,858
NM	1,420	0	1	0	1,419
OK,N	1,763	0	0	1	1,762
OK,E	1,064	0	0	0	1,064
OK,W	3,782	0	1	0	3,781
UT	6,802	0	0	0	6,802
WY	526	0	0	0	526

Table F-2. (December 31, 2024—Continued)

Circuit and District	Total All Chapters	Total Chapter 9	Total Chapter 12	Total Chapter 15 [1]	All Other Chapters
11th	**85,234**	**0**	**25**	**37**	**85,172**
AL,N	9,827	0	3	0	9,824
AL,M	5,995	0	2	0	5,993
AL,S	3,573	0	1	0	3,572
FL,N	2,099	0	0	0	2,099
FL,M	21,094	0	3	3	21,088
FL,S	13,963	0	5	13	13,945
GA,N	19,082	0	1	21	19,060
GA,M	5,981	0	7	0	5,974
GA,S	3,620	0	3	0	3,617

[1] Total Chapter 15 column includes cases filed under chapter 15 (330) as well as Section 304 (0).
[2] The United States Bankruptcy Court for Arkansas (AR) includes both the Eastern and Western Districts of Arkansas.

Table F-2 Quarterly.
U.S. Bankruptcy Courts—Business and Nonbusiness Cases Commenced, by Chapter of the Bankruptcy Code, During the Three-Month Period Ending March 31, 2025, Based on Data Current as of March 31, 2025

Circuit and District	Total All Chapters	Total Chapter 7	Total Chapter 11	Total Chapter 13	Total Other Chapters [1]	Predominant Nature of Debt								
						Business					Nonbusiness			
						All Chapters	Chapter 7	Chapter 11	Chapter 13	Other Chapters [1]	All Chapters	Chapter 7	Chapter 11	Chapter 13
Total	**134,063**	**82,059**	**2,039**	**49,850**	**115**	**5,648**	**3,300**	**1,910**	**323**	**115**	**128,415**	**78,759**	**129**	**49,527**
DC	**112**	**75**	**10**	**27**	**0**	**15**	**6**	**9**	**0**	**0**	**97**	**69**	**1**	**27**
1st	**3,301**	**1,731**	**49**	**1,518**	**3**	**127**	**73**	**42**	**9**	**3**	**3,174**	**1,658**	**7**	**1,509**
ME	134	97	4	32	1	11	6	4	0	1	123	91	0	32
MA	1,199	802	19	378	0	62	44	17	1	0	1,137	758	2	377
NH	215	154	6	55	0	17	11	5	1	0	198	143	1	54
RI	264	189	1	74	0	9	8	1	0	0	255	181	0	74
PR	1,489	489	19	979	2	28	4	15	7	2	1,461	485	4	972
2nd	**6,518**	**4,339**	**253**	**1,908**	**18**	**571**	**306**	**228**	**19**	**18**	**5,947**	**4,033**	**25**	**1,889**
CT	894	715	4	175	0	28	22	2	4	0	866	693	2	171
NY,N	888	680	7	198	3	28	11	7	7	3	860	669	0	191
NY,E	2,846	1,663	157	1,026	0	318	178	140	0	0	2,528	1,485	17	1,026
NY,S	1,227	831	73	308	15	156	68	67	6	15	1,071	763	6	302
NY,W	596	395	12	189	0	32	19	12	1	0	564	376	0	188
VT	67	55	0	12	0	9	8	0	1	0	58	47	0	11
3rd	**7,419**	**4,127**	**355**	**2,928**	**9**	**573**	**199**	**342**	**23**	**9**	**6,846**	**3,928**	**13**	**2,905**
DE	646	265	247	128	6	315	62	247	0	6	331	203	0	128
NJ	3,482	2,099	54	1,329	0	121	64	46	11	0	3,361	2,035	8	1,318
PA,E	1,289	605	19	665	0	59	39	15	5	0	1,230	566	4	660
PA,M	897	464	7	425	1	26	15	7	3	1	871	449	0	422
PA,W	1,104	694	27	381	2	51	19	26	4	2	1,053	675	1	377
VI	1	0	1	0	0	1	0	1	0	0	0	-	-	-
4th	**10,515**	**5,582**	**84**	**4,842**	**7**	**309**	**192**	**78**	**32**	**7**	**10,206**	**5,390**	**6**	**4,810**
MD	2,826	1,754	24	1,048	0	90	57	23	10	0	2,736	1,697	1	1,038
NC,E	1,179	274	25	877	3	52	16	24	9	3	1,127	258	1	868
NC,M	505	239	1	265	0	8	7	1	0	0	497	232	0	265
NC,W	569	259	6	304	0	27	16	6	5	0	542	243	0	299
SC	1,219	416	6	794	3	32	21	6	2	3	1,187	395	0	792
VA,E	2,965	1,794	12	1,158	1	64	49	9	5	1	2,901	1,745	3	1,153
VA,W	858	527	3	328	0	18	15	3	0	0	840	512	0	328
WV,N	178	134	5	39	0	12	6	5	1	0	166	128	0	38
WV,S	216	185	2	29	0	6	5	1	0	0	210	180	1	29

Table F-2 Quarterly. (Three Months Ending March 31, 2025—Continued)

Circuit and District	Total All Chapters	Total Chapter 7	Total Chapter 11	Total Chapter 13	Total Other Chapters [1]	Predominant Nature of Debt								
						Business					Nonbusiness			
						All Chapters	Chapter 7	Chapter 11	Chapter 13	Other Chapters [1]	All Chapters	Chapter 7	Chapter 11	Chapter 13
5th	**13,267**	**6,362**	**422**	**6,475**	**8**	**916**	**457**	**414**	**37**	**8**	**12,351**	**5,905**	**8**	**6,438**
LA,E	632	157	9	466	0	29	19	8	2	0	603	138	1	464
LA,M	283	129	2	152	0	5	3	2	0	0	278	126	0	152
LA,W	1,399	292	5	1,100	2	13	6	4	1	2	1,386	286	1	1,099
MS,N	1,062	439	3	620	0	23	18	3	2	0	1,039	421	0	618
MS,S	1,337	684	9	643	1	23	14	7	1	1	1,314	670	2	642
TX,N	2,920	1,571	166	1,181	2	313	137	166	8	2	2,607	1,434	0	1,173
TX,E	1,455	803	36	615	1	106	64	35	6	1	1,349	739	1	609
TX,S	2,340	1,149	160	1,029	2	272	102	158	10	2	2,068	1,047	2	1,019
TX,W	1,839	1,138	32	669	0	132	94	31	7	0	1,707	1,044	1	662
6th	**19,825**	**12,296**	**81**	**7,441**	**7**	**301**	**192**	**72**	**30**	**7**	**19,524**	**12,104**	**9**	**7,411**
KY,E	1,437	922	0	515	0	10	8	0	2	0	1,427	914	0	513
KY,W	1,499	698	6	795	0	17	9	6	2	0	1,482	689	0	793
MI,E	4,552	3,141	17	1,393	1	45	20	15	9	1	4,507	3,121	2	1,384
MI,W	961	644	2	312	3	20	11	2	4	3	941	633	0	308
OH,N	3,390	2,707	10	672	1	46	32	10	3	1	3,344	2,675	0	669
OH,S	2,670	1,831	2	837	0	46	44	1	1	0	2,624	1,787	1	836
TN,E	1,812	1,006	7	798	1	39	25	6	7	1	1,773	981	1	791
TN,M	1,398	738	26	633	1	63	37	23	2	1	1,335	701	3	631
TN,W	2,106	609	11	1,486	0	15	6	9	0	0	2,091	603	2	1,486
7th	**13,313**	**7,787**	**61**	**5,450**	**15**	**328**	**241**	**59**	**13**	**15**	**12,985**	**7,546**	**2**	**5,437**
IL,N	5,558	3,191	37	2,330	0	162	121	36	5	0	5,396	3,070	1	2,325
IL,C	699	503	2	192	2	20	16	2	0	2	679	487	0	192
IL,S	479	265	3	210	1	50	43	3	3	1	429	222	0	207
IN,N	1,626	930	4	692	0	18	14	4	0	0	1,608	916	0	692
IN,S	2,511	1,343	6	1,156	6	37	24	6	1	6	2,474	1,319	0	1,155
WI,E	1,713	1,030	5	678	0	21	13	5	3	0	1,692	1,017	0	675
WI,W	727	525	4	192	6	20	10	3	1	6	707	515	1	191

Table F-2 Quarterly. (Three Months Ending March 31, 2025—Continued)

Circuit and District	Total All Chapters	Total Chapter 7	Total Chapter 11	Total Chapter 13	Total Other Chapters [1]	Predominant Nature of Debt								
						Business					Nonbusiness			
						All Chapters	Chapter 7	Chapter 11	Chapter 13	Other Chapters [1]	All Chapters	Chapter 7	Chapter 11	Chapter 13
8th	**8,214**	**5,087**	**66**	**3,042**	**19**	**271**	**161**	**63**	**28**	**19**	**7,943**	**4,926**	**3**	**3,014**
AR [2]	1,695	712	15	965	3	57	39	12	3	3	1,638	673	3	962
IA,N	355	314	1	33	7	15	7	1	0	7	340	307	0	33
IA,S	510	398	1	107	4	15	10	1	0	4	495	388	0	107
MN	2,361	1,765	2	592	2	65	51	2	10	2	2,296	1,714	0	582
MO,E	1,432	865	16	549	2	42	20	16	4	2	1,390	845	0	545
MO,W	1,012	472	26	513	1	46	16	26	3	1	966	456	0	510
NE	591	369	1	221	0	17	12	1	4	0	574	357	0	217
ND	125	104	3	18	0	7	4	3	0	0	118	100	0	18
SD	133	88	1	44	0	7	2	1	4	0	126	86	0	40
9th	**22,735**	**18,291**	**312**	**4,124**	**8**	**1,129**	**779**	**276**	**66**	**8**	**21,606**	**17,512**	**36**	**4,058**
AK	47	29	2	16	0	3	1	2	0	0	44	28	0	16
AZ	2,877	2,330	41	505	1	110	67	39	3	1	2,767	2,263	2	502
CA,N	1,498	979	44	475	0	117	75	33	9	0	1,381	904	11	466
CA,E	2,908	2,318	19	565	6	116	79	19	12	6	2,792	2,239	0	553
CA,C	6,632	5,531	124	977	0	454	330	109	15	0	6,178	5,201	15	962
CA,S	1,356	1,198	7	151	0	67	57	5	5	0	1,289	1,141	2	146
HI	278	155	2	121	0	12	8	0	4	0	266	147	2	117
ID	519	472	3	44	0	15	13	2	0	0	504	459	1	44
MT	183	143	5	35	0	14	7	5	2	0	169	136	0	33
NV	2,182	1,804	35	343	0	84	48	34	2	0	2,098	1,756	1	341
OR	2,055	1,602	11	442	0	63	43	11	9	0	1,992	1,559	0	433
WA,E	562	464	8	89	1	24	13	8	2	1	538	451	0	87
WA,W	1,629	1,259	11	359	0	50	38	9	3	0	1,579	1,221	2	356
GU	9	7	0	2	0	0	-	-	-	-	9	7	0	2
NMI	0	-	-	-	-	-	-	-	-	-	-	-	-	-
10th	**6,553**	**4,713**	**44**	**1,792**	**4**	**265**	**206**	**42**	**13**	**4**	**6,288**	**4,507**	**2**	**1,779**
CO	1,801	1,421	26	354	0	119	87	25	7	0	1,682	1,334	1	347
KS	842	460	5	375	2	28	19	5	2	2	814	441	0	373
NM	399	352	3	44	0	20	17	2	1	0	379	335	1	43
OK,N	437	377	1	59	0	22	21	1	0	0	415	356	0	59
OK,E	243	214	0	29	0	5	5	0	0	0	238	209	0	29
OK,W	970	724	2	242	2	35	30	2	1	2	935	694	0	241
UT	1,740	1,063	6	671	0	31	23	6	2	0	1,709	1,040	0	669
WY	121	102	1	18	0	5	4	1	0	0	116	98	0	18

Table F-2 Quarterly. (Three Months Ending March 31, 2025—Continued)

Circuit and District	Total All Chapters	Total Chapter 7	Total Chapter 11	Total Chapter 13	Total Other Chapters [1]	Predominant Nature of Debt								
						Business					Nonbusiness			
						All Chapters	Chapter 7	Chapter 11	Chapter 13	Other Chapters [1]	All Chapters	Chapter 7	Chapter 11	Chapter 13
11th	**22,291**	**11,669**	**302**	**10,303**	**17**	**843**	**488**	**285**	**53**	**17**	**21,448**	**11,181**	**17**	**10,250**
AL,N	2,515	1,022	9	1,483	1	33	19	9	4	1	2,482	1,003	0	1,479
AL,M	1,523	278	5	1,240	0	11	5	4	2	0	1,512	273	1	1,238
AL,S	958	207	7	744	0	16	9	7	0	0	942	198	0	744
FL,N	564	416	13	135	0	32	21	11	0	0	532	395	2	135
FL,M	5,628	4,299	89	1,236	4	285	189	83	9	4	5,343	4,110	6	1,227
FL,S	3,655	2,035	64	1,553	3	186	105	58	20	3	3,469	1,930	6	1,533
GA,N	4,993	2,753	102	2,137	1	229	118	101	9	1	4,764	2,635	1	2,128
GA,M	1,606	511	10	1,077	8	38	14	10	6	8	1,568	497	0	1,071
GA,S	849	148	3	698	0	13	8	2	3	0	836	140	1	695

NOTE: The nature of debt is business if the debtor is a corporation or partnership, or if debt related to the operation of a business predominates. Nonbusiness debt includes consumer debt, as defined in Section 101 of the U.S. Bankruptcy code, or other debt that the debtor indicates is not consumer debt or business debt. Because the bankruptcy database is continually updated, the numbers in this table may not match those in previously published tables. The United States territorial courts assume the jurisdiction of United States bankruptcy courts within their respective territories, which do not have separate bankruptcy courts.

