Buy Local: An Analysis of Potential Legal Challenges To Local Food Purchase Preferences

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In response to a number of concerns, including the obesity epidemic, a move toward more sustainability in government operations, and a desire to prime local economies, state and local governments are seeking to enhance their procurement policies to improve the nutritional content of food they purchase and to purchase more food locally. One way to do so is to give competitive bidding preferences to government procurements of agricultural products or food that is produced in the local community.

Many states have procurement laws or standards that give a purchasing preference for food or agricultural goods that are grown or produced in-state.[1] The statutes vary in their application (whether they apply to state agencies, local governments, or school districts), the scope of goods covered (food, agriculture products, or more general "goods"), and the type of preference awarded (selection when equally priced to out-of-state goods or percentage bidding advantages to in-state goods).

I. Potential Federal Law Challenges to Food Purchasing Preference Laws

There is very little case law considering local food or agricultural products purchasing preference laws. Only one case, *Big Country Foods v. Board of Education*[2] discussed below, expressly addresses the issue. There are, however, cases considering challenges to other major types of in-state preference procurement laws, specifically those giving preferences to: (1) employment of state or local residents on public works projects[3] and (2) resident contractors.[4] In many cases, those who grow locally produced food will also be resident contractors. The challenges raised to these other preference laws are those most likely to be raised against food purchasing preference laws.

A. Challenges Specific to Procurements Using Federal Funds

When states or local governments use funds awarded pursuant to federal programs to procure goods or services, they must comply with the federal laws and regulations governing those programs. Federal programs require procurement using a competitive process, but generally allow states and localities to elect to follow either their own laws governing contracting or the federal guidelines, provided that, regardless of the option selected, the agency complies with federal requirements.[5] Many federal programs prohibit uses of geographic preferences unless the applicable federal statutes "expressly mandate or encourage geographic preference."[6]

1. Geographic Preferences When Using School Lunch and School Breakfast Act Funding

Prior to 2008, the federal School Lunch Program encouraged institutions (primarily school districts) receiving funding under the program to purchase locally grown and raised, unprocessed agricultural products to the maximum extent possible.[7] The 2008 Farm Bill expressly amended the program to permit institutions receiving funds under the Childhood Nutrition Act "to use a geographic preference for the procurement of unprocessed agricultural products, both locally

grown and locally raised."[8] In February 2011, the United States Department of Agriculture ("USDA") clarified that the purchasing institutions, school food authorities, child care institutions, and Summer Food Service Program ("SFSP") sponsors, may specify the geographic area, provided it is within the United States, within which unprocessed agricultural products will originate.[9] The USDA also specified that school districts may select a geographic preference different from that required under state law since the federal law grants to the purchasing institution the authority to specify the geographic preference.[10]

2. Geographic Preferences When Using Other Federal Funding

State and local governments often receive funding under other federal grant programs, some of which could be used to procure food. If those programs expressly allow for a geographic preference, the state and local entities may expend those funds on locally-produced food. If not, the question arises whether a geographic preference is consistent with the competitive procurement required under federal law.

In *City of Cleveland v. Ohio*,[11] the city sought a declaratory judgment that application of a city ordinance imposing a twenty percent hiring mandate for public projects using local workers did not violate federal regulations prohibiting anti-competitive bidding procedures or discrimination against out-of-state employment. The ordinance favored Cleveland residents over other Ohio state residents, but not out-of-state workers.[12] The court held that, while the federal regulation prohibited discrimination against out-of-state workers, it did not prohibit intrastate discrimination.[13]

After the case was decided, Cleveland sought approval from the Department of Transportation to apply its hiring preference ordinance to U.S. Department of Transportation Recovery Act funding. Secretary Ray LaHood declined to approve the use of local hiring preferences, concluding that the *City of Cleveland* decision "left intact [the Federal Highway Administration's] authority to regulate what constitutes an anti-competitive practice.... Upon further review, we continue to believe that FHWA's longstanding practice of prohibiting mandatory local hiring preferences, such as the [Cleveland] Law, is necessary to ensure that Federal aid project plans and specifications are effective in securing competition."[14] Thus, where no geographic preference is explicitly authorized in the federal funding legislation, states and cities should use extreme caution before employing a state or local preference for a federally-funded procurement.

The federal courts of appeal have rejected most Commerce Clause challenges to in-state preference laws, holding that the market participant exception applies.

