

1 **I. Background.**

2 **A. Federal Regulation of Animal Breeders.**

3 The federal government regulates the treatment of animals through the Animal
4 Welfare Act (“AWA”), which sets standards for the treatment of certain animals that are
5 bred for sale, exhibited to the public, used in biomedical research, or transported
6 commercially. *See* 7 U.S.C. §§ 2131-59. As relevant here, the AWA regulates the
7 activities of most breeders of dogs by requiring them to have a license before selling their
8 animals. 9 C.F.R. § 2.1(a). A breeder becomes eligible for a license by agreeing to
9 follow specified standards for caring for animals. *Id.* § 2.2(a). These standards include
10 housing dogs in appropriate enclosures (9 C.F.R. § 3.1), regularly exercising them
11 (§ 3.8), feeding them once a day (§ 3.9), and reducing pest contamination in animal areas
12 (§ 3.11). The United States Department of Agriculture (“USDA”) enforces the AWA by
13 inspecting breeders and imposing penalties for violations. 7 U.S.C. §§ 2147, 2149.

14 Some believe that the AWA does not adequately protect dogs. *See, e.g.*, Doc. 148-
15 1 at 213-14. They argue that lax enforcement and poor standards have led to a
16 proliferation of “puppy mills” where dogs are bred in large numbers and inhumane
17 conditions. *See* Doc. 148 at 4-5. The HSUS has stated that the “AWA allows dogs to be
18 kept in cramped, wire-floored cages for their entire lives, churning out litter after litter of
19 puppies for the commercial pet trade.” Doc. 137-23 at 5. In 2010, the Inspector General
20 of USDA similarly found that enforcement of the AWA “was ineffective in achieving
21 dealer compliance with [the] AWA and regulations[.]” Doc. 148-1 at 422. The Inspector
22 General reported that inspectors had found dogs cared for by USDA-licensed breeders
23 that were walking on injured legs, suffering from tick-infestations, eating contaminated
24 food, and living in unsanitary conditions. *Id.* at 432-42. Since 2010, the USDA has
25 worked to improve enforcement of the AWA. *See* Doc. 157-12 at 19-20.

26 **B. The Ordinance.**

27 Many states and municipalities have decided to impose stricter standards on
28 animal breeders and pet stores. *See* Doc. 157, ¶¶ 10-14. Missouri, where a large number

1 of USDA-licensed breeders are located, requires breeders to keep dogs in large and
2 impervious cages, provide regular opportunities for outdoor exercise, and provide
3 comprehensive annual veterinary exams. *See* Mo. Rev. Stat. § 273.345; *see also*
4 Doc. 137-1 at 16-18. Indiana, Iowa, Oklahoma, and Texas have passed similar laws. *See*
5 Doc. 157, ¶¶ 10-14. Although not directly regulating animal breeders, Arizona has
6 passed a law regulating retail pet stores. *See* A.R.S. §§ 44-1799 *et seq.* Under this law,
7 pet stores must adequately care for their animals and ensure the good health of animals
8 before selling them. *Id.*

9 In recent years, cities such as Austin, Chicago, Los Angeles, Miami, and San
10 Diego have passed ordinances prohibiting pet stores from selling dogs obtained from
11 certain types of breeders. *See* Krysten Kenny, *A Local Approach to A National Problem:
12 Local Ordinances As A Means of Curbing Puppy Mill Production and Pet
13 Overpopulation*, 75 Alb. L. Rev. 379, 379 (2012). The HSUS is a proponent of these
14 ordinances. Doc. 137-23 at 5-12. The HSUS believes that because many pet shops sell
15 dogs obtained from puppy mills, governments should limit pet shops to selling dogs
16 obtained from animal shelters. *Id.* On December 18, 2013, with encouragement from the
17 HSUS, Phoenix joined the other cities in passing a pet-store ordinance. Doc. 136-1 at 2-
18 6. The Ordinance is entitled “[p]rohibition on sale of dogs or cats” and states:

19 A. No pet shop or pet dealer shall display, sell, deliver, offer for sale,
20 barter, auction, give away, broker or otherwise transfer or dispose of
a dog or cat except for a dog or cat obtained from:

- 21 1. An animal shelter;
- 22 2. A private, nonprofit humane society or nonprofit
23 animal rescue organization; or
- 24 3. An animal shelter, nonprofit humane society or
25 nonprofit animal rescue organization that operates out
of or in connection with a pet shop.