[1] Other Chapters includes cases filed under chapters 9 (0), 12 (88) and 15 (27) as well as Section 304 (0).

[2] The United States Bankruptcy Court for Arkansas (AR) includes both the Eastern and Western Districts of Arkansas.

Table F-2 Quarterly.
U.S. Bankruptcy Courts—Bankruptcy Cases Commenced, by Chapter of the Bankruptcy Code,
During the Three-Month Period Ending March 31, 2025, Based on Data Current as of March 31, 2025

Circuit and District	Total All Chapters	Total Chapter 9	Total Chapter 12	Total Chapter 15 [1]	All Other Chapters
Total	**134,063**	**0**	**88**	**27**	**133,948**
DC	**112**	**0**	**0**	**0**	**112**
1st	**3,301**	**0**	**3**	**0**	**3,298**
ME	134	0	1	0	133
MA	1,199	0	0	0	1,199
NH	215	0	0	0	215
RI	264	0	0	0	264
PR	1,489	0	2	0	1,487
2nd	**6,518**	**0**	**4**	**14**	**6,500**
CT	894	0	0	0	894
NY,N	888	0	3	0	885
NY,E	2,846	0	0	0	2,846
NY,S	1,227	0	1	14	1,212
NY,W	596	0	0	0	596
VT	67	0	0	0	67
3rd	**7,419**	**0**	**3**	**6**	**7,410**
DE	646	0	0	6	640
NJ	3,482	0	0	0	3,482
PA,E	1,289	0	0	0	1,289
PA,M	897	0	1	0	896
PA,W	1,104	0	2	0	1,102
VI	1	0	0	0	1
4th	**10,515**	**0**	**3**	**4**	**10,508**
MD	2,826	0	0	0	2,826
NC,E	1,179	0	2	1	1,176
NC,M	505	0	0	0	505
NC,W	569	0	0	0	569
SC	1,219	0	0	3	1,216
VA,E	2,965	0	1	0	2,964
VA,W	858	0	0	0	858
WV,N	178	0	0	0	178
WV,S	216	0	0	0	216

Table F-2 Quarterly. (Three Months Ending March 31, 2025—Continued)

Circuit and District	Total All Chapters	Total Chapter 9	Total Chapter 12	Total Chapter 15 [1]	All Other Chapters
5th	**13,267**	**0**	**7**	**1**	**13,259**
LA,E	632	0	0	0	632
LA,M	283	0	0	0	283
LA,W	1,399	0	2	0	1,397
MS,N	1,062	0	0	0	1,062
MS,S	1,337	0	1	0	1,336
TX,N	2,920	0	2	0	2,918
TX,E	1,455	0	1	0	1,454
TX,S	2,340	0	1	1	2,338
TX,W	1,839	0	0	0	1,839
6th	**19,825**	**0**	**7**	**0**	**19,818**
KY,E	1,437	0	0	0	1,437
KY,W	1,499	0	0	0	1,499
MI,E	4,552	0	1	0	4,551
MI,W	961	0	3	0	958
OH,N	3,390	0	1	0	3,389
OH,S	2,670	0	0	0	2,670
TN,E	1,812	0	1	0	1,811
TN,M	1,398	0	1	0	1,397
TN,W	2,106	0	0	0	2,106
7th	**13,313**	**0**	**15**	**0**	**13,298**
IL,N	5,558	0	0	0	5,558
IL,C	699	0	2	0	697
IL,S	479	0	1	0	478
IN,N	1,626	0	0	0	1,626
IN,S	2,511	0	6	0	2,505
WI,E	1,713	0	0	0	1,713
WI,W	727	0	6	0	721

Table F-2 Quarterly. (Three Months Ending March 31, 2025—Continued)

Circuit and District	Total All Chapters	Total Chapter 9	Total Chapter 12	Total Chapter 15 [1]	All Other Chapters
8th	**8,214**	**0**	**19**	**0**	**8,195**
AR [2]	1,695	0	3	0	1,692
IA,N	355	0	7	0	348
IA,S	510	0	4	0	506
MN	2,361	0	2	0	2,359
MO,E	1,432	0	2	0	1,430
MO,W	1,012	0	1	0	1,011
NE	591	0	0	0	591
ND	125	0	0	0	125
SD	133	0	0	0	133
9th	**22,735**	**0**	**8**	**0**	**22,727**
AK	47	0	0	0	47
AZ	2,877	0	1	0	2,876
CA,N	1,498	0	0	0	1,498
CA,E	2,908	0	6	0	2,902
CA,C	6,632	0	0	0	6,632
CA,S	1,356	0	0	0	1,356
HI	278	0	0	0	278
ID	519	0	0	0	519
MT	183	0	0	0	183
NV	2,182	0	0	0	2,182
OR	2,055	0	0	0	2,055
WA,E	562	0	1	0	561
WA,W	1,629	0	0	0	1,629
GU	9	0	0	0	9
NMI	0	-	-	-	-
10th	**6,553**	**0**	**4**	**0**	**6,549**
CO	1,801	0	0	0	1,801
KS	842	0	2	0	840
NM	399	0	0	0	399
OK,N	437	0	0	0	437
OK,E	243	0	0	0	243
OK,W	970	0	2	0	968
UT	1,740	0	0	0	1,740
WY	121	0	0	0	121

Table F-2 Quarterly. (Three Months Ending March 31, 2025—Continued)

Circuit and District	Total All Chapters	Total Chapter 9	Total Chapter 12	Total Chapter 15 [1]	All Other Chapters
11th	**22,291**	**0**	**15**	**2**	**22,274**
AL,N	2,515	0	1	0	2,514
AL,M	1,523	0	0	0	1,523
AL,S	958	0	0	0	958
FL,N	564	0	0	0	564
FL,M	5,628	0	4	0	5,624
FL,S	3,655	0	1	2	3,652
GA,N	4,993	0	1	0	4,992
GA,M	1,606	0	8	0	1,598
GA,S	849	0	0	0	849

[1] Total Chapter 15 column includes cases filed under chapter 15 (27) as well as Section 304 (0).
[2] The United States Bankruptcy Court for Arkansas (AR) includes both the Eastern and Western Districts of Arkansas.

Positive
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Doug's Elec. Serv. v. Miller

Court of Appeals of Arkansas, Division Four

August 28, 2002, Opinion Delivered

CA 01-1343

Reporter
79 Ark. App. 28 *; 83 S.W.3d 425 **; 2002 Ark. App. LEXIS 427 ***

DOUG'S ELECTRICAL SERVICE, INC., APPELLANT v. Mike MILLER and Cliff Goodin, APPELLEES

Prior History: [*1]** APPEAL FROM POPE COUNTY CIRCUIT COURT [NO. E-2001-319]. HONORABLE DENNIS SUTTERFIELD, CIRCUIT JUDGE.

Disposition: Affirmed.

Core Terms

easement, extinguished, deed, ownership, merger, summary judgment, servient estate, quiet, severance, trial court, recreate, parcels, revived

Case Summary

Procedural Posture

Appellant landowner filed a petition in the Pope County Circuit Court, Arkansas, to remove an easement burdening its land and benefitting the land of appellee neighbors. The trial court granted the neighbors' motion for summary judgment. The landowner appealed.

Overview

The neighbors' predecessor in title owned land that included an access easement across an adjacent parcel of land owned by her son. When the neighbors' predecessor in title died, the son became the owner of the dominant estate along with his sisters. Thereafter, the son quieted title to the property by having a court decree the servient property remained encumbered by the easement. After the landowner acquired the servient estate, the neighbors sought to pave the easement. The landowner unsuccessfully sought to remove the easement. On appeal, the landowner argued the trial court erred in granting the neighbors summary judgment because the easement was extinguished by merger of the dominant and servient estates, and was not subsequently revived. The appellate court held the doctrine of merger did not apply when the two properties were held under the ownership of the son of the neighbor's predecessor in interest because the burden did not come into a single ownership. The appellate court concluded the quiet title action served to reaffirm the easement and indicated an intent to continue the servient nature of the landowner's property.

Outcome

The judgment of the trial court was affirmed.

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

Real Property Law > ... > Limited Use Rights > Easements > Termination of Easements

Civil Procedure > Judgments > Summary

Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Civil Procedure > Appeals > Standards of Review > General Overview

HN1[] **Summary Judgment, Supporting Materials**

When reviewing orders of summary judgment, an appellate court need only decide if the granting of summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of the motion left a material question of fact unanswered. The proof submitted must be viewed in the light most favorable to the nonmoving party, and any doubts or inferences must be resolved against the moving party. Once a moving party establishes a prima facie entitlement to summary judgment by affidavits or other supporting documents, the opposing party must demonstrate a genuine issue of material fact by meeting proof with proof. Summary judgment is proper when the nonmoving party fails to show that there is a genuine issue as to any material fact and when the moving party is entitled to summary judgment as a matter of law on the issues set forth in the motion. Ark. R. Civ. P. 56(c)(2) (2002). If, after reviewing undisputed facts, reasonable men might reach different conclusions from those facts, then summary judgment should be denied.

Real Property Law > ... > Limited Use Rights > Easements > Termination of Easements

Real Property Law > Encumbrances > Limited Use Rights > General Overview

Real Property Law > ... > Limited Use Rights > Easements > General Overview

HN2[] **Easements, Termination of Easements**

Arkansas recognizes the doctrine of merger of dominant and servient estates thereby extinguishing a former encumbering easement.

Real Property Law > Encumbrances > Restrictive Covenants > Enforcement of Restrictive Covenants

Real Property Law > ... > Limited Use Rights > Easements > General Overview

HN3[] **Restrictive Covenants, Enforcement of Restrictive Covenants**

A servitude is terminated when all the benefits and burdens come into a single ownership. The rationale for this doctrine is that when the benefits and burdens are united in a single person, or group of persons, the servitude ceases to serve any function, and because no one else has an interest in enforcing the servitude, the servitude terminates.

Real Property Law > ... > Limited Use Rights > Easements > General Characteristics

Real Property Law > Encumbrances > Limited Use Rights > General Overview

Real Property Law > ... > Limited Use Rights > Easements > General Overview

Real Property Law > ... > Limited Use Rights > Easements > Termination of Easements

HN4 **Easements, General Characteristics**

In order to extinguish an easement by merger, the unity of title or ownership must be co-extensive in validity, quality, and all other circumstances of right, and an easement is not extinguished by the acquisition by the owner of one estate of title to only a fractional part of the other estate. Merger of estates is a question of intent.

Real Property Law > ... > Limited Use Rights > Easements > General Overview

Real Property Law > Estates > Concurrent Ownership > Tenancies in Common

HN5 **Limited Use Rights, Easements**

Merger does not apply to estates held in co-ownership, but only to estates held in severalty; however, merger does not occur where only one estate is held by tenants in common.

Real Property Law > ... > Limited Use Rights > Easements > Termination of Easements

Real Property Law > Encumbrances > Limited Use Rights > General Overview

Real Property Law > ... > Limited Use Rights > Easements > General Overview

HN6 **Easements, Termination of Easements**

Once an easement has been extinguished through merger, the easement does not come into existence again merely by severance of the estates. However, upon severance, a new easement authorizing a use corresponding to the use authorized by the extinguished easement may arise, but if it does arise, it does so because it was newly created at the time of the conveyance. Such a new creation may result, as in other cases of severance, from an express stipulation in the conveyance by which the severance is made or from the implications of the circumstances of the severance. The standards for recreating an easement that has been extinguished are the same standards that are required to create an easement in the first instance.

Headnotes/Summary

Headnotes

1.

JUDGMENT -- SUMMARY JUDGMENT -- APPELLATE REVIEW. -- When reviewing orders of summary judgment, the appellate court need only decide if the granting of summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of the motion left a material question of fact unanswered; the proof submitted must be viewed in the light most favorable to the nonmoving party, and any doubts or inferences must be resolved against the moving party.

2.

JUDGMENT -- SUMMARY JUDGMENT -- SHIFTING BURDEN. -- Once a moving party establishes a prima facie entitlement to summary judgment by affidavits or other supporting documents, the opposing party must demonstrate a genuine issue of material fact by meeting proof with proof.

3.

JUDGMENT -- SUMMARY JUDGMENT -- WHEN PROPER. -- Summary judgment is proper when the nonmoving party fails to show that there is a genuine issue as to any material fact and when the moving party is entitled to summary judgment as a matter of law on the issues set forth in the motion.

4.

JUDGMENT -- SUMMARY JUDGMENT -- WHEN DENIED. -- If, after reviewing undisputed facts, reasonable men might reach different conclusions from those facts, then summary judgment should be denied.

5.

EASEMENTS -- MERGER -ARKANSAS RECOGNIZES DOCTRINE. -- Arkansas recognizes the doctrine of merger.

6.

EASEMENTS -- SERVITUDE -- WHEN TERMINATED. -- A servitude is terminated when all the benefits and burdens come into a single ownership; the rationale for this doctrine is that when the benefits and burdens are united in a single person or group of persons, the servitude ceases to serve any function, and because no one else has an interest in enforcing the servitude, the servitude terminates.

7.

EASEMENTS -- MERGER -- REQUIREMENTS FOR EXTINCTION BY. -- To extinguish an easement by merger, the unity of title or ownership must be co-extensive in validity, quality, and all other circumstances of right; an easement is not extinguished by the acquisition by the owner of one estate of title to only a fractional part of the other estate.

8.