B. Other Potential Federal Law Challenges to Procurement Preference Laws

1. Dormant Commerce Clause Challenges

One of the most common challenges to in-state preference laws is made under the Dormant Commerce Clause. The U.S. Constitution grants Congress the power to regulate interstate commerce.[15] The U.S. Supreme Court has held that this grant of power to Congress impliedly limits the power of state or local governments to regulate interstate commerce.[16] This limitation is known as the "Dormant Commerce Clause." Generally, under the Dormant Commerce Clause, states and local governments may not enact laws treating in-state products or services more favorably than out-of-state products or services.[17]

Two exceptions exist to this prohibition. First, state and local governments may "discriminate" in favor of in-state products or services when expressly granted permission from Congress to do so.[18] For example, as discussed above, Congress has expressly granted school districts authorization to impose a geographic preference when purchasing unprocessed agricultural products under the School Lunch Program.[19]

Second, governments may give local preferences when they act as "market participants" rather than regulators.[20] Generally, governments act as market participants when they are purchasing and selling like a private entity, as opposed to exercising taxing, regulatory, or police powers. "In making the determination whether a state is acting as a market participant or regulator, a court must examine whether the state or local government has imposed restrictions that 'reach beyond the immediate parties with which the government transacts business.'"[21]

The federal courts of appeal have rejected most Commerce Clause challenges to in-state preference laws, holding that the market participant exception applies.[22] In *Big Country Foods v. Board of Education*,[23] the only federal appellate case challenging a food preference statute, involved a disappointed bidder for a contract to supply milk for a school district that used federal funds from the National School Breakfast and Lunch programs. The bidder sued the district and the USDA.[24] Alaskan law required school districts to give a seven percent bidding preference to Alaskan milk products.[25] The plaintiff argued that the market participant exception to the Dormant Commerce Clause did not apply, because the state was acting as a regulator by imposing on its political subdivisions the requirement to favor state residents in the procurement of foods.[26] Initially, the court rejected the argument that "the local school district should be considered 'a market participant in its own right.' The school district acted pursuant to state law, and did not seek to

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give an in-state preference on its own."[27]

The court held, however, that the state was acting as a market participant and was exercising that power through its local subdivisions.[28] The court noted that "political subdivisions generally exist at the will of the state" and that "local control fosters both administrative efficiency and democratic governance."[29] As a result, the court refused to penalize the state for "exercising its [market] power through smaller, localized units."[30]

The court also rejected the plaintiff's final two arguments. First, the court rejected the plaintiff's argument that neither Alaska nor the school district could be considered a market participant because federal funds were used to pay for all of the milk.[31] The court held that while federal resources did provide the funding to make the milk purchases, Alaska was the direct participant in the market.[32] Second, the court rejected the plaintiff's argument that Alaska was acting "in its sovereign capacity, rather than as a market participant," finding that the state was "simply making a decision as to what it [would] pay for a product bought on the open market."[33]

The only successful Dormant Commerce Clause challenge to a state preference law in a federal appellate court to date was a challenge to an Illinois law requiring any public works project for the state or any political subdivision to employ workers who resided in the state.[34] In that Seventh Circuit case, Judge Posner acknowledged that if the state "preference law [were limited] to construction projects financed ... or administered by the state ... it would ... not violate the commerce clause."[35] But, because the law imposed the preference on local governments, the court found that the state was acting as a regulator and not as a market participant.[36] Accordingly, the court held that the preference law violated the Commerce Clause.[37] Other circuits that have considered the same pattern a state law imposing preferences on local governmental entities—have found the market participant exception applicable.[38]

It is unlikely that a Dormant Commerce Clause challenge will be successful to a state-grown preference law. A state law requiring state agencies to apply a preference when purchasing state-grown goods is classic market participant activity. The majority of federal courts that have considered the issue have also found a state law imposing the same requirement on its political subdivisions to fall within the market participant exception. Similarly, a local entity that is empowered to set the parameters for its market purchases is exercising market participant power when imposing preferences on its purchases. Accordingly, local food purchasing preferences are unlikely to violate the Dormant Commerce Clause.

Competitive preference laws have also been challenged under the Privileges and Immunities Clause.

2. Privileges and Immunities Clause Challenges

Competitive preference laws have also been challenged under the Privileges and Immunities Clause. The Privileges and Immunities Clause of the U.S. Constitution provides that, "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."[39] Generally, the Privileges and Immunities Clause is designed to protect citizens from discrimination against out-of-state residents.[40]

In *United Building and Construction Trades Council v. Mayor of Camden*,[41] the U.S. Supreme Court considered Camden, New Jersey's ordinance requiring "that at least forty percent of the employees of contractors and subcontractors working on city construction projects be Camden residents." The Court first held that the Privileges and Immunities Clause applied to a municipal ordinance, and not just to state law, because "a municipality is merely a political subdivision of the state from which its authority derives."[42] It also concluded that the clause applies to distinctions based on municipal residency (and not just on state residency), because out-of-state residents were still burdened by a municipal preference law.[43]

The court then considered the two-step inquiry used to determine whether the ordinance violated the Privileges and Immunities Clause: First, "whether the ordinance burdens one of those privileges and immunities protected by the clause," and second, "whether there is a 'substantial reason' for the difference in treatment."[44] The court concluded that an out-of-state resident's interest in employment on public works contracts was sufficiently fundamental to the promotion of interstate harmony to fall within the purview of the clause.[45] The court then remanded the case, finding Camden's asserted justification for the difference in treatment, including grave and economic ills, such as spiraling unemployment and a dramatic reduction in city businesses, impossible to evaluate.[46]