26 * * *

27 C. This section does not apply to:

- 28 1. A person or establishment, other than a pet shop or pet
dealer, which displays, sells, delivers, offers for sale,
barters, auctions, gives away, brokers or otherwise

- 1 transfers or disposes of only dogs and cats that were
2 bred and reared on the premises of the person or
3 establishment;
- 4 2. An animal shelter;
- 5 3. A private, nonprofit humane society or nonprofit
6 animal rescue organization; or
- 7 4. An animal shelter, nonprofit humane society or
8 nonprofit animal rescue organization that operates out
9 of or in connection with a pet shop.

10 D. Nothing in this section shall prevent a pet shop or pet dealer from
11 providing space and appropriate care for animals owned by an
12 animal shelter, nonprofit humane society or nonprofit animal rescue
13 agency and maintained at a pet shop for the purpose of adopting
14 those animals to the public.

15 Doc. 136-1 at 2-6.¹ The Ordinance also requires pet shops to maintain records “listing
16 the source of all dogs or cats under their ownership, custody or control.” *Id.* at 5.

17 In sum, the Ordinance prevents pet shops from selling animals obtained from
18 commercial breeders. Pet shops may sell animals obtained only from shelters and rescue
19 organizations. Breeders and animal shelters within the City may, however, continue
20 selling directly to customers.

21 **C. City of Phoenix Pet Market.**

22 In Maricopa County, which encompasses Phoenix and other cities, the Maricopa
23 County Animal Care and Control organization (“MCACC”) shelters unwanted dogs and
24 cats. Doc. 148-1 at 241-42. In 2014, MCACC took in 38,235 animals, almost 34,000 of
25 which were dogs. *Id.*; Doc. 157-42 at 5. MCACC found new homes for 11,382 of these
26 animals, euthanized 10,160, and returned 4,183 to their original owners. Doc. 157-42 at
27 5. MCACC also transferred 12,129 of these animals to other animal rescue organizations
28 through its New Hope program. Doc. 157-43 at 2. Partners in the New Hope Program

29 ¹ Under the Ordinance, an animal shelter is defined as “any establishment
30 maintained by the Maricopa County Board of Supervisors or the City of Phoenix for the
31 confinement and maintenance of dogs and other animals” as well as “any establishment
32 maintained by a nonprofit organization for the relief of suffering of dogs and other
33 animals” Doc. 136-1 at 2-3. A pet shop is “any establishment at which are kept for
34 sale any animals generally considered to be household pets, but excluding kennels or
35 livery stables.” *Id.* at 4.

1 include the Arizona Humane Society and the Arizona Animal Welfare League.
2 Doc. 148-1 at 243. MCACC and other rescue organizations believe that the Ordinance
3 will reduce animal homelessness and result in more adoptions. *Id.* at 245-47.

4 Many breeders located in the City of Phoenix offer pets for sale and often
5 advertise through the internet. Doc. 137-31 - 35. Some of these breeders are commercial
6 operations. Others may be described as “backyard breeders” with little experience and
7 low standards for dog breeding. Doc. 152-1 at 17; Doc. 137-24 at 23. Out-of-state
8 breeders also sell dogs to Phoenix residents, either through the internet or local pet stores.
9 Almost all of these breeders believe that there are disadvantages in selling pets through
10 the internet. *See* Doc. 137-36 at 20, 25, 31, 35. Not only are there costs associated with
11 advertising on the internet, but sales can be difficult to make. Customers may suspect
12 that internet dealers are fraudulent. *See id.* at 9-10, 16. More importantly, customers
13 want to interact with an animal before buying it as a pet. *Id.* at 21, 26, 32, 36. For that
14 reason, out-of-state breeders rely on local pet stores like Puppies ‘N Love to sell their
15 dogs to Phoenix residents. *Id.* As one Arkansas breeder put it: “Without access to a local
16 pet store in Phoenix, I would be unable to compete with local breeders, who would have
17 preferential access to local residents by virtue of their physical location in or near the
18 city.” *Id.* at 20.

19 **D. Puppies ‘N Love.**

20 The Ordinance will have a significant impact on Puppies ‘N Love, which operates
21 the only pet store in Phoenix that sells commercially-bred dogs. Doc. 152-1 at 8-9;
22 Doc. 137-6 at 9. Puppies ‘N Love sells purebred puppies to the public at the Paradise
23 Valley Mall, as well as other locations outside of the City of Phoenix. Doc. 137-6 at 28,
24 43. The store advertises itself as promoting “the highest standards in animal welfare by
25 committing ourselves 100% to the puppies in terms of their health, safety and well-
26 being[.]” *Id.* at 44. Puppies ‘N Love buys puppies from commercial breeders, almost all
27 of which are located out-of-state. Doc. 157, ¶ 134; Doc. 167-1 at 3. Local breeders
28 provide too few puppies and, according to the store’s owners, lack the professionalism of

1 breeders from the Midwest. *Id.* at 4. The store sells approximately 500 puppies each
2 year. Doc. 152-1 at 32.