EASEMENTS -- MERGER -- QUESTION OF INTENT. -- Merger of estates is a question of intent.

9.

EASEMENTS -- MERGER -- CONVEYOR'S OWNERSHIP OF BOTH ESTATES WOULD NOT EXTINGUISH EASEMENT. -- The *Restatement (First) of Property § 497, Comment b*, states that merger does not apply to estates held in co-ownership, but only to estates held in severalty; the *Restatement (Third) of Property, Servitudes, § 7.5, Illustration 7*, provides that merger does not occur where only one estate is held by tenants in common; thus, it appeared that the conveyor's ownership of both estates would not extinguish the easement, regardless of whether he owned the dominant estate as a joint owner or a tenant in common.

10.

EASEMENTS -- SEVERANCE -- NEW EASEMENT ARISING FROM. -- Once an easement has been extinguished through merger, the easement does not come into existence again merely by severance of the estates; however, upon severance, a new easement authorizing a use corresponding to the use authorized by the extinguished easement may arise, but if it does arise, it does so because it was newly created at the time of the conveyance; such a new creation may result, as in other cases of severance, from an express stipulation in the conveyance by which the severance is made or from the implications of the circumstances of the severance; the standards for recreating an easement that has been extinguished are the same standards that are required to create an easement in the first instance.

11.

EASEMENTS -- NEW EASEMENT -- LANGUAGE IN DEED TO APPELLANT WAS SUFFICIENT TO CREATE. -- The appellate court found that the language in the deed from the conveyor to appellant was sufficient to create a new easement; it is an express easement created by a written instrument, and the description of the easement was such that a surveyor could go on the land and locate the easement from the description,

as evidenced by the survey commissioned by appellant that indicated the easement.

12.

JUDGMENT -- SUMMARY JUDGMENT -- CIRCUIT COURT DID NOT ERR IN GRANTING. -- Where the evidence clearly showed that the conveyor had the requisite intent to recreate the easement in the quiet-title decree and to convey the property to appellant subject to the easement; where the easement was reflected in documents in appellant's chain of title, as well as in his survey, real-estate contract, and title-disclosure documents; and where it was clear from the record that appellant had actual notice of the easement, the trial court accordingly found that there were no material issues of fact to be litigated, and summary judgment was appropriate as a matter of law; the appellate court could not say that the court erred in granting the summary judgment.

Counsel: Hurst Law Firm, P.L.L.C., by: Q. Byrum Hurst, Jr., and Travis J. Morrissey, for appellant.

Laws & Murdoch, P.A., by: Ike Allen Laws, Jr., for appellees.

Judges: ANDREE LAYTON ROAF, Judge. HART and VAUGHT, JJ., agree.

Opinion by: ANDREE LAYTON ROAF

Opinion

[427] [*30]** ANDREE LAYTON ROAF, Judge. Appellant, Doug's Electrical Service ("Doug's Electrical"), filed a quiet-title petition to remove an easement burdening its land and benefitting the land of appellees, Mike Miller and Cliff Goodin. The trial court granted appellees' motion for summary judgment, and Doug's Electrical appeals. On appeal, Doug's Electrical argues that the trial court erred in granting summary judgment, because the easement at issue was extinguished by merger of the dominant and servient estates and was not subsequently revived. We affirm.

Both parcels of land involved in this case were once owned by Jessie Bell Smith. Mrs. Smith transferred the south portion of her property to her son, Doyle Smith, in a warranty deed dated September 8, 1987. This deed provided that the land conveyed **[*31]** was subject to a seventy-foot-wide right-of-way running between the two parcels, along and parallel with the south edge of a ditch that ran east to west. At some point after this deed was recorded, **[***2]** Mrs. Smith died and the north portion of the property came into the ownership of Doyle Smith and his two sisters, Delores Buffington and Mary Williams. [1] Doyle Smith then brought a quiet title action against Buffington and Williams involving the parcel deeded to him by Jessie Bell Smith in 1987. Buffington and Williams consented to quiet title in Doyle Smith, with the provision that there be a seventy-foot-wide easement along the north side of the property for utilities and a road and another easement on the south side of the property for ingress and egress. A quiet title decree was entered on September 24, 1996, specifically reciting that the property was "subject to a 70 feet (sic) wide easement along the North side."

On October 25, 1996, Doyle Smith conveyed the property at issue to Doug's Electrical by warranty deed that also recited a seventy-foot-wide easement across the north side, in addition to an easement on the south **[***3]** side of the property and any other easements of record. The property owned by Doyle Smith, Buffington, and Williams was later conveyed to appellees, Mike Miller and Cliff Goodin. On April 24, 2001, Doug's Electrical sued appellees to quiet title to the seventy-foot easement after it learned that appellees planned to put a road on the easement. The trial court granted summary

[1] The record does not reflect how Smith and his sisters held title to this property.

judgment in favor of appellees, and Doug's Electrical brings this appeal.

On appeal, Doug's Electrical argues that the trial court erred in granting summary judgment because the easement was extinguished by merger of the dominant and servient estates and was not subsequently revived. ***HN1***[⬆] When reviewing orders of summary judgment, the appellate court need only decide if the granting of summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of the motion left a material question of fact unanswered. *Chambers v. Stern, 347 Ark. 395, 64 S.W.3d 737 (2002)*. The proof submitted must be viewed in the light most favorable to the nonmoving **[*32]** party, and "any doubts or inferences must be resolved against the moving party." *Renfro v. Adkins, 323 Ark. 288, 295, 914 S.W.2d 306, 309-10 (1996)*. **[***4]** Once a moving party establishes a prima facie entitlement to summary judgment by affidavits or other supporting documents, the opposing party must demonstrate a genuine issue of material fact by meeting proof with proof. *Id.* **[**428]** Summary judgment is proper when the nonmoving party fails to show that there is a genuine issue as to any material fact and when the moving party is entitled to summary judgment as a matter of law on the issues set forth in the motion. Ark. R. Civ. P. 56(c)(2) (2002). If, after reviewing undisputed facts, reasonable men might reach different conclusions from those facts, then summary judgment should be denied. *Plant v. Wilbur, 345 Ark. 487, 47 S.W.3d 889 (2001)*.

Doug's Electrical first contends that the easement contained in the deed from Jessie Bell Smith to Doyle Smith was extinguished when Doyle Smith became the owner of the dominant estate while concurrently owning the servient estate. Doug's Electrical cites *Massee v. Schiller, 237 Ark. 809, 376 S.W.2d 558 (1964)*, in support of its argument that the ownership of both the dominant and servient estates creates a merger of the two titles, thus extinguishing the encumbering **[***5]** easement. The appellants in *Massee* claimed ownership of a twenty-foot-wide lane by adverse possession. *Id.* The court did not expressly address the issue of merger, but stated that a prior common ownership of both parcels at issue "annihilated any inferior interest or title such as adverse possession or easement" that the owner might have previously acquired against the former owner of one of the parcels. *237 Ark. at 811-12, 376 S.W.2d at 559*. Also, in a second appeal involving the same parties, the court stated that the easement ran with the ownership of the dominant owners' land until ownership of the easement was merged with ownership of the servient estate or until the easement was abandoned. *Massee v. Schiller, 243 Ark. 572, 420 S.W.2d 839 (1967)*. Thus, it appears that ***HN2***[⬆] Arkansas recognizes the doctrine of merger.

Merger has been applied in other jurisdictions and is recognized by the Restatement of Property. *See, e.g., Freeman v. Rost Family Trust, 973 P.2d 1281*, (Colo. Ct. App. 1999); *Ellis v. **[*33]** McClung, 291 Ill. App. 3d 448, 683 N.E.2d 911, 225 Ill. Dec. 408 (1997)*; *Mularoni v. Bing, 2001 MT 215, 306 Mont. 4405, 34 P.3d 497 (2001)*; **[***6]** *Faulconer v. Williams, 327 Ore. 381, 964 P.2d 246 (1998)*; *Radovich v. Nuzhat, 104 Wn. App. 800, 16 P.3d 687 (2001)*; *Restatement (Third) of Property, Servitudes, § 7.5* (1998); *Restatement (First) of Property § 497* (1944). ***HN3***[⬆] "A servitude is terminated when all the benefits and burdens come into a single ownership." *Restatement (Third) of Property, Servitudes, § 7.5*. The rationale for this doctrine is that when the benefits and burdens are united in a single person, or group of persons, the servitude ceases to serve any function, and because no one else has an interest in enforcing the servitude, the servitude terminates. *Id.* at cmt. a.

In this case, however, it appears from the record that the ownership of the dominant and servient estates did not come into the ownership of a single person or group of persons. Doyle Smith owned the servient estate outright, but after his mother died he came into ownership of the dominant estate jointly

with his sisters, Buffington and Williams. *HN4*[⬆] In order to extinguish an easement by merger, the unity of title or ownership must be co-extensive in validity, quality, and all other circumstances of right, and an easement **[***7]** is not extinguished by the acquisition by the owner of one estate of title to only a fractional part of the other estate. *Mularoni v. Bing, supra* (citing 28A C.J.S. *Easements* § 123 (1996)); *Ellis v. McClung, supra.* Merger of estates is a question of intent. *Ellis v. McClung, supra.*

It is not clear from the record precisely how Doyle Smith and his sisters **[**429]** acquired the property from their mother. The *Restatement (First) of Property § 497, Comment b*, states that *HN5*[⬆] merger does not apply to estates held in co-ownership, but only to estates held in severalty [2]; however, the caveat in Comment b states that the Restatement takes no position on whether the doctrine of merger applies where there is unity of ownership of an undivided fractional interest, such as by a tenant in common, with a like fractional interest in the other tenement. The *Restatement [*34] (Third) of Property, Servitudes, § 7.5, Illustration 7*, provides that merger does not occur where only one estate is held by tenants in common. Thus, it appears that Doyle Smith's ownership of both estates would not extinguish the easement, regardless of whether he owned the **[***8]** dominant estate as a joint owner or a tenant in common. However, the outcome of this case does not rest solely upon resolution of this issue; even if the easement was extinguished by merger, the question remains as to whether the easement was revived in the subsequent conveyances.

In this regard, Doug's Electrical also argues that the extinguished easement was not subsequently revived, even though the easement was recited in his chain of title and in his deed from Doyle Smith. *HN6*[⬆] Once an easement has been extinguished through merger, the easement does not come into existence again merely by severance of the estates. *Restatement (First) of Property § 497, cmt. h.* However, upon severance, "a new easement authorizing a use corresponding to the use authorized by the **[***9]** extinguished easement may arise," but if it does arise, "it does so because it was newly created at the time of the conveyance." *Id.* "Such a new creation may result, as in other cases of severance, from an express stipulation in the conveyance by which the severance is made or from the implications of the circumstances of the severance." *Id.* The *Restatement (Third) of Property, Servitudes, § 7.5* also states that the standards for recreating an easement that has been extinguished are the same standards that are required to create an easement in the first instance.

There are no Arkansas cases addressing this issue. Doug's Electrical cites to cases from other jurisdictions that hold that an easement cannot be revived merely by severance of the merged estate in conjunction with language in subsequent deeds referring to the extinguished easement. In *Capital Candy Co. v. Savard, 135 Vt. 14, 369 A.2d 1363 (1976)*, the court stated that the easement was not recreated upon severance where the subsequent deeds merely referred to a nonexistent easement that had been extinguished. However, in *Radovich v. Nuzhat, supra*, the court disagreed with this **[***10]** view, and cited the Restatement view, stating that the opinion in *Capital Candy* does not indicate whether those deeds contained language actually describing the easement or **[*35]** merely incorporated the description by reference. The court stated that, to the extent that *Capital Candy* and other cases could be read to hold that language sufficient to create a new easement is not sufficient to recreate an extinguished easement, it disagreed and declined to follow them. *Id.*

In this instance, we find that the language in the deed from Doyle Smith to Doug's Electrical is

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[2] An estate in severalty is one "which is held by the tenant in his own right only, without any other person being joined or connected with him in point of interest during the continuance of his estate." *Black's Law Dictionary* 1374 (6th ed. 1990).

sufficient to create a new easement. It is an express easement created by a written instrument, and the description of the easement is such that a surveyor could go on the land and locate the easement from the description, as evidenced **[**430]** by the survey commissioned by Doug's Electrical that indicated the easement. *See* *Wilson v. Johnston, 66 Ark. App. 193, 990 S.W.2d 554 (1999)*.

Moreover, even if other evidence of intent to create a new easement were necessary to recreate the extinguished easement, as under the view of *Capital Candy Co., supra*, such evidence exists in this case. The descriptions **[***11]** of the easement found in deeds subsequent to its alleged extinguishment are not mechanistic recitals of the description in the original deed from Jessie Bell Smith to Doyle Smith, as alleged by Doug's Electrical. The language describing the easement changed from the original deed to the description of the easement found in the Decree Quieting Title and in the deed to Doug's Electrical. The easement was previously described as running along the south edge of the ditch, but in the subsequent conveyances, the easement is described as across the north side of the property. Also, the servient estate was not described in exact metes and bounds in the original deed, but in the subsequent deeds, the estate is described by degrees, minutes, and seconds. In addition, the documents dealing with the quiet title action between Doyle Smith and his sisters show that this easement was bargained for by the sisters when they consented to the quiet title and is contained in the quiet title decree. This evidence clearly shows that Doyle Smith had the requisite intent to recreate the easement in the quiet-title decree, and to convey the property to Doug's Electrical subject to this easement. In fact, the **[***12]** easement was reflected in documents in Doug's Electrical's chain of title, as well as in his survey, real-estate contract, and title-disclosure documents, and it is clear from the record that Doug's **[*36]** Electrical had actual notice of this easement. The trial court accordingly found that there were no material issues of fact to be litigated, and summary judgment was appropriate as a matter of law. We cannot say that the court erred in granting the summary judgment.