Following the *Camden* case, in *W.C.M. Window Co. v. Bernardi*,[47] the U.S. Court of Appeals for the Seventh Circuit held an Illinois law requiring any public works project for the state or any political subdivision to employ in-state workers prima facie unlawful under the Clause.[48] The court noted that "there must be some evidence of the benefits of a residents-preference law in dealing with a problem created by nonresidents, and Illinois has presented none."[49] Similarly, in *Utility Contractors Association v. Worcester*,[50] the district court issued an injunction against the city's ordinance requiring fifty percent of construction hours on public works project to be allocated to city residents. The court held that the plaintiffs were likely to prevail in their challenge to the ordinance under the Privileges and Immunities Clause, because the city failed to justify the difference in treatment of out-of-state residents.[51] The court found inadequate basis to conclude that employment of nonresidents caused the far-reaching economic problems the city described as the justification for the ordinance.[52]

As noted above, in *City of Cleveland v. Ohio*,[53] Cleveland avoided a Privileges and Immunities challenge to its local hiring ordinance.[54] The ordinance provided that contractors employing Ohio workers on a public project for Cleveland must ensure that a minimum of twenty percent of the work on the project be performed by Cleveland residents.[55] Because the prefer-

ence did not affect residents from states other than Ohio, it did not invoke the Privileges and Immunities Clause.[56]

A state or local law giving preference to the purchase of locally grown food could be challenged under the Privileges and Immunities Clause, although there have been no such challenges to date. Because the Clause offers no protection to corporations, the challenge would need to state a case for discrimination against an individual. To have standing, the individual challenging the law would have to allege a direct injury he or she, as opposed to his or her employer, might suffer.[57] An individual out-of-state farmer might be able to state a case that a state preference law violated the Privileges and Immunities Clause.

Assuming an individual could base the challenge on his or her substantial interest in selling agricultural products, the state would need to justify the difference in treatment. The state might have strong arguments in favor of the law, including the need to support local agriculture, the benefits to residents derived from fresher produce, and the desire of the state to reduce the transportation costs and environmental impacts of importing produce. But the state might also need to show that the procurement of food from out-of-state producers was the cause of the problem the state was facing or would face. A state might argue that importing food could cause food shortages in the event of natural or man-made disasters or future shortages of fuel.

It is difficult to predict whether these state defenses would be sufficient to meet the second prong of the test: whether there is a substantial reason for the difference in treatment. Depending on the factual justification underlying the statute, a court might find that the need to support local agriculture, improve residents' health, reduce state costs, and be prepared in the event of emergencies, constitutes a substantial reason for the disparate treatment.[58] It seems less likely, however, that the state could show that nonresidents are the "peculiar source of the evil" at which that statute was aimed.[59] A distance, rather than state-based preference, might be a better alternative for a state.

3. Equal Protection Challenges

State preference laws have also been challenged on equal protection grounds. The majority of challenges have failed. In *Smith Setzer & Sons, Inc. v. South Carolina Procurement Review Panel*,[60] an out-of-state concrete pipe manufacturer with the lowest bid challenged South Carolina's in-state preference statute on equal protection grounds, among others.[61] The court agreed with the parties that the economic activity affected—a contract to supply concrete culvert piping to various state and local agencies—did not impact any suspect or quasi-suspect class or fundamental right, thus the "rational basis" standard of review applied.[62] The court first considered whether the purpose behind the law was legitimate. Plaintiffs, relying on *Metropolitan Life Insurance Co. v. Ward*,[63] claimed it was not. In *Ward*, the Supreme Court rejected as illegitimate the purpose of an Alabama insurance code provision that taxed foreign insurance companies at a higher rate than domestic companies, finding it purely discriminatory.[64] The *Smith Setzer* court rejected an interpretation of *Ward* that would prohibit any line-drawing between in-state and out-of-state persons. Instead, the court determined that to uphold the statute, the state must articulate a rational purpose for the line it has drawn.[65] The court held that the purpose of the law—to direct benefits generated by state purchases to the citizens of the state who fund the treasury and for whom the state was created to serve—was legitimate.[66] Interestingly, the court noted that "[f]or if it is true that there will be instances in which the state border provides a useful and legitimate line of demarcation, there also will be instances in which it acts as a capricious or protectionist line."[67] The court next concluded that the lawmakers' belief that use of the classification would further that purpose was reasonable.[68]