3 Puppies ‘N Love asserts that it does not buy from puppy mills. Doc. 137-6 at 28.
4 Rather, the store buys puppies only from USDA-licensed breeders and hobby breeders
5 that have four or fewer breeding females. *Id.* If a breeder is reported to have one direct
6 or three indirect violations of USDA standards, Puppies ‘N Love states that it will not do
7 business with that breeder. *Id.*; Doc. 137, ¶ 14. The store has a full-time employee who
8 ensures that the breeders are “providing excellent and loving conditions in which dogs
9 are bred and raised.” Doc. 137-6 at 28.

10 Despite these policies, Puppies ‘N Love has done business with at least three
11 breeders who have had direct violations of USDA standards. Doc. 137, ¶ 21. One of
12 these breeders arguably is a prototypical puppy mill. Doc. 148 at 6-12. This breeder
13 breeds female dogs every six to twelve months, keeps dogs in small enclosures without
14 solid flooring, and has at most six employees to take care of approximately 700 dogs. *Id.*
15 at 6-7. Although Puppies ‘N Love disputes this characterization and argues that the
16 breeder has a good business reputation (Doc. 157, ¶¶ 72-88), the store no longer buys
17 from him and others who have directly violated USDA standards (Doc. 137, ¶¶ 21-22,
18 Doc. 157-22 at 77).

19 Frank and Vicki Mineo own and operate Puppies ‘N Love. Doc. 137-6 at 28, 36.
20 Because Puppies ‘N Love does not buy dogs from animal shelters, they believe that the
21 Ordinance will force them to close their store in Phoenix. *Id.* at 29-30, 37-38. They
22 considered the possibility of selling dogs from shelters, but found that it is not
23 economically feasible. *Id.* at 30. They believe that they could not compete on a for-
24 profit basis with subsidized shelters and humane societies that provide the same dogs for
25 free or a minimal price. *Id.* at 29; Doc. 11-1 at 13. The Mineos and Puppies ‘N Love
26 therefore brought suit against the City, claiming that the Ordinance violates the dormant
27 Commerce Clause, the Equal Protection Clause, and the Arizona Constitution’s
28 prohibition on special laws. Doc. 1. They also claim that the Ordinance is preempted by

1 A.R.S. § 44-1799 and is unconstitutionally vague.² The HSUS subsequently was
2 permitted to enter the case as an intervenor. Doc. 37.

3 On April 2, 2014, the Court granted Plaintiffs' request for a preliminary
4 injunction. Doc. 41. The Court found that the balance of hardships tipped sharply in
5 Plaintiffs' favor and that the existence of serious merits questions warranted preliminary
6 injunctive relief. *Id.* (citing *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127,
7 1135 (9th Cir. 2011)).

8 **II. Interpretation of the Ordinance.**

9 The Ordinance is not a model of clarity. It states that “pet shops” may sell only
10 animals obtained from animal shelters and nonprofit rescue organizations. *Id.* at 5. This
11 much is clear, but the Ordinance’s exception for breeders is less so. It provides that “[a]
12 person or establishment, other than a pet shop or pet dealer,” may sell “dogs and cats that
13 were bred and reared on the premises of the person or establishment.” *Id.* at 5-6. But if a
14 person or establishment sells dogs and cats that are kept on-site, then that person or
15 establishment would fall within the Ordinance’s definition of a pet shop: “any
16 establishment at which are kept for sale any animals generally considered to be
17 household pets, but excluding kennels or livery stables.” Doc. 136-1 at 4. Thus, the
18 breeder exception – that “a person or establishment, *other than a pet shop*,” may sell dogs
19 and cats that are bred onsite – could be viewed as meaningless because the instant a
20 person or establishment sells dogs and cats that are kept on-site it becomes a pet shop not
21 allowed to sell these animals. The only meaningful reading of these provisions is that
22 establishments selling dogs and cats that are bred on-site are breeders, regardless of the
23 definition of pet shop, and may sell the animals. Otherwise, the exemption for breeders
24 would be meaningless, an interpretation the Court should avoid. *See Mejak v. Granville*,
25 136 P.3d 874, 876 (Ariz. 2