Affirmed.

HART and VAUGHT, JJ., agree.

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SPECIAL WARRANTY DEED

(WITH RESTRICTIVE COVENANTS, RESERVATIONS, AND RETAINED EASEMENTS)

THIS SPECIAL WARRANTY DEED, made this _____ day of _____ 20____, between _____ (collectively the "Grantors"), and ___ _____ ("Grantee"),

WITNESSETH, the Grantors, for and in consideration of the sum of $1 and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, have granted, bargained, sold, and conveyed, and by these presents do grant, bargain, sell, convey, and confirm unto the Grantee, its successors and assigns forever, the real property in _____, described on the attached Exhibit A (the "Real Property"),

SUBJECT TO THE FOLLOWING:

I) MATTERS OF RECORD. All easements, rights of way, leases, licenses, setbacks, protective and restrictive covenants, reservations, and restrictions of record, if any.

II) RETAINED EASEMENT. Grantors hereby retain a [Identify Easement Boundary], with all reasonable right of ingress and egress by Grantors and their agents, successors, and assigns for the purpose of accessing the [Identify Dominant Estate]. This easement shall be a perpetual easement and run with the Real Property.

III) RESERVATION OF MINERALS. Grantors and their successors and assigns reserve all oil, gas, and other minerals, and the reasonable right of surface use for the extraction or production thereof.

IV) RESTRICTIVE COVENANT. Grantee is prohibited from [Insert Restrictive Covenant]. This restrictive covenant shall run with the land.

TO HAVE AND TO HOLD THE SAME, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, forever.

AND GRANTORS do hereby covenant, promise, and agree to and with Grantee, that Grantors shall **WARRANT** the Real Property in the quiet and peaceable possession of Grantee against all and every person or persons claiming the whole or any part thereof by, through, or under the Grantors.

IN WITNESS WHEREOF, the Grantors have caused this Special Warranty Deed to be executed on the date set forth above.

[Signature Pages and Exhibit "A" Intentionally Omitted]

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Foreign Ownership, Control, and Influence (FOCI) Risks in the Food and Agriculture Sector

June 13, 2024

Congressional Research Service
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R48094

CRS REPORT
Prepared for Members and
Committees of Congress

Congressional Research Service
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Foreign Ownership, Control, and Influence (FOCI) Risks in the Food and Agriculture Sector

SUMMARY

R48094

June 13, 2024

Brian E. Humphreys
Analyst in Science and Technology Policy

In recent years, congressional concerns over potential risks to domestic food security posed by foreign ownership, control, and influence (FOCI) of critical infrastructure in the U.S. food and agriculture sector (FA Sector) have grown. FA Sector critical infrastructure encompasses many elements of the nation's food supply chain. Examples include farms, grain elevators, certain testing laboratories, meatpacking facilities, and supermarkets.

The U.S. Department of Agriculture (USDA) and the Food and Drug Administration (FDA) are the designated Sector Risk Management Agencies (SRMAs) for the FA Sector (1 of 16 federally designated critical infrastructure sectors). The SRMAs identify four main categories of risk to FA Sector-related functions: food contamination and disruption (accidental or intentional), disease and pests, severe weather, and cybersecurity. Partnerships are premised on the overarching assumption that private-sector owners of critical systems and assets are good-faith actors in a shared enterprise focused on ensuring availability and continuity of "national critical functions."

However, FOCI risks more often relate to the control, exploitation, or malicious use of otherwise operable systems and assets by self-interested foreign adversaries—instances where the good faith of asset owners cannot be assumed. This type of risk has not been consistently or systematically assessed within the existing critical infrastructure security and resilience (CISR) voluntary partnership framework. Potential FOCI risks in the FA Sector include prioritization of foreign markets over domestic food security considerations; intellectual property (IP) theft of strategically important genetic engineering research; illicit or forced technology transfer; control of agricultural land and basic agricultural inputs; access to sensitive infrastructure information (e.g., vulnerability assessments based on voluntary disclosures by private-sector entities); and control of critical cyber systems, assets, and networks.

The Biden Administration has released several policy directives that address various infrastructure and supply chain issues specific to the FA Sector or—more broadly—to FOCI risks affecting multiple sectors. This includes a 2022 National Security Memorandum (NSM), "Strengthening the Security and Resilience of United States Food and Agriculture" (NSM-16), which contains provisions that expand federal regulatory reviews of foreign acquisitions of agricultural firms to include food security (in addition to national security) and that mandate supply chain security assessments by federal agencies (including USDA in the FA Sector).

Many recent assessments note trends toward consolidation and foreign ownership within key segments of U.S. agriculture. For example, a USDA report identified the growing ownership concentration in meat and poultry manufacturing, pesticides and crop seeds, and farm machine parts as sources of potential supply chain risk, although it did not specifically identify FOCI as a factor. A 2021 joint report on FA Sector risks by the Department of Homeland Security (DHS) and the Office of the Director of National Intelligence (ODNI) warned of the possibility of a "takeover of [an] important supply chain entity by foreign investors" as part of an economic coercion and manipulation campaign. Foreign-owned or -controlled multinationals already have large, legally acquired holdings in various FA Sector segments.

Some Members of Congress have expressed concern about the People's Republic of China's (PRC's) acquisition of major food processing and agrochemical firms that have significant market share in the United States. Some public interest groups allege that multinationals may abuse IP protections for agrochemicals and genetically engineered seed, effectively control use of agricultural land, and gain access to farm-level data. Multinationals counter that IP protections allow for investments in new technologies and provision of innovative products at affordable prices to U.S. food producers. Foreign acquisitions of U.S. farmland have also caused concern, prompting legislative proposals that would restrict certain acquisitions. According to USDA, as of December 31, 2022, foreign entities—mainly Canada and some Western European countries—held an interest in 44.3 million acres of U.S. agricultural land, or about 3.4% of the total. PRC-linked holdings are small by comparison but have garnered scrutiny.

Policy options for Congress exist in several areas related to FOCI risks in the FA Sector. These areas include (1) federal reviews of foreign investments and acquisitions of FA Sector assets, (2) requirements for data and reporting of foreign land purchases, (3) resourcing of SRMA programs and activities, (4) assessments of FOCI risk, and (5) IP protections in the bioeconomy and farming.

Contents

Tables

Contacts

Introduction

In recent years, congressional concerns have grown over potential risks to domestic food security posed by foreign ownership, control, and influence (FOCI) of critical infrastructure in the U.S. food and agriculture sector (FA Sector). *Critical infrastructure* is defined in statute as "systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating impact on security, national economic security, national public health or safety, or any combination of those matters."[1] Critical infrastructure systems and assets in the FA Sector encompass many elements of the nation's food supply chain. Examples include farms, grain elevators, farm supply wholesalers, certain testing laboratories, meatpacking facilities, bars and restaurants, and supermarkets.[2]

The national critical infrastructure security and resilience (CISR) enterprise combines both varying degrees of regulation and voluntary public-private partnerships for information sharing and best practices.[3] The Department of Homeland Security (DHS) coordinates national strategy, interagency activities, and public-private partnerships for infrastructure security and resilience. DHS delegates sector leadership to other federal agencies in some cases, including the FA Sector. The FA Sector is 1 of 16 designated critical infrastructure sectors under current presidential directives.[4]

CISR programs and activities in the FA Sector are led by the U.S. Department of Agriculture (USDA) and Food and Drug Administration (FDA), which are the FA Sector's designated Sector Risk Management Agencies (SRMAs). Public-private partnerships are largely voluntary and are premised on the overarching assumption that private-sector owners of critical systems and assets are good-faith actors in a risk management enterprise focused on protecting critical systems and assets and the functions they enable.[5] USDA and FDA identify four main categories of risk to FA Sector-related functions: food contamination and disruption (accidental or intentional), disease and pests, severe weather (i.e., droughts, floods, and climate variability), and cybersecurity.[6]

FOCI risks in the FA Sector are not associated with the incapacity or destruction of critical systems and assets or disruption of essential functions. More often, FOCI risks relate to the

[1] The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act (P.L. 107-56). The FA Sector is 1 of 16 designated critical infrastructure sectors under current presidential directives. For information on the critical infrastructure risk management framework, see Department of Homeland Security (DHS), *The National Infrastructure Protection Plan (NIPP) 2013: Partnering for Critical Infrastructure Security and Resilience*, 2013, and Food and Drug Administration (FDA), U.S. Department of Agriculture (USDA), and DHS, *Food and Agriculture Sector-Specific Plan*, 2015, pp. 5-7, https://www.usda.gov/sites/default/files/documents/2015-food-and-agriculture-sector-specific-plan.pdf (hereinafter FA SSP).

[2] See Appendix 6, FA SSP. According to the DHS Cybersecurity and Infrastructure Security Agency (CISA), the FA Sector has critical dependencies with several other designated critical infrastructure sectors, including Water and Wastewater Systems, Transportation Systems, Energy, and Chemical. However, an examination of foreign ownership risks in these sectors and their potential applicability to the FA Sector is beyond the scope of this report. Likewise, this report does not cover foreign ownership of systems, assets, and networks outside U.S. jurisdiction or imports of essential foreign-sourced agricultural production materials into the United States.

[3] See White House, "National Security Memorandum on Critical Infrastructure Security and Resilience," (NSM-22), presidential memorandum, April 30, 2024, https://www.whitehouse.gov/briefing-room/presidential-actions/2024/04/30/national-security-memorandum-on-critical-infrastructure-security-and-resilience.

[4] Ibid.

[5] FA SSP.

[6] For information on the critical infrastructure risk management framework, see DHS, *The National Infrastructure Protection Plan (NIPP) 2013: Partnering for Critical Infrastructure Security and Resilience*, 2013, and FA SSP, pp. 5-7.

control, exploitation, or malicious use of productive systems and assets by self-interested foreign adversaries—instances where the good faith of asset owners cannot be assumed. This type of risk has not been consistently or systematically assessed within the existing CISR voluntary partnership framework.

Potential FOCI risks in the FA Sector identified in this report include prioritization of foreign markets over domestic food security considerations; intellectual property (IP) theft of strategically important genetic engineering research; illicit or forced technology transfer; control of agricultural land and basic agricultural inputs; access to sensitive infrastructure information (e.g., vulnerability assessments based on voluntary disclosures by private-sector entities); and control of critical cyber systems, assets, and networks.

This report provides analysis of potential FOCI risks in the FA Sector and the bearing these risks might have on the overall security and resilience of the sector. The report also provides options for congressional legislation and oversight.

Background: The Food and Agriculture Sector

Presidential directives established critical infrastructure sectors that encompass broad areas of the economy, government, and public services.[7] There are currently 16 sectors and numerous subsectors. The William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 (FY2021 NDAA; P.L. 116-283) defined the role of SRMAs.[8] In each sector, SRMAs chair the Government Coordinating Councils (GCCs), which provide for coordination among interagency and intergovernmental partners. Sector Coordinating Councils (SCCs) operate as counterparts to the GCCs, representing the interests of private-sector partners and other nongovernmental stakeholders within a given sector. SCCs are voluntary, self-organized, and self-governing bodies, often chaired by private-sector industry leaders.

The Department of Health and Human Services (HHS), acting through FDA, and USDA are the designated co-SRMAs for the FA Sector. FA SCC membership is composed of major industry enterprises and trade groups.[9] Most sectors have a recognized Information Sharing and Analysis Center (ISAC), which serves as a hub for threat reporting, analysis, and information sharing with sector partners on cybersecurity and other matters.

The FA Sector's ISAC was originally formed in 2002 but closed in 2008 after failing to attract an active user base.[10] Sector stakeholder interests were then represented by the Food and Ag Special Interest Group (SIG) within the Information Technology (IT) ISAC. Some observers criticized

[7] White House, "National Security Memorandum on Critical Infrastructure Security and Resilience" (NSM-22), presidential memorandum, April 30, 2024, https://www.whitehouse.gov/briefing-room/presidential-actions/2024/04/30/national-security-memorandum-on-critical-infrastructure-security-and-resilience/.

[8] See Section 9002, "Sector Risk Management Agencies." These coordinating bodies are chartered under Critical Infrastructure Protection and Advisory Council (CIPAC) auspices. CIPAC authorities, originally established by DHS in 2006 pursuant to the Homeland Security Act of 2002 (P.L. 107-296), afford certain exemptions from public reporting of meetings and disclosure of sensitive infrastructure information. See DHS, "Critical Infrastructure Partnership Advisory Council," 71 *Federal Register* 14930, March 24, 2006.

[9] For a full list of FA Sector Coordinating Council membership and links to the current charter, see CISA, "Food and Agriculture Sector: Council Charters and Membership," https://www.cisa.gov/food-and-agriculture-sector-council-charters-and-membership.

[10] The Food Marketing Institute, an industry group, established an agriculture Information Sharing and Analysis Center (ISAC) in 2002 prior to the establishment of DHS as an agency but disbanded it in 2008 due to "lack of activity and information flow," according to media reports. See "Food Sector Abandons Its ISAC," *Security Management*, September 1, 2008, https://www.asisonline.org/security-management-magazine/articles/2008/09/food-sector-abandons-its-isac/.

this arrangement as inadequate to the scale of cyber threats faced by the FA Sector.[11] Industry leaders rebranded the Food and Ag SIG as the Food and Agriculture Sector ISAC in 2023.[12] Although the new ISAC continued to operate under IT-ISAC auspices, its leaders asserted that the change would raise the profile of the organization and clarify its mission.[13] Separately, in 2022, DHS sponsored preliminary development of a state-level pilot ISAC for FA Sector issues through the National Agriculture Biosecurity Center at Kansas State University.[14]

Policy options for Congress include whether current information-sharing organizations are appropriately organized and have the necessary resources to meet FA Sector cybersecurity and other security needs, as well as legislation to create new information-sharing organizations.[15]

Risk Management in the FA Sector

SRMAs consider a wide range of plausible man-made and natural hazard events that could negatively affect availability and continuity of critical infrastructure functions.[16] CISR programs and activities in the FA Sector to date have been limited in scale and centered on traditional agency missions, such as maintaining the national food safety system and safeguarding farm production of raw foodstuffs from contamination.