In *Associated General Contractors v. City and County of San Francisco*,[69] the Ninth Circuit considered a city ordinance that gave bidding preferences to minority, women, and locally-owned businesses on city contracts. The court upheld against an equal protection challenge the locally-owned business preference.[70] The court distinguished the city ordinance from the state law challenged in *Ward* on several grounds. First, the court noted that the city ordinance affected only the expenditure of public funds and that the city could "rationally allocate its own funds to ameliorate" the disadvantages under which local businesses labored.[71] Second, the court noted the legitimate purposes of the ordinance as stated in the findings: to lighten the competitive burden on local businesses "because of the higher administrative costs of doing business in the City," such as higher taxes, rents, wages and benefits, and insurance rates, and to encourage businesses to locate in the city.[72] Finally, the court concluded that the means adopted to achieve these purposes were measured and appropriate.[73] The court noted that local businesses received only a five percent bidding preference and that the ordinance did not impose any goals, quotas, or set-asides and the definition of a local business was "rather broad"—having a fixed office or distribution point in the city and paying permit and license fees from a city address.[74]

Two cases have upheld equal protection challenges to preference statutes. In *Big D Construction Corp. v. Court of Appeals for the State of Arizona, Division One*,[75] the Arizona Supreme Court held that the state's preference law giving preference to "resident tax paying contractors" violated the Equal Protection Clause. The original law required that, to be eligible for the bid preference, the contractor "had to be licensed in Arizona, have successfully completed prior public contracts, have paid Arizona state and county taxes on a plant and equipment of the type required for performance of the contract (or on real or personal property equivalent in value) for at least two consecutive years prior to making the bid."[76] At the time of the challenge, however, the criteria had been amended to require only that the contractor have successfully completed prior public contracts and paid at least $200 in taxes within the state for at least two consecutive years prior to the bid.[77] The location of the bidder's home office was no longer considered in determining whether the bidder was entitled to the preference.[78]

The court held that the statute failed to further the state's purposes in enacting the legislation—"to provide employment for Arizona residents and contractors"—because the criteria used to give the preference no longer reasonably related to the state's purpose of encouraging the employment

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of Arizonans.[79] Accordingly, the statute violated equal protection.[80]

In *Rayco Construction Co. v. Vorsanger*,[81] the district court held that an Arkansas preference law violated the Equal Protection Clause. The law gave a three percent bidding preference to contractors who had satisfactorily performed prior public contracts and who had paid state and county taxes on a plant and equipment of the type required for performance of the contract or on real or personal property equivalent in value for at least two consecutive years prior to submitting the bid.[82] The court found that the purpose of the legislation was to give a bidding preference to Arkansas contractors over those from other states.[83] The court held, however, that the statute discriminated against resident or non-resident contractors who failed to meet the criteria and that the differentiation was not based on rational standards of classification.[84] The court found that satisfactory performance in prior contracts was a legitimate basis to differentiate, but that the requirement limiting the criteria to past performance of only public contracts was not.[85] In addition, the court questioned the constitutionality of differentiating contractors based on property ownership or tax payments.[86]

A state home-grown preference law likely would survive an equal protection challenge. Because the purchasing laws do not impact any suspect or quasi-suspect class or fundamental right, a rational basis standard of review would apply. A court would likely uphold a state-grown preference law, provided that the state articulates a legitimate reason for giving preference to state produce and the means the state uses to further that purpose are reasonable. As noted in the cases discussed above, courts have found the desire to use state funds to support state residents to be a legitimate basis.[87] Other reasons, such as supporting local agriculture, the benefit of fresher produce, and a reduction of costs and environmental effects of importing produce would likely also be found legitimate state ends or goals. Further, the means used in the state preference laws—granting the preference when the price is equal or only a small percentage preference—would likely survive a challenge, provided that the criteria used to determine what produce is produced "in-state" is legitimate.

4. Due Process Challenges

One state preference law, with particularly vague preference criteria, was successfully challenged on due process grounds. In *Rayco Construction Co. v. Vorsanger*,[88] discussed above, the plaintiffs also challenged the Arkansas preference statute on due process grounds. The court stated that "due process requires that the criteria set out in the statute be sufficiently definite and concrete to enable bidders to compute their bids intelligently, to enable contracting officers to grant or withhold preferences fairly and intelligently, and to enable both bidders and contracting officers to avoid criminal violations of the statute."[89]

The court held that the statute violated due process, because the criteria used to determine a preference were "so vague as to be almost meaningless," particularly in light of the possibility of criminal sanctions.[90] The statute, which gave a preference, in part, to contractors who had "satisfactorily" performed in prior public contracts, failed to define "satisfactory performance," "who or what agency must be satisfied," and how long a history of satisfactory performance a company must demonstrate.[91] In addition, the statute failed to reflect the fact that much contracting is done by contractors who lease or rent, rather than own, their plants and equipment.[92] Finally, the court noted that the statute failed to define state and county taxes and given the state's tax scheme it was unclear what types of taxes were included within the statute's criteria.[93]

State grown produce laws are unlikely to raise due process issues, provided that the criteria for qualifying produce as state grown are sufficiently definite and concrete to enable contracting officers to grant or withhold preferences fairly and intelligently.

5. Foreign Relations Clause Challenges

Because foreign-grown food is often found in groceries in the United States, an in-state food purchasing preference law could be challenged as unconstitutionally burdening foreign commerce or interfering with the foreign relations power. In *Trojan Technologies v. Pennsylvania*,[94] a Canadian corporation challenged a Pennsylvania law requiring state and local agencies constructing public works to procure only steel produced in the United States. After rejecting the preemption claims, the court considered the constitutional claims.[95] The court rejected the argument that the state law unlawfully burdened foreign commerce, finding that the state and its subdivisions were acting as market participants, not regulators.[96] Therefore, the market participant exception applied to the Foreign Commerce Clause, even under the more "searching review" required for statutes affecting foreign commerce.[97]

The court also rejected the foreign affairs challenge, noting that an action with only some incidental or indirect effect in foreign countries, as the court found here, does not intrude on the foreign relations power.[98] The statute offered no opportunity for state officials or judges to comment on or make key decisions as to the nature of foreign regimes.[99]

It is likely that a state home-grown preference law would survive both foreign commerce and foreign relations power challenges. Local purchasing preference laws are market participant activity; therefore, the market participant exception to the Foreign Commerce Clause would apply. Like the preference for purchasing American-produced steel, the purchase of home-grown food by a state would likely have only an incidental or indirect effect on foreign countries. As a result, it is unlikely that a court would find that the laws intrude on the foreign relations power.

II. Potential Challenges to Local Community Preference Laws

As noted above, many states have laws requiring local governments or school districts to give preference to in-state grown or produced food when procuring food products. Some cities or counties in those states may wish to give food grown within a smaller region a competitive advantage. In addition, municipalities or counties in states without a state preference law may also wish to favor food produced locally

in competitive procurements. Because analyzing all fifty states' laws is beyond the scope of this article, this article offers analysis of the types of challenges that may arise to municipal or regional local preference ordinances.

A. Preemption by a State Preference Law

In states where a local governmental entity wishes to use a more local geographic preference than state law provides, the first concern is whether the state law preempts the city's ability to use a local preference. In *City of Green River v. Debernardi Construction, Inc.*,[100] the Wyoming Supreme Court held that a city's policy giving city residents a ten percent preference on a public works contract was preempted by a state law requiring state and local agencies to give a five percent preference to state residents. The court found that the local policy conflicted with the state law.[101] While the statute did not expressly preempt the field, the court found that the comprehensive nature of the scheme, particularly its express list of entities contained in the statute to be "broad, detailed and appear[ed] to be all inclusive."[102] As a result, the court held the local policy was preempted.[103]

In contrast, in *J.A. Croson Co. v. City of Zanesville*,[104] the Ohio Court of Appeals upheld against a preemption challenge a municipal ordinance giving preference to local bidders whose principal place of business was within the municipality. State law required preference to Ohio contractors on contracts funded wholly or in part with state funds.[105] The local project, however, was funded entirely by local funds.[106] The court upheld the local ordinance, finding there was no conflict with the state law.[107] Instead, the court reasoned, the local government bidding ordinance was "but a local application of the same state public policy inherent in" the state law.[108] Whether a local preference law would be preempted by a state preference law varies according to the state's preemption jurisprudence, but localities should be wary of imposing local preferences when their state law imposes a state preference.[109]

B. Conflict with an Overriding Competitive Bidding Law

Another obstacle for imposing a local procurement law or policy is an overriding law that requires awards to the lowest bidder. By way of example, in *Associated General Contractors v. City & County of San Francisco*,[110] the court held that a municipal ordinance requiring percentage bidding preferences on contracts, including those contracts over $50,000, violated the city charter requirement that contracts over $50,000 be awarded to the "lowest reliable and responsible bidder."[111] In California, a charter is the "constitution" of a municipality and ordinances are invalid to the extent that they conflict with governing charter provisions.[112]

Before instituting a local preference, the locality should consider whether overriding law, such as a charter in a home rule city, requires award to the lowest bidder. If the charter does not contain an exception for local purchasing preferences, the municipality should be extremely cautious before adopting a local purchasing preference by ordinance.

Where a city is subject to state contracting law, and state contracting law requires the contracting agency to award the contract to the lowest responsible bidder, the municipality should also use caution. Whether the general contracting law overrides the municipality's authority to give local preferences depends on the state's preemption jurisprudence.