FOCI risks affecting food and agriculture may be addressed through national security reviews of certain covered foreign investment transactions, including mergers and acquisitions, by the interagency Committee on Foreign Investment in the United States (CFIUS)—CFIUS authorities are governed by Section 721 of the Defense Production Act of 1950 (P.L. 81-774), as amended. CFIUS may recommend that the President block certain foreign investments, including those that would result in foreign control of any critical infrastructure, if it determines that the transaction would threaten to impair U.S. national security and the risk cannot be mitigated. CFIUS may review certain covered foreign investment and real estate transactions involving the acquisition of

[11] See Eric Geller, "The Dangerous Weak Link in the U.S. Food Chain," *Wired*, April 6, 2023, https://www.wired.com/story/us-food-agriculture-isac-cybersecurity/. The Food and Agriculture Industry Cybersecurity Support Act, introduced in the 118th Congress (S. 2393 and H.R. 1219), would mandate creation of a cybersecurity clearinghouse for the sector hosted by the National Telecommunications and Information Administration, a Department of Commerce agency.

[12] Food and Ag ISAC (an IT ISAC Community), "Built by Industry for Industry," https://www.foodandag-isac.org/, and "Food and Ag-ISAC Forms to Protect Agrifood Sector from Cybersecurity Threats," *Food Safety Magazine*, May 26, 2023, https://www.food-safety.com/articles/8617-food-and-ag-isac-forms-to-protect-agrifood-sector-from-cybersecurity-threats.

[13] Tim Starks, "The Food and Agriculture Industry Gets a New Center to Share Cybersecurity Information," *Washington Post*, May 24, 2023, https://www.washingtonpost.com/politics/2023/05/24/food-agriculture-industry-gets-new-center-share-cybersecurity-information/.

[14] FDA, USDA, DHS, *Food and Agriculture Sector Annual Report: Fiscal Year 2022*, p. 17, https://www.fda.gov/media/171959/download; Kansas State University, "Creation of a Kansas Food and Agriculture Information Sharing and Analysis Organization," https://www.k-state.edu/govrelations/federal/NABC-CreationofaKansasFoodandAgricultureInformationSharingandAnalysisCenter.pdf.

[15] Representative Pfluger introduced a bill in the 118th Congress, "Food and Agriculture Industry Cybersecurity Support Act" (H.R. 1219), which directs the Government Accountability Office to report on the feasibility of creating a dedicated FA Sector ISAC.

[16] CISA defines a set of 55 National Critical Functions as "functions of government and the private sector so vital to the United States that their disruption, corruption, or dysfunction would have a debilitating effect on security, national economic security, national public health or safety, or any combination thereof."

agricultural land and corporate entities, and may consider "elements of the agriculture industrial base that have implications for food security."[17]

However, the range of transactions CFIUS covers is relatively narrow, focusing on national security risks of corporate acquisitions, noncontrolling investments, and real estate transactions, rather than CISR writ large. Options for Congress include legislation to expand CFIUS jurisdiction over transactions in the FA Sector and to add the Secretary of Agriculture as a full member of CFIUS.[18] Another option is to provide USDA with additional appropriations to fund expansion of CFIUS-related programs and activities to cover a wider range of FOCI risks in the FA Sector.

SRMA Organization and Resourcing for FA Sector Engagements

USDA SRMA responsibilities reside with USDA's National Security Division within the Office of Homeland Security (OHS). The division oversees the agency's programs and participation in interagency activities, which may include FOCI-related risk management activities under programs such as CFIUS, Critical Infrastructure and Insider Threat, Foreign National Vetting, Intelligence, and FA Sector.[19] FDA SRMA responsibilities reside with the Office of Analytics and Outreach/Food Defense and Emergency Coordination Staff at the Center for Food Safety and Applied Nutrition (CFSAN). Neither USDA/OHS nor FDA/CFSAN receives dedicated appropriations for SRMA-related programs and activities. Instead, SRMA engagement appears to be carried out in addition to other customary activities included in these offices' program portfolios.[20]

USDA requested $225,000 in funds to support OHS engagements with FA Sector stakeholders in its FY2024 budget request.[21] Referencing a ransomware attack on JBS—a Brazilian-owned meat processing firm with extensive operations in the United States—USDA/OHS stated that as "cybersecurity threats and vulnerabilities continue to grow, USDA is unable to conduct ... SRMA responsibilities[,] which could have a significant impact on the safety and security of U.S. agriculture" because of a lack of dedicated appropriations for this purpose.[22] The FDA budget

[17] Executive Order (E.O.) 14083, "Ensuring Robust Consideration of Evolving National Security Risks by the Committee on Foreign Investment in the United States," 87 *Federal Register* 57369, September 15, 2022. Committee on Foreign Investment in the United States (CFIUS) reviews may involve consultation with a designated USDA official. CFIUS is an interagency body comprising nine Cabinet members and others, as appointed. For more information on CFIUS authorities and activities, see CRS In Focus IF10177, *The Committee on Foreign Investment in the United States*, by Cathleen D. Cimino-Isaacs and Karen M. Sutter.

[18] See CRS In Focus IF12312, *Foreign Ownership of U.S. Agriculture: Selected Policy Options*, by Renée Johnson.

[19] See USDA, National Security Division, "National Security Division Related Topics," https://www.usda.gov/da/ohs/nsd.

[20] Based on review of the FA SSP; USDA Office of Homeland Security (OHS), *2024 USDA Explanatory Notes*, 2023, https://www.usda.gov/sites/default/files/documents/02-2024-OHS.pdf; Department of Health and Human Services (HHS), *Food and Drug Administration: Justification of Estimates for Appropriations Committees*, 2023, https://www.fda.gov/media/166182/download; FDA, "Food Defense," https://www.fda.gov/food/food-defense; and FDA, "What We Do at CFSAN," https://www.fda.gov/about-fda/center-food-safety-and-applied-nutrition-cfsan/what-we-do-cfsan.

[21] See USDA OHS, *2024 USDA Explanatory Notes*, p. 2-7; and Geller, "The Dangerous Weak Link in the U.S. Food Chain." Geller notes, "By comparison, the Energy Department requested $245 million for its Office of Cybersecurity, Energy Security, and Emergency Response."

[22] USDA OHS, *2024 USDA Explanatory Notes*, p. 2-7.

justification for FY2025 does not show any dedicated SRMA appropriations for FA Sector activities.[23]

USDA and FDA list FA Sector engagement activities in annual Food and Agriculture Sector Specific Plan (FA SSP) progress reports, including exercises with FA Sector stakeholders.[24] The exercises include several food defense emergency scenarios but do not include FOCI-related threats or other FOCI issues that might affect emergency response. In April 2024, the Cybersecurity and Infrastructure Security Agency (CISA) hosted the Cyber Storm IX exercise, a major national cybersecurity exercise, which focused on the FA Sector as a possible target of cyberattacks.[25] The extent to which potential FOCI-related vulnerabilities or threats were incorporated into the exercise scenario is not clear.[26]

The USDA Office of Inspector General (OIG) has participated in the interagency Foreign Influence Investigations Working Group, but it is not clear what the scope of the activity was or whether the group is still active.[27] Some former agency officials and infrastructure protection experts have publicly voiced general concerns about the scope and effectiveness of FA Sector SRMA engagements with key stakeholders, according to media reports, although these concerns do not appear to be specific to management of FOCI risks.[28]

USDA is not an official member of CFIUS but is sometimes brought in at the Treasury Department's discretion on certain transactions. Some Members of Congress have argued that USDA should be a full member given the number of CFIUS cases and sensitive foreign acquisitions involving agriculture, biotechnology, and other USDA equities.[29] USDA/OHS currently has one staff member fully dedicated to CFIUS, according to the agency's FY2024 budget justification. USDA requested an additional $500,000 and two full-time employees in anticipation of a potential increase in the scope of CFIUS activity, to include a wider array of agriculture-related transactions. According to its FY2024 budget justification, USDA concluded an agreement with the Treasury Department, giving it "enhanced access" to CFIUS cases that "requires additional OHS and [Office of the General Counsel] resources to ensure we support the

[23] HHS, FDA, *Justification of Estimates for Appropriations Committees: Fiscal Year 2025*, 2024, https://www.fda.gov/media/176925/download.

[24] See DHS, *Food and Agriculture Sector Annual Report: Fiscal Year 2021*, https://www.fda.gov/media/165833/download. FDA provides free emergency exercise scenarios for FA Sector stakeholders on its website, "Food Related Emergency Exercise Bundle (FREE-B) Download," https://www.fda.gov/food/food-defense-tools/food-related-emergency-exercise-bundle-free-b-download. The content is listed as current as of March 5, 2024.

[25] See Jen Easterly, "Prepared Together—Cyber Storm IX Recap," Cybersecurity and Infrastructure Security Agency (CISA), May 16, 2024, https://www.cisa.gov/news-events/news/prepared-together-cyber-storm-ix-recap. According to Jen Easterly, the CISA Director, "Participating organizations worked directly with CISA and coordinating bodies such as Sector Risk Management Agencies and Information Sharing and Analysis Centers to understand roles and capabilities during a cyberattack."

[26] CISA has released after-action reports for past Cyber Storm exercises, typically several months after their conclusion. No after-action report for Cyber Storm IX is available as of this writing.

[27] See FY2021 FA SSP annual progress report, and USDA Office of Inspector General, *Semiannual Report to Congress: Second Half April 1, 2022–September 30, 2022*, no. 88, October 2022, p. 32, https://usdaoig.oversight.gov/sites/default/files/reports/2023-12/SARC_FY%25202022_Second%2520Half_508.pdf.

[28] Geller, "The Dangerous Weak Link in the U.S. Food Chain." For example, Geller quotes Mark Montgomery, former executive director of the Cyberspace Solarium Commission, as saying that USDA as co-SRMA is "significantly less effective" than other SRMAs. Brian Harrell, a former assistant director for infrastructure security at CISA, is quoted as saying that the FA Sector needs its own ISAC to provide "a true operational assessment."

[29] For example, Congressman Frank Lucas, "Lucas Legislation Addressing Foreign Land Acquisition Passes Through Committee," press release, September 29, 2023, https://lucas.house.gov/posts/lucas-legislation-addressing-foreign-land-acquisition-passes-through-committee.

agreement between Departments. Previously USDA reviewed less than 50 CFIUS cases annually, and since August 2022, our workload has increased to over 250 cases."[30]

Options for Congress include requesting additional information about the scope and extent of FDA and USDA activities to support CISR (and specifically FOCI) risk management programs and activities in the FA Sector and providing appropriations to support additional SRMA engagement with the FA Sector. A potential oversight question for Congress could be whether FOCI-related risks are included in relevant exercise scenarios provided by SRMAs (see above). Congressional oversight could also include examination of reports and data on sector engagement from the relevant FA Sector SRMAs—to include appropriate quantifiable metrics and criteria of success. Greater overall engagement with industry stakeholders may clarify what, if any, differences exist between the rate and quality of foreign- and U.S.-owned firms' participation in public-private partnerships and the nature of those differences.

DHS Leadership and Coordination

DHS is responsible for overall coordination of federal CISR activities. It maintains food and agriculture defense programs and activities through the Office of Health Security to support the FA Sector according to legislative requirements and executive branch policy directives.[31] In addition, DHS previously provided grant funding to the University of Minnesota Center of Excellence for food protection and defense, which now operates independently as the Food Protection and Defense Institute. The institute supports interdisciplinary research on protection of the global food supply, "including supply chain resilience, information sharing, risk analysis and assessment, education, epidemiology, [and] economics," among other topics.[32]

In 2019, CISA introduced National Critical Functions as a conceptual framework for identifying and assessing cross-sector risk to essential or systematically important infrastructure systems, assets, and networks, to complement and expand the existing sector-based CISR framework. CISA defines National Critical Functions as

> functions of government and the private sector so vital to the United States that their disruption, corruption, or dysfunction would have a debilitating effect on security, national economic security, national public health or safety, or any combination thereof.[33]

The 55 designated National Critical Functions include production and provision of agricultural products and services, and human and animal food products and services.[34]

[30] USDA OHS, *2024 USDA Explanatory Notes*, pp. 2-7.

[31] See DHS, *DHS Fact Sheet on National Security Memorandum-16 on Strengthening the Security and Resilience of United States Food and Agriculture*, 2022, https://www.dhs.gov/sites/default/files/2022-11/NSM_DHS%20FACT%20SHEET%20on%20NSM%20Food%20and%20Agriculture.pdf; also see DHS, Science and Technology Directorate (DHS S&T), "Food and Agriculture Defense," https://www.dhs.gov/science-and-technology/food-and-agriculture-defense. According to the web page, "S&T's food and agriculture defense work includes risk assessments; threat characterizations; countermeasures to defend against pathogens, pests, and toxins; food defense and ingestion threat modeling; characterizations of chemical threats for food contamination and adulteration; laboratory experiments and foundational research; diagnostics; veterinary medical countermeasures; decontamination strategies; trainings; and coordination with partners for joint efforts that defend food and agriculture systems."

[32] See University of Minnesota, Food Protection and Defense Institute, "Protecting the Global Food Supply Through Research, Education, and the Delivery of Innovative Solutions," https://foodprotection.umn.edu/.