C. Intra-Regional or Intrastate Challenges

A local governmental preference policy could face challenge from neighboring government entities or citizens from those neighboring communities. Recently, for example, in *City of Los Angeles v. County of Kern*,[113] the Ninth Circuit rejected a Dormant Commerce Clause challenge by the City of Los Angeles and private parties challenging a neighboring county's ordinance making it unlawful to apply biosolids to unincorporated portions of the county. The court held that the parties lacked standing to raise the Dormant Commerce Clause challenge because their concerns raised only intrastate issues—the ability to dispose of waste in a neighboring county—and not interstate issues.[114]

D. Intrastate Equal Protection Challenges

Other plaintiffs have tried challenging intrastate actions on equal protection grounds. Most of these cases tend to involve city regulatory actions as opposed to market participant actions.[115] In *Walsh Construction Co. v. City of Detroit*,[116] the court upheld Detroit's local contractor preference law against an equal protection challenge. The court held that the ordinance was rationally related to the legitimate state purpose of promoting local business.[117]

It seems unlikely that an equal protection challenge to a local produce preference ordinance would be successful in that the local ordinance need only be rationally related to a legitimate governmental objective. Careful drafting of a local preference ordinance can avoid allegations of discrimination against out-of-city residents. First, local governments can offer legitimate bases for the preference: Local purchasing provides fresher produce with better taste and enhanced nutrition. In addition, purchases made nearby minimize the environmental impacts and costs of transporting and shipping produce. Second, local governments should define the preference region by distance rather than by jurisdiction. Giving preference to produce grown within a 200-mile range, rather than within a particular city or county, avoids an allegation that the entity is discriminating in favor of or against a particular jurisdiction and arguably better supports the legitimate ends sought by the local ordinance—fresh food that travelled less distance.

III. Conclusion

The obesity epidemic, a move toward more sustainability in government operations, and a desire to prime local economies are driving state and local governments to enhance their procurement policies to improve the nutritional content of food they purchase and to purchase more food locally. To date, only one unsuccessful legal challenge has been brought agaisnt a state food purchase preference law.[118] Cases considering challenges to other major types of in-state preference procurement laws provide guidelines for crafting laws likely to withstand legal challenges.

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Drafters of state laws should ensure the state is exercising market participatory, and not regulatory, power. The statute should clearly articulate the need for and purpose of the law, use measured and appropriate means to achieve the purpose, and contain standards and criteria sufficiently clear to enable contracting officers to grant preferences fairly and intelligently. Local government attorneys should first consider home rule authority and their state preemption jurisprudence to consider whether their municipality has the authority to implement a more local preference ordinance. If so, the same drafting standards apply.

Even using these drafting standards, a state preference law is most likely vulnerable to a challenge under the Privileges and Immunities Clause—provided that the plaintiff has standing to raise such a challenge. A distance-based, rather than state-based, preference would be more likely to withstand such a challenge and arguably better supports the ends sought by these laws—fresher food, support of local food systems, and more sustainability.

Notes

1. *See, e.g.,* ALASKA STAT. ANN. § 29.71.040 (West 2011)(requiring municipalities to give preference to Alaska agriculture and fisheries products); COLO. REV. STAT. ANN. § 8-18-103 (West 2011)(requiring state agencies to give preference to Colorado agricultural products); CONN. GEN. STAT. ANN. § 4a-51 (requiring state agencies to give preferences to Connecticut dairy products, poultry, eggs, and produce)(West 2011); FLA. STAT. ANN. § 287.0822 (requiring state and municipal agencies to give preference to Florida fresh or frozen meats)(West 2011); and HAW. REV. STAT. § 103D-1002 (requiring state and municipal agencies to give preference to Hawaiian agricultural, aquacultural, horticultural, silvicultural, floricultural, or livestock products).
2. *Big Country Foods v. Bd. of Educ.*, 952 F.2d 1173 (9th Cir. 1992).
3. *See infra* Part *(B)(2).*
4. *See infra* Part *(B)(4).*
5. *See, e.g.,* 7 C.F.R. § 3016.36(c)(1) (2010) ("All procurement transactions will be conducted in a manner providing full and open competition ..."); ("A school food authority may use its own procurement procedures which reflect applicable State and local laws and regulations, provided that procurements [comply with federal standards].").
6. *See, e.g.,* 7 C.F.R. § 3016.36(c)(2) (2010) ("Grantees and subgrantees will conduct procurements in a manner that prohibits the use of statutorily or administratively imposed in-State or local geographical preferences in the evaluation of bids or proposals, except in those cases where applicable Federal statutes expressly mandate or encourage geographic preference.").
7. 7 C.F.R. § 210.21(d)(2)(i).
8. 42 U.S.C. § 1758(j)(3) (2010).
9. 7 C.F.R. § 210.21(g) (2011) (National School Lunch Program); 7 C.F.R. § 215.14a (2011) (Special Milk Program For Children); 7 C.F.R. § 220.16(f) (2011) (School Breakfast Program); 7 C.F.R. § 225.17(e) (2011) (Summer Food Service Program); 7 C.F.R. § 226.22(n) (2011) (Child and Adult Care Food Program); Memorandum from U.S.D.A. on Procurement Geographic Preference to Regional and State Directors of Nutrition Programs (February 1, 2011).
10. Memorandum from U.S.D.A., *supra* note 9 (Question 12). Under the School Lunch Act (and the other Child Nutrition Act programs), the Secretary of the USDA enters into an agreement with each state to disperse moneys to the state in exchange for the state and its participating institutions agreeing to abide by the program requirements. "Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power 'to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.'" *South Dakota v. Dole,* 483 U.S. 203, 206 (1987) (citation omitted).
11. 508 F.3d 827 (6th Cir. 2007).
12. *Id.* at 838.
13. *Id.* at 846-47. In *Big Country Foods v. Board of Education*, the plaintiff argued that the Alaska preference statute requiring school districts to give a competitive preference to Alaskan milk violated the federal competitive bidding requirements. 952 F.2d 1173, 1173 (9th Cir. 1992) (finding the plaintiffs lacked standing to challenge the Alaskan preference statute).
14. Letter from Ray LaHood, Secretary of Transportation, to Honorable Frank G. Jackson, Mayor of Cleveland (June 6, 2009).
15. U.S. CONST. art. I, § 8 cl. 3.
16. *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.,* 550 U.S. 330, 338 (2007).
17. *Id.*
18. *W. & S. Life Ins. Co. v. State Bd. of Calif.,* 451 U.S. 648 (1981).
19. 7 C.F.R. §§ 210, 215, 220, 225-26 (2011).
20. *White v. Mass. Council of Constr. Emp'rs,* 460 U.S. 204, 213 (1983).
21. *Big Country Foods v. Bd. of Educ.*, 952 F.2d 1173, 1178 (9th Cir. 1992) (citations omitted).
22. See *Smith Setzer & Sons, Inc. v. S.C. Procurement Review Panel,* 20 F.3d 1311 (4th Cir. 1994) (applying market participant exception to state resident vendor and allowing vendor products preference); *J.F. Shea Co., Inc. v. City of Chi.,* 992 F.2d 745, 747 (7th Cir. 1993) (applying market participant exception to City's local business preference rule in construction contracts); *Big Country Foods,* 952 F.2d at 1173 (applying market participant exception to Alaska statutory preference requiring school districts to give preference to Alaskan-harvested milk); *Trojan Techs. v. Commonwealth of Pa.,* 916 F.2d 903 (3d Cir. 1990) (applying market participant exception to foreign commerce clause challenge to Pennsylvania law requiring American-produced steel on public work projects).
23. 952 F.2d at 1175.
24. *Id.*
25. *Id.*
26. *Id.* at 1179.
27. *Id.* at 1178.
28. *Id.*
29. *Big Country Foods,* 952 F.2d at 1180.
30. *Id.* at 1179.
31. *Id.*
32. *Id.* at 1180.
33. *Id.* at 1180-81.
34. *W.C.M. Window Co. v. Bernardi,* 730 F.2d 486, 489 (7th Cir. 1984).
35. *Id.* at 495.
36. *Id.*
37. *Id.* at 496.
38. *Big Country Foods,* 952 F.2d at 1178-79; *see also Smith Setzer & Sons, Inc. v. S.C. Procurement Review Panel,* 20 F.3d 1311, 1318-20 (3d Cir. 1990) (rejecting *Bernardi); Trojan Techs v. Commonwealth of Pa.,* 916 F.2d 903, 911 (4th Cir. 1994).
39. U.S. CONST., art. IV, §2, cl. 1.
40. The Privileges and Immunities