[33] See CISA, "National Critical Functions," https://www.cisa.gov/national-critical-functions.

[34] See CISA, "National Critical Functions Set," https://www.cisa.gov/national-critical-functions-set.

Related Programs, Policies, and Directives

The 2013 National Infrastructure Protection Plan (NIPP) and the FA SSP have provided the primary risk management guidance for FA Sector stakeholders over the past decade.[35] The FA SSP defines risk "in the context of the NIPP 2013 ... as the potential for loss, damage, or disruption to the Nation's critical infrastructure resulting from destruction, incapacitation, or exploitation during some future manmade or naturally occurring event."[36] These documents outline an organizational approach and framework for sector risk management—primarily through voluntary public-private partnerships—but generally do not direct specific agency actions. FA Sector Annual Reports provide updates on progress toward meeting FA SSP goals.[37] (The FA SSP and the subsequent annual progress reports do not specifically identify foreign ownership of agricultural land or sector assets as threats to the FA Sector.)

Section 9002 of the FY2021 NDAA (P.L. 116-283) directed the Secretary of Homeland Security to assess the current CISR policy framework and assess the need for changes to the existing critical infrastructure sectors. In November 2021, CISA submitted a statutorily mandated report on its assessment of the CISR framework and preliminary findings. It suggested, among other things, that the review process offered "an opportunity" to designate a Bioeconomy Sector separate from the existing FA Sector.[38] (The National Security Memorandum [NSM] on Critical Infrastructure Security and Resilience [NSM-22] retained existing sectors without modification but did not foreclose the possibility of new sectors in the future.) The bioeconomy is the portion of the economy based on products, services, and processes derived from biological resources (e.g., plants and microorganisms). Some of the FOCI risks in the FA Sector, such as IP protection of genetically engineered seed traits, relate to the bioeconomy.

Options for congressional action include oversight over DHS updates of its CISR policy framework as mandated in the FY2021 NDAA, to include changes to risk assessment scope and methods, and creation of a new Bioeconomy Sector. Another option would be oversight of executive branch programs and activities set forth in Executive Order (E.O.) 14017, NSM-16, NSM-22, Section 9002(b) of P.L. 116-283, and other laws, policies, and directives that may have a bearing on assessment of FOCI risks in the FA Sector.

National Security Memorandum for the FA Sector

On November 10, 2022, the White House released an NSM, "Strengthening the Security and Resilience of United States Food and Agriculture" (NSM-16), which covers the security and resilience of food and agriculture systems and supply chains; directs federal agencies to take actions to "identify and assess threats, vulnerabilities, and impacts" from high-consequence and catastrophic incidents; and prioritize resources "to prevent, protect against, mitigate, respond to,

[35] NSM-22 directs SRMAs to submit new sector-specific plans to the Secretary of Homeland Security within 270 days of issuance—January 25, 2025—and then biennially by February 1 of each year.

[36] FA SSP, p. 5.

[37] See FDA, "Food and Agriculture Sector and Other Related Activities: Food and Agriculture Sector Reports," https://www.fda.gov/food/food-defense-initiatives/food-and-agriculture-sector-and-other-related-activities. The website has links to four FA Sector Annual Reports since 2015, for 2020, 2021, 2022, and 2023, respectively.

[38] CISA, *FY 2021 National Defense Authorization Act: Section 9002(b) Report*, November 12, 2021, p. 2, https://www.cisa.gov/resources-tools/resources/section-9002b-report. The term bioeconomy "refers to the share of the economy based on products, services, and processes derived from biological resources (e.g., plants and microorganisms). The bioeconomy is crosscutting, encompassing multiple sectors, in whole or in part (e.g., agriculture, textiles, chemicals, and energy)." See CRS Report R46881, *The Bioeconomy: A Primer*, by Marcy E. Gallo.

and recover from the threats and hazards that pose the greatest risk."[39] It supersedes previous White House policy guidance given in Homeland Security Presidential Directive 9 (HSPD-9), issued in 2004.[40]

NSM-16 identifies a wide range of threats facing sector stakeholders, to include chemical, biological, radiological, and nuclear (CBRN) threats; intentional introduction of hazardous contaminants; natural or genetically engineered pathogens and pests; and cybersecurity breaches leading to disruption of networked systems or IP theft. As with the earlier plans and directives, it does not specifically identify foreign ownership and control as a threat.

NSM-16 assigns primary responsibility for coordinating executive branch actions to the Assistant to the President for National Security Affairs (APNSA). The APNSA must provide an annual report to the President summarizing implementation progress, identifying capability gaps, and providing recommendations to close those gaps. Relevant provisions and reporting requirements are summarized in **Table 1**.

In March 2023, the FA Sector SRMAs and DHS jointly published the interim risk review mandated under NSM-16. The review contains a short section on foreign acquisitions in the FA Sector as a "potential factor contributing to risk," which states[41]

> Foreign acquisition of U.S. agricultural assets may pose risks to the U.S. food and agriculture sector in some cases. For example, a recent research report prepared to support the deliberations of the U.S.-China Economic and Security Review Commission describes several potential risks to U.S. agriculture associated with recent acquisitions and attempted acquisitions of U.S.-based agricultural assets (including agricultural land, intellectual property [such as IP related to genetically modified seeds], and U.S.-based food producers and logistics companies), which may include loss of economic competitiveness, reduced exports, negative environmental impacts, and associated public health risks.[42]

The review supports several other required assessment and planning products mandated by NSM-16 (see **Table 1**), which are in progress as of this writing, according to information posted on agency websites.[43]

Three other relevant E.O.s preceded NSM-16—E.O. 14081 on the bioeconomy, E.O. 14083 related to CFIUS reviews, and E.O. 14017 on supply chain security and resilience. They are discussed below.

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[39] See White House, "National Security Memorandum on Strengthening the Security and Resilience of United States Food and Agriculture," presidential memorandum, November 10, 2022, https://www.whitehouse.gov/briefing-room/presidential-actions/2022/11/10/national-security-memorandum-on-on-strengthening-the-security-and-resilience-of-united-states-food-and-agriculture/.

[40] White House, "Homeland Security Presidential Directive 9 (HSPD-9), Defense of United States Agriculture and Food," presidential memorandum, January 30, 2004, https://georgewbush-whitehouse.archives.gov/news/releases/2004/02/20040203-2.html.

[41] HHS, USDA, DHS, *National Security Memorandum on Strengthening the Security and Resilience of United States Food and Agriculture: 120-Day Food and Agriculture Interim Risk Review*, March 2023, p. 16, https://www.fda.gov/media/170114/download.

[42] Ibid., p. 22.

[43] See FDA, "National Security Memorandum on Strengthening the Security and Resilience of United States Food and Agriculture" (content current as of March 5, 2024), https://www.fda.gov/food/food-defense/national-security-memorandum-strengthening-security-and-resilience-united-states-food-and; and USDA, "Vulnerability Assessments" (content current as of July 31, 2023), https://www.fsis.usda.gov/food-safety/food-defense-and-emergency-response/food-defense.

Table 1. Agency Deliverables in "National Security Memorandum on Strengthening the Security and Resilience of United States Food and Agriculture" (NSM-16)

Department and Agency	Requirement	Timeline	Status
DOJ, DHS (in coordination with DOD and relevant agencies)	Provide threat assessment to leaders of relevant federal agencies on actors, threats, delivery systems, and methods that could be directed against the FA Sector.	Within 60 days (January 9, 2023) of publication of NSM-16, then annually.	No information
USDA, HHS, other relevant agencies (in coordination with FSLTT partners)	Conduct sector vulnerability assessment based on identified threats.	Within 180 days (May 9, 2023) of publication of NSM-16, then as needed.	In progress
DHS (in coordination with DOJ, USDA, HHS, and relevant agencies)	Provide comprehensive data-driven sector risk assessment informed by required threat and vulnerability assessments, prioritizing highest risks.	Within 1 year (November 10, 2023) of publication of NSM-16, then annually.	In progress
USDA, HHS (in coordination with relevant agencies)	Develop strategy and action plan based on risk assessment. Provide information on resilience capabilities, costs, and benefits; conduct risk mitigation analysis; and recommend research and development options to support mitigation.	Within 180 days of risk assessment completion, then revisions as needed.	In progress
USDA, HHS, DHS (in coordination with relevant agencies)	Conduct interim risk review on critical and emergent risks to FA Sector.	Within 120 days (March 10, 2023) of publication of NSM-16.	Published

Sources: CRS analysis of NSM-16 and U.S. Department of Agriculture (USDA) and Food and Drug Administration online updates.

Notes: DHS = Department of Homeland Security; DOD = Department of Defense; DOJ = Department of Justice; FA Sector = Food and Agriculture Sector; FSLTT = federal, state, local, territorial, and tribal; HHS = Department of Health and Human Services.

Executive Order on Bioeconomy

On September 12, 2022, President Biden issued E.O. 14081, "Advancing Biotechnology and Biomanufacturing Innovation for a Sustainable, Safe, and Secure American Bioeconomy."[44] The E.O. focused on the economic potential of the bioeconomy and federal support of research and development (R&D), data sharing, workforce training, regulatory reforms, and other goals and objectives. In addition, it contained a security-related objective:

> Secure and protect the United States bioeconomy by adopting a forward-looking, proactive approach to assessing and anticipating threats, risks, and potential vulnerabilities (including digital intrusion, manipulation, and exfiltration efforts by foreign adversaries), and by partnering with the private sector and other relevant stakeholders to jointly mitigate risks to protect technology leadership and economic competitiveness.

[44] E.O. 14081, "Advancing Biotechnology and Biomanufacturing Innovation for a Sustainable, Safe, and Secure American Bioeconomy," 87 *Federal Register* 56849, September 15, 2022.

Accordingly, the E.O. instructed the APNSA and the Assistant to the President for Economic Policy to coordinate with the Secretaries of Defense and Agriculture and other agency leaders to identify actions to "mitigate risks posed by foreign adversary involvement in the biomanufacturing supply chain and to enhance biosafety, biosecurity, and cybersecurity in new and existing infrastructure." Additionally, it required the Secretary of Homeland Security to conduct vulnerability assessments of bioeconomy-related critical infrastructure and National Critical Functions and to "enhance coordination with industry on threat information sharing, vulnerability disclosure, and risk mitigation for cybersecurity and infrastructure risks to the United States bioeconomy."

For more information on E.O. 14081 and bioeconomy issues, see CRS Report R47274, *White House Initiative to Advance the Bioeconomy, E.O. 14081: In Brief*; CRS Report R46881, *The Bioeconomy: A Primer*; and CRS Report R47265, *Synthetic/Engineering Biology: Issues for Congress*.

Executive Order on CFIUS

On September 15, 2022, President Biden issued E.O. 14083, "Ensuring Robust Consideration of Evolving National Security Risks by the Committee on Foreign Investment in the United States," to update the factors taken into consideration in the CFIUS review process as part of ongoing implementation of the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA; P.L. 115-232, Title XVII, Subtitle A).[45] E.O. 14083 notes that certain foreign investments "may undermine supply chain resilience efforts and therefore national security by making the United States vulnerable to future supply disruptions" and directs CFIUS to consider the effect of covered transactions on supply chain resilience and security, including with respect to "elements of the agriculture industrial base that have implications for food security," among other sectors. For more information on E.O. 14083, see CRS In Focus IF12415, *CFIUS Executive Order on Evolving National Security Risks and CFIUS Enforcement Guidelines*.

Executive Order on America's Supply Chains

On February 24, 2021, President Biden signed E.O. 14017, "America's Supply Chains," to ensure that supply chains are "resilient, diverse, and secure" against threats and hazards that might affect the "availability and integrity of critical goods, products, and services."[46] It contains two requirements related to foreign investment issues (not specific to the FA Sector): (1) a progress report on developing domestic critical minerals supply chains and (2) recommendations for federal incentives and regulatory changes to encourage domestic and foreign investment in critical goods and materials. As with the more recent NSM, it assigns the White House coordination role to the APNSA. It requires each critical infrastructure sector SRMA to produce a report on relevant supply chain risks within one year. USDA, as co-SRMA in the FA Sector, published the required report (hereinafter the USDA supply chain report) in February 2022.[47]

[45] E.O. 14083, "Ensuring Robust Consideration of Evolving National Security Risks by the Committee on Foreign Investment in the United States," 87 *Federal Register* 57369, September 15, 2022.

[46] E.O. 14017, "America's Supply Chains," 86 *Federal Register* 11849, March 1, 2021.

[47] USDA, *Agri-Food Supply Chain Assessment: Program and Policy Options for Strengthening Resilience*, Washington, DC, February 2022, https://www.ams.usda.gov/supply-chain.

Prospective Cyber Incident Reporting Requirements

In April 2024, DHS issued a proposed rule, "Cyber Incident Reporting for Critical Infrastructure Act Reporting Requirements."[48] The proposed rule was issued in compliance with provisions of the Cyber Incident Reporting for Critical Infrastructure Act of 2022 (CIRCIA), enacted under Division Y of the Consolidated Appropriations Act, 2022 (P.L. 117-103). It requires CISA to (1) engage in rulemaking to mandate reporting of cybersecurity incidents to the agency, (2) enforce noncompliance with required reporting, and (3) disseminate analysis based on the information collected. The FA Sector annual progress report for FY2022 noted that the FA Sector GCC and SCC "assisted in shaping the implementation" of CIRCIA requirements, without providing further detail.[49]

According to P.L. 117-103, the reporting requirements apply to entities in federally designated critical infrastructure sectors "that [satisfy] the definition established by the Director in the final rule." In designating covered entities, CISA proposed both general (e.g., size) and sector-based criteria. CISA declined to apply sector-based criteria to the FA Sector following consultations with the co-SRMAs.[50] Instead, CISA would apply a general size-based criterion to agricultural enterprises, which exempts small businesses from regulatory compliance, likely "based on the mean, median, or mode of number of employees across such entities."[51] According to CISA, the intent is to cover larger entities in the FA Sector to allow for development of "sector-specific threat and trends analysis."[52] The threat of state and non-state foreign adversaries was discussed throughout the proposed rule. However, the discussion did not include potential FOCI risks.