Clause does not protect corporations. *Paul v. Virginia*, 75 U.S. 168, 170 (1869).
41. *United Bldg. and Constr. Trades Council v. Mayor of Camden*, 465 U.S. 208, 208 (1984).
42. *Id.* at 215 (*citing City of Trenton v. New Jersey*, 262 U.S. 182, 187 (1923)).
43. *Id.* at 216-18.
44. *Id.* at 221-22.
45. *Id.* at 218-21.
46. *United Bldg. and Constr. Trades Council*, 465 U.S. at 222-23.
47. 730 F.2d 486 (7th Cir. 1984).
48. *Id.* at 496-98.
49. *Id.* at 497.
50. *Utility Contractors Ass'n v. Worcester*, 236 F. Supp. 2d 113 (D. Mass. 2002).
51. *Id.* at 117.
52. *Id.* at 119-21.
53. *City of Cleveland v. Ohio*, 508 F.3d 827 (6th Cir. 2007).
54. *Id.* at 848.
55. *Id.* at 831.
56. *Id.* at 848.
57. *J.F. Shea v. City of Chi.*, 992 F.2d 745, 749 (7th Cir. 1993).
58. *See, e.g.*, ALASKA STAT. ANN. § 36.30.170 (West 2011) (allowing the state of Alaska to award a contract to an in-state producer even when the cost is higher than if awarded to an out-of-state bidder). States such as Alaska would likely have more difficulty arguing that there is a substantial reason for the difference in treatment.
59. *See Utility Contractors Ass'n v. Worcester*, 236 F. Supp. 2d 113, 119-20 (D. Mass. 2002) (providing: "Even if I were to accept that poor economic conditions are a sufficiently substantial reason to defeat the plaintiffs' claim ... I cannot accept that nonresidents are the peculiar source of the evils Worcestor has described ....").
60. 20 F.3d 1311, 1320-24 (4th Cir. 1994).
61. *Id.* at 1321.
62. *Id.* at 1323.
63. *Metropolitan Life Insur. Co. v. Ward*, 470 U.S. 869 (1985) (holding that (1) the promotion of domestic business within the state of Alabama was not a legitimate state purpose, and (2) investment of Alabama assets and securities in a discriminatory manner served no legislative state purpose).
64. *Id.*
65. *Smith Setzer*, 20 F.3d at 1320-21.
66. *Id.* at 1323.
67. *Id.* at 1322.
68. *Id.* at 1323-24; see also *Trojan Technologies, Inc. v. Pennsylvania*, 916 F.2d 903, 915 (3d Cir. 1990) (rejecting equal protection challenge to state preference law finding equal protection clause "permits economic regulation that distinguishes between groups that are legitimately different—as local institutions so often are ...."); *Galesburg Constr. v. Bd. of Tr.*, 641 P.2d 745 (Wy. 1982) (Wyoming Supreme Court rejected equal protection challenge to resident preference statute finding that encouraging local industry was a legitimate state interest and giving residents a preference would further local industry).
69. *Assoc. Gen. Contractors v. City and Cnty. of S.F.*, 813 F.2d 922 (9th Cir. 1987).
70. *Id.* at 943.
71. *Id.* at 942-43.
72. *Id.* at 943.
73. *Id.*
74. *Id.*
75. 789 P.2d 1061 (Ariz. 1990).
76. *Id.* at 1065.
77. *Id.* at 1066.
78. *Id.*
79. *Id.* at 1067.
80. *Id.* at 1068-70.
81. 397 F. Supp. 1105 (E.D. Ark. 1975).
82. *Id.* at 1107-08.
83. *Id.* at 1111.
84. *Id.*
85. *Id.* at 1111-12.
86. *Id.* at 1112.
87. *Smith Setzer & Sons, Inc. v. S.C. Procurement Review Panel*, 20 F.3d 1311, 1320-21 (4th Cir. 1994); *Assoc. Gen. Contractors v. City and Cnty. of S.F.*, 813 F.2d 922 (9th Cir. 1987); *see supra* text accompanying notes 71-88.
88. 397 F. Supp. 1105 (E.D. Ark. 1975).
89. *Id.* at 1110.
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*
94. 916 F.2d 903 (3d Cir. 1990).
95. *Id.* at 906-10.
96. *Id.* at 910-12.
97. *Id.* at 910-13.
98. *Id.* at 913-14.
99. *Id.* at 913-15. But *see Bethlehem Steel Corp. v. Bd. of Comm'rs of Dept. of Water & Power*, 276 Cal. App. 2d 221 (1969) (holding that California's Buy American Act was an unconstitutional encroachment on the federal government's exclusive power over foreign affairs).
100. 816 P.2d 1287 (Wyo. 1991).
101. *Id.* at 1290.
102. *Id.* at 1290-91.
103. *Id.* at 1291.
104. 623 N.E.2d 152 (Ohio Ct. App. 1993).
105. *Id.* at 102.
106. *Id.*
107. *Id.*
108. *Id.*
109. For an excellent discussion of the complexities raised by this scenario, see Laurie Reynolds, *A Role for Local Government Law in Federal-State-Local Disputes*, 43 URB. LAW. 977 (2011).
110. 813 F.2d 922, 924-27 (9th Cir. 1987).
111. *Id.* at 924-27 (quoting S.F. CHARTER § 7.200) (holding that the term "responsible" meant qualified to do the particular work under consideration and rejecting the argument that the term "responsible" could encompass other legitimate municipal concerns such as remedying past discrimination).
112. *Brown v. Berkeley, 129 Cal. Rptr. 1, 4 (1976).*
113. 581 F.3d 841, 841 (9th Cir. 2009).
114. *Id.* at 845-48.
115. *See, e.g., Cnty. of Alameda v. City & Cnty. of S.F.*, 97 Cal. Rptr. 175 (1971) (holding San Francisco's ordinance imposing a tax on persons who were employed within San Francisco, but lived elsewhere impermissibly discriminated against out-of-city residents).
116. 257 F. Supp. 2d 935, 935 (E.D. Mich. 2003).
117. *Id.* at 940-41.
118. *Big Country Foods, Inc. v. Bd. of Educ.*, 952 F.2d 1173, 1173 (9th Cir. 1991). ML

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