Potential FOCI Risks in the FA Sector

Supply Chain Security

A 2021 joint report on FA Sector risks by DHS, the Office of the Director of National Intelligence (ODNI), academics, and industry stakeholders (hereinafter the joint report) identified certain FOCI threats in agricultural supply chains.[53] Specifically, it identified the possibility of a "takeover of [an] important supply chain entity by foreign investors" as part of an economic coercion and manipulation campaign but did not elaborate on specific cases, threats, or acquisition mechanisms.[54] A 2022 report (hereinafter the Review Commission report) by the congressionally mandated U.S.-China Economic and Security Review Commission provided information on these and other issues as they related to China. The report stated that acquisition of major domestic agribusinesses may "confer undue leverage over U.S. supply chains" and lead to restructuring of supply chains that negatively affects domestic producers and service providers.[55]

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[48] DHS, "Cyber Incident Reporting for Critical Infrastructure Act (CIRCIA) Reporting Requirements," 89 *Federal Register* 23644, April 4, 2024 (hereinafter CIRCIA rulemaking).

[49] FA SSP FY2022 update, p. 12, https://www.fda.gov/media/171959/download.

[50] CIRCIA rulemaking, p. 23702.

[51] Ibid.

[52] Ibid., p. 23683.

[53] Office of the Director of National Intelligence and DHS, *Threats to Food and Agricultural Resources*, Washington, DC, 2021.

[54] Ibid., p. 61.

[55] Lauren Greenwood, *Staff Research Report: China's Interests in U.S. Agriculture: Augmenting Food Security* (continued...)

The Review Commission report also identified risks of IP theft, illicit technology transfer, and foreign control of domestic FA Sector supply chains. According to the report, these activities are part of a coordinated and deliberate policy of the government of the People's Republic of China (PRC) to address China's domestic food security challenges by increasing productivity through illicit technology transfer and overseas diversification of its agricultural supply chains.[56] In addition, the report warned that the PRC-linked firms may attempt to reverse-engineer illegally acquired U.S. seed varieties to identify vulnerabilities to crop disease and other threats.

The USDA supply chain report identified the growing ownership concentration in meat and poultry manufacturing, pesticides and crop seeds, and farm machine parts as sources of potential risk.[57] It did not specifically identify FOCI as a threat or risk factor. However, foreign-owned or -controlled multinationals have significant presence in these areas of production.

Foreign Acquisition of Seed and Agricultural Chemical Suppliers

In 2016, ChemChina announced plans to acquire Syngenta, a Swiss-based agricultural conglomerate (with extensive business operations in the United States) for $43 billion.[58] The acquisition—claimed as the largest foreign acquisition by a PRC company at the time—became the subject of CFIUS review and was eventually approved.[59] While CFIUS reviews are not public, media reports suggested that the review would likely focus on defense-specific issues, such as proximity of Syngenta facilities to U.S. military bases and ownership of potentially sensitive military contracts, more than food-security-related FOCI issues.[60]

In a press release following CFIUS's approval of the transaction, Senator Grassley (IA) stated

> It's clear that China is looking at purchasing companies with food production expertise as part of a long-term strategic plan and a component of their national security. We need to be looking at these mergers in the same way, so it makes sense for CFIUS to take that angle

Through Investment Abroad, U.S.-China Economic and Security Review Commission, May 26, 2022, p. 3, https://www.uscc.gov/annual-report/2022-annual-report-congress.

[56] The government of the People's Republic of China has released national-level strategies in recent years highlighting acquisition of biotechnology from foreign firms as a priority. For more information, see CRS In Focus IF11684, *China's 14th Five-Year Plan: A First Look*, by Karen M. Sutter and Michael D. Sutherland.

[57] According to the report, "In 2019, the four largest fed cattle processing companies accounted for 85 percent of the total U.S. annual slaughter; the four largest hog processing companies accounted for 67 percent of the total annual hog slaughter; and the four largest chicken processing companies accounted for 53 percent of the total annual slaughter." See USDA, *Agri-Food Supply Chain Assessment: Program and Policy Options for Strengthening Resilience*, Washington, DC, February 2022, p. 13.

[58] Syngenta is one of the four largest suppliers of crop seeds and agricultural chemicals in the United States, according to the USDA Economic Research Service. See USDA Economic Research Service, "Two Companies Accounted for More than Half of Corn, Soybean, and Cotton Seed Sales in 2018-2020," https://www.ers.usda.gov/data-products/chart-gallery/gallery/chart-detail/?chartId=107516.

[59] Michael Shields, "ChemChina Clinches Landmark $43 Billion Takeover of Syngenta," Reuters, May 5, 2017, https://www.reuters.com/article/idUSKBN1810CM/; Shangjing Li, "Simpson Thacher Helps ChemChina Obtain CFIUS Clearance for $43 Bln Syngenta Buy," *Asian Legal Business*, August 26, 2016, https://china.legalbusinessonline.com/node/73060; ChemChina and Syngenta, "ChemChina and Syngenta Receive Clearance from the Committee on Foreign Investment in the United States," press release, August 22, 2016, https://www.syngenta.com/sites/syngenta/files/press-release-pdf/2017/20160822-en-joint-release.pdf.

[60] Diane Bartz, "ChemChina, Syngenta to Move Quickly on U.S. National Security Review," Reuters, February 3, 2016, https://www.reuters.com/article/idUSKCN0VD03C/; "'No Security Issues' in Syngenta Sale to China," *CHEManager International*, July 4, 2016, https://www.chemanager-online.com/en/news/no-security-issues-syngenta-sale-china.

> into consideration when reviewing these transactions. The fact that a state-owned enterprise may have yet another stake in U.S. agriculture is alarming.[61]

In 2020, ChemChina and Sinochem—a Chinese state-owned multinational chemical manufacturing conglomerate—consolidated their agricultural assets into Syngenta.[62] In response, some Members of Congress called upon the Treasury Secretary, as chair of CFIUS, to include food security issues in assessments of any foreign acquisitions of FA Sector entities.[63] In the 118th Congress, several bills under consideration would expand CFIUS reviews of foreign investment transactions in the FA Sector to include food security issues and would mandate regular USDA membership as opposed to informal, ad hoc participation.

The Consolidated Appropriations Act, 2024 (P.L. 118-42, §787), enacted in March 2024, requires the Secretary of Agriculture to be included as a member of CFIUS on a case-by-case basis with respect to covered transactions involving agricultural land, agriculture biotechnology, or the agriculture industry (including agricultural transportation, agricultural storage, and agricultural processing), as determined by the chair of CFIUS in coordination with the Secretary of Agriculture.[64] Congress provided $2 million in appropriated funds, to remain available until expended, for USDA to implement this provision.

Foreign Acquisition of Meat and Poultry Suppliers

The MITRE Corporation noted in a July 2021 report (hereinafter the MITRE report) on domestic meat and poultry supply chains that some foreign-owned U.S. meat and poultry providers prioritized exporting meat products to their home country rather than supplying domestic consumption needs when spot shortages occurred during the COVID-19 public health emergency.[65] Further, the report recommended that FA Sector SRMAs and certain interagency partners identify foreign ownership of key processing and production facilities and analyze "the policy implications of non-compliance with U.S. government mandates during an emergency."[66]

Four major multinational agricultural companies control the majority of U.S. beef production. Two of these—JBS and National Beef Packing Company—are owned or controlled by Brazilian

[61] Office of Sen. Chuck Grassley, "Grassley Statement on Conclusion of CFIUS Review of ChemChina-Syngenta Merger," press release, August 22, 2016, https://www.grassley.senate.gov/news/news-releases/grassley-statement-conclusion-cfius-review-chemchina-syngenta-merger.

[62] Reuters, "ChemChina, Sinochem Merge Agricultural Assets - Syngenta," January 5, 2020, https://www.reuters.com/article/idUSKBN1Z40HA/.

[63] House Foreign Affairs Committee, "McCaul, Crawford Urge Treasury Department to Review Merger Between Chinese Government-Backed Military Companies," press release, April 15, 2021, https://foreignaffairs.house.gov/press-release/mccaul-crawford-urge-treasury-department-to-review-merger-between-chinese-government-backed-military-companies/.

[64] Other legislation in the 118th Congress would broaden CFIUS's authorities to review and potentially prohibit certain foreign purchases of real estate and/or agricultural land (e.g., H.R. 917/S. 369, H.R. 558, S. 1066, H.R. 1448, H.R. 4577, H.R. 5078/S. 2060), add USDA as a permanent CFIUS member agency (e.g., H.R. 683/S. 168, S. 2312, H.R. 3378, H.R. 4577, S. 2312, H.R. 5078/S. 2060), and expand the defined scope of U.S. critical infrastructure to explicitly include agricultural systems and supply chains (e.g., H.R. 513/S. 68).

[65] Bradford Brown et al., *U.S. Food Supply Chain Security: A Network Analysis*, MITRE Corporation, July, 2021, p. 4, https://www.mitre.org/sites/default/files/2021-10/pr-21-1826-us-food-supply-chain-security-a-network-analysis.pdf.

[66] Ibid., p. 6.

entities.[67] Similarly, the acquisition of Smithfield Foods by WH Group Limited—a PRC firm—conferred control of 20% of the domestic pork processing industry to a foreign owner.[68]

Reports that some foreign-owned meat processing plants prioritized deliveries to their home countries during the COVID-19 pandemic could also be a subject for congressional oversight and legislation.

Food Processing, Packaging, and Production

The MITRE report found that trends toward consolidation of entities were highly pronounced in the processing, packaging, and production of meat and poultry, creating a "dense and complex network" with several "key hubs" that were potentially vulnerable to disruption by man-made or natural causes:[69]

> With their high connectivity, these five key hubs have significant and extensive influence on the resilience and continuity of the U.S. meat supply chain. A disruption in any one of these hubs can have a large downstream effect on the rest of the network. The potential for disruption is further exacerbated by the network structure of "super embedded hubs" where each of these five key hubs are tightly interconnected.[70]

The MITRE report considered several types of intentional threats to such hubs, to include biological, physical, or cyber-based attacks. The report did not specifically consider FOCI risks as they might relate to any of these types of attacks. It is not clear whether foreign-owned entities are more vulnerable to these attacks than their U.S.-owned counterparts or whether the fact of foreign ownership itself may be a threat in some cases. A report by the Food Protection and Defense Institute (hereinafter the FPDI report) asserts that cybersecurity vulnerabilities, exacerbated by poor technical competence and a lax security culture, are widespread throughout FA Sector supply chains, but the FPDI report does not attribute specific risks to FOCI threats in the FA Sector.

Although not specific to the FA Sector, E.O. 14083 of September 2022 states

> investments by foreign persons with the capability and intent to conduct cyber intrusions or other malicious cyber-enabled activity—such as ... the operation of United States critical infrastructure ... may pose a risk to national security.

It is not yet clear whether FOCI risks to critical infrastructure identified in E.O. 14083 would fall within the scope of various risk management activities mandated in NSM-16, because the latter directive is still in the early implementation phase as of the date of this report (see "National Security Memorandum for the FA Sector" section).

Agricultural and Food Supporting Facilities

Agricultural and food supporting facilities include R&D facilities. The joint report states that these may be targeted by foreign entities for purposes of espionage, theft of trade secrets, and IP

[67] Christopher Walljasper, "More Foreign Ownership of U.S. Beef Processors Raises Food Safety Concerns," *Investigate Midwest*, December 19, 2019, https://investigatemidwest.org/2019/12/18/more-foreign-ownership-of-u-s-beef-processors-raises-food-safety-concerns/.

[68] See Fitch Ratings, "Fitch Affirms Smithfield Foods, Inc.'s IDR at 'BBB'; Outlook Stable," October 10, 2022, https://www.fitchratings.com/research/corporate-finance/fitch-affirms-smithfield-foods-inc-idr-at-bbb-outlook-stable-10-10-2022.

[69] Bradford Brown et al., *U.S. Food Supply Chain Security: A Network Analysis*, p. 4.

[70] Ibid.

theft.[71] Further, these activities may confer competitive advantages on foreign entities and provide "coercion points on aggressive corporate takeovers of U.S. corporations."[72] The joint report identifies "small and emerging corporations, universities, and government research organizations" as the most vulnerable entities of such targeting.[73]

Regulatory, Oversight, and Industry Organizations

The USDA OIG noted investigations involving foreign influence or interference in the FA Sector in some recent reports to Congress. In its FY2022 (second half) semiannual report to Congress, the USDA OIG reported substantiated allegations of insider threat activity involving a senior official at USDA's Animal and Plant Health Inspection Service (APHIS). Investigators found that the official maintained "inappropriate relationships" with foreign nationals, failed to report personal and official foreign travel, violated IT security, and accepted a gift from a foreign official without properly reporting it.[74] The FY2020 (first half) report noted that OIG audited USDA controls to prevent "unauthorized access to, and transfer of, USDA-funded research technology to foreign countries" by foreign research collaborators and found weaknesses that required correction by USDA agencies.[75] Semiannual USDA OIG reports for FY2023—the most recent available as of this writing—do not note any FOCI-related activities.

An option for Congress would be to exercise its oversight authorities to ascertain whether the recommended corrections suggested by USDA OIG to prevent further occurrences of IP theft by foreign entities were implemented. Another option for Congress would be to request the relevant OIG report in nonredacted form from USDA.

The Role of Transnational Criminal Organizations

A 2019 study included in the FPDI report found that FOCI threats in the FA Sector were not necessarily limited to otherwise legitimate business transactions. According to the FPDI study, "transnational criminal organizations (TCOs) are already heavily involved in large-scale food-related crimes such as counterfeiting, economically motivated adulteration, theft and resale, and smuggling."[76] Further, cargo thefts are often aided by malicious cyber intrusions to penetrate agricultural supply chains and to identify and reconnoiter targets.[77]

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[71] Office of the Director of National Intelligence and DHS, *Threats to Food and Agricultural Resources*, p. 26.

[72] Ibid.

[73] Ibid.

[74] See USDA Office of Inspector General, *Semiannual Report to Congress: Second Half April 1, 2022–September 30, 2022*, no. 88, October, 2022, p. 87, https://usdaoig.oversight.gov/sites/default/files/reports/2023-04/SARC_FY%25202022_Second%2520Half_508.pdf. No motive was reported. Among other activities, the Animal and Plant Health Inspection Service (APHIS) has oversight responsibilities in animal health, biotechnology, imports and exports of food and plant products, and international services. The Department of Justice (DOJ) declined to prosecute the official; their security clearance was revoked by the agency.

[75] USDA Office of Inspector General, *Semiannual Report to Congress: First Half, October 1, 2019–March 31, 2020*, no. 83, May 2020, p. 5, https://usdaoig.oversight.gov/sites/default/files/reports/2023-04/sarc2020_1st_half_508.pdf. The public report was fully redacted. According to USDA, "Due to the nature of our findings and the agency's responses, the report contains sensitive content. Thus, we are withholding it from public release due to concerns about the risk of circumvention of law." See USDA Office of Inspector General, *USDA's Controls to Prevent the Unauthorized Access and Transfer of Research Technology*, p. 1, https://www.oversight.gov/sites/default/files/oig-reports/50701-0002-21.pdf.

[76] Food Protection and Defense Institute, *The Cyber Risk to Food Processing and Manufacturing*, September 2019, p. 9, https://conservancy.umn.edu/bitstream/handle/11299/217703/FPDI-Food-ICS-Cybersecurity-White-Paper.pdf.

[77] Ibid.

In some cases, foreign-controlled firms have been targeted by TCOs for criminal exploitation or have themselves engaged in criminal practices. According to media reports, meat production by JBS facilities in the United States was disrupted in 2021 by a ransomware attack, which JBS attributed to a Russian TCO.[78] It is not clear whether foreign-owned entities are more vulnerable to these attacks than their U.S.-owned counterparts. The previous year, J&F Investimentos S.A., the Brazilian investment group that controls JBS,[79] pleaded guilty to violations of the Foreign Corrupt Practices Act as part of a bribery scheme in Brazil to obtain financing and other benefits and agreed to pay a $256 million criminal penalty.[80]

Foreign Control of U.S. Farmland

FOCI risks to U.S. farmland may involve direct ownership of the land or de facto control over land use for agricultural purposes, such as use of specific seed varieties and pesticides.

Land Ownership Risks

Increasing scarcity of arable land globally coupled with increasing demand for agricultural commodities has made U.S. farmland an attractive investment for certain foreign entities. Motivations for land acquisitions may be economic, strategic, or both. USDA tracks foreign acquisition of agricultural and nonagricultural land under authorities of the Agricultural Foreign Investment Disclosure Act of 1978 (AFIDA; P.L. 95-460). According to USDA, as of December 31, 2022, foreign persons and entities held an interest in 44.3 million acres of U.S. agricultural and nonagricultural land, accounting for 3.4% of total privately owned land.[81]

Owners from five countries (Canada, the Netherlands, Italy, the United Kingdom, and Germany) accounted for approximately 62% of all foreign-owned U.S. agricultural land in 2022. Other countries with aggregate owner holdings of more than 500,000 acres were Portugal, France, Denmark, Luxembourg, Mexico, Switzerland, the Cayman Islands, Japan, and Belgium. As of year-end 2022, USDA reports that PRC entities accounted for 383,935 acres, or 0.8%, of total foreign-owned U.S. agricultural land.[82]

Ownership of U.S. agricultural land by PRC entities, as reported by USDA under AFIDA, appears negligible, accounting for less than 1% of total foreign-owned U.S. agricultural land as of year-end 2022. However, the Review Commission report raised concerns about the noncommercial purposes of PRC acquisitions (i.e., increasing China's food security) and the apparent acceleration of the pace of acquisitions, which have elicited concern both from Congress and

[78] Tom Polanske and Jeff Mason, "U.S. Says Ransomware Attack on Meatpacker JBS Likely from Russia," Reuters, June 1, 2021, https://www.reuters.com/world/us/some-us-meat-plants-stop-operating-after-jbs-cyber-attack-2021-06-01/.

[79] See JBS, "Ownership and Corporate," https://ri.jbs.com.br/en/esg-investors/corporate-governance/ownership-and-corporate/.

[80] DOJ, "J&F Investimentos S.A. Pleads Guilty and Agrees to Pay over $256 Million to Resolve Criminal Foreign Bribery Case," press release, October 14, 2020, https://www.justice.gov/opa/pr/jf-investimentos-sa-pleads-guilty-and-agrees-pay-over-256-million-resolve-criminal-foreign.

[81] CRS from USDA, *Foreign Holdings of U.S. Agricultural Land Through December 31, 2022* (Report 6), https://www.fsa.usda.gov/Assets/USDA-FSA-Public/usdafiles/EPAS/PDF/2022_afida_annual_report_12_20_23.pdf. Data cover sole foreign and joint U.S. ownership of privately held agricultural and nonagricultural land (out of a total of 1,290.5 million acres).

[82] Ibid. For more background on the Agricultural Foreign Investment Disclosure Act of 1978 and foreign ownership of farm land, see CRS In Focus IF11977, *Foreign Ownership and Holdings of U.S. Agricultural Land*, by Renée Johnson, and CRS Report R47893, *Selected Recent Actions Involving Foreign Ownership and Investment in U.S. Food and Agriculture: In Brief*, by Renée Johnson.

from certain agricultural stakeholders and industry observers.[83] Legislation to restrict certain sales of agricultural land, tighten disclosure requirements, and expand federal review of foreign investment transactions has been introduced in recent Congresses.[84]

Neither USDA, FDA, nor businesses associated with the FA Sector track or compile data on any associated farm assets and property conveyances that may be attached to the farmland ownership or property investment, such as buildings, equipment, machinery, livestock, and IP and other production-related or technology rights. This may create data gaps that complicate analysis of relevant events or trends. Congress may consider what data categories used for AFIDA disclosures are sufficient to identify FOCI-related risks to the FA Sector.

Technology Use Agreements for Basic Agricultural Inputs

Large agrochemical and seed firms—many foreign owned—commonly require customers to sign technology use agreements for use of seed and pesticides. Technology use agreements for patented seed varieties typically impose legally enforceable conditions on end users (farmers) that cover a range of common agricultural practices.[85] Some public interest groups and critics claim that the current patent system gives too much power to large firms, exceeds congressional intent, and allows for agency overreach in granting and enforcing IP rights.[86]

"Ownership of [seed] biotech traits enable a level of control over every acre containing the trait," one law firm wrote in response to a 2022 USDA request for public comment on competitiveness in the agricultural seed production business. "The contractual terms reach far beyond grants of [IP] rights and impose wide-ranging, intrusive, and often poorly defined, obligations and requirements on licensees."[87]

Enforcement clauses of technology use agreements may allow firms to have unrestricted access to licensees' properties and facilities, business records (including receipts for chemicals and herbicides), internet service provider details, required crop-record submissions to USDA, and detailed records of farming practices (e.g., fertilizing, planting, and harvesting).[88] Violations may result in lawsuits or cancellation of use agreements, which may have the practical effect of cutting off access to seed supply for planting.

Some public interest groups assert that corporate collection and ownership of detailed data on farming practices may also raise fair data use and privacy issues. According to the American Antitrust Institute, "digital farming will likely enhance incentives to amass and appropriate valuable farm data for potential use as a strategic competitive asset."[89]

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[83] See Review Commission report.

[84] For more information on recent legislation and policy development, see CRS In Focus IF12312, *Foreign Ownership of U.S. Agriculture: Selected Policy Options*, by Renée Johnson, and CRS Report R47893, *Selected Recent Actions Involving Foreign Ownership and Investment in U.S. Food and Agriculture: In Brief*, by Renée Johnson.

[85] For an overview of relevant legislation, court cases, and enforcement policies as presented to farmers, see Wisconsin Department of Agriculture, Trade and Consumer Protection, *What Is the U.S. Plant Variety Protection Act?* https://datcp.wi.gov/Documents/BrownBagSeed.pdf.

[86] For a public interest group perspective on congressional intent and other legal issues, see Debbie Barker et al., *Seed Giants vs. U.S. Farmers*, Center for Food Safety & Save Our Seeds, 2013, pp. 13-15, https://www.centerforfoodsafety.org/files/seed-giants_final_04424.pdf.

[87] Joel E. Cape, *Comments of Cape Law Firm*, Cape Law Firm, USDA Docket No. AMS-AMS-22-0025, June 15, 2022, pp. 2 and 4, https://www.regulations.gov/comment/AMS-AMS-22-0025-0062.

[88] Debbie Barker et al., *Seed Giants vs. U.S. Farmers*, p. 23.

[89] Diana L. Moss, *Comments of the American Antitrust Institute*, American Antitrust Institute, USDA Docket No. (continued...)

Because foreign-owned agrochemical and seed firms predominate in the U.S. market (see "Foreign Acquisition of Seed and Agricultural Chemical Suppliers" section), it follows that foreign-owned and -controlled entities may be able to amass detailed farm-level data—whether collected through IP enforcement activities or other means—across broad swaths of U.S. agricultural land.

Global agriculture firms assert that the patent system incentivizes and protects long-term R&D investments, which are necessary to produce seed traits such as those that have made higher crop yields possible over time at reasonable cost to farmers.[90] Additionally, they assert that acquisition of farm-level data facilitates development of precision agriculture products, as well as individualized recommendations for seed and herbicide use that benefit farmers.

In 2021, the Biden Administration directed USDA to prepare a report on consolidation within the agricultural seed industry, for which the agency subsequently sought public comment.[91] Commenters—ranging from small organic farmers to major multinational conglomerates—noted the trend toward consolidation and globalization in the seed industry, the seed industry's convergence with the agrochemical industry, and the increasing prevalence of seeds engineered to withstand various treatments (often sold by the same firms) against pests, weeds, and disease. In general, arguments centered on ecological, economic, and competitiveness concerns, rather than potential FOCI risks. Nonetheless, in some cases, foreign firms' acquisitions of major seed producers have raised security concerns (see "Foreign Acquisition of Seed and Agricultural Chemical Suppliers" section).

Options for Congress include amending patent law to clarify its intent regarding the use of utility patents for genetically engineered seed traits and examining IP enforcement practices that foreign-owned firms may use to collect farm-level data and whether data are aggregated and used in ways that safeguard U.S. security interests.

Conclusion

FOCI within the U.S. FA Sector is widespread. Foreign-owned multinationals are present throughout the sector, in segments such as meat processing, agricultural chemicals, and crop seeds. Some foreign acquisitions of corporate entities or agricultural land may be subject to CFIUS review but are generally legal and generally allowed. In the R&D field, collaboration with foreign nationals and research institutions is commonplace in both the public and private sector. Further, the national CISR enterprise itself frequently relies on collaboration of U.S. public- and private-sector entities with their foreign counterparts. SRMAs generally assume that asset owners are good-faith actors, regardless of nationality.

However, FOCI may also present potential risks to the FA Sector, as seen in allegations of unauthorized technology transfer, theft or misappropriation of IP, prioritization of overseas markets over domestic demand, and attempted land purchases near sensitive military assets. Other potential areas of concern, such as farm-level data gathering by multinational firms and alleged

AMS-AMS-22-0025, May 16, 2022, p. 17, https://www.antitrustinstitute.org/wp-content/uploads/2022/05/USDA-Comment-Agbiotech-6-10-22-REVISED-FINAL-FOR-AAI-WEBSITE.pdf. Another nonprofit, The Open Markets Institute makes substantially similar arguments in its comments. See Open Markets Institute, *The Open Markets Institute's Comments on "Competition and the Intellectual Property System: Seeds and Other Agricultural Inputs*," May 16, 2022, pp. 5-7, https://www.regulations.gov/comment/AMS-AMS-22-0025-0033.

[90] For example, see Syngenta, "Intellectual Property & Regulatory," https://www.syngenta.com/en/about/faq/intellectual-property-regulatory.

[91] USDA Agriculture Marketing Service, "Competition and the Intellectual Property System: Seeds and Other Agricultural Inputs," https://www.regulations.gov/document/AMS-AMS-22-0025-0001.

abuse of IP protections to control farming practices, relate primarily to concerns about corporate consolidation and concentration that are not specific to foreign ownership. Nonetheless, some Members of Congress and other observers have raised concerns over foreign acquisitions of U.S. and multinational firms in key FA Sector segments.

The full extent to which specifically *foreign* ownership, control, or influence over critical infrastructure systems and assets affects the overall level of risk to critical functions of the FA Sector (i.e., the safe production, distribution, and supply of food) has yet to be established. Much of the publicly available reporting is conjectural and anecdotal, complicating any more systemic analysis of FOCI risk to the FA Sector. Legislative mandates for data gathering on certain commercial transactions (e.g., AFIDA) and cybersecurity incident reporting (e.g., CIRCIA), as well as executive branch directives to appropriate federal agencies to conduct relevant studies, may offer an opportunity for more authoritative analyses.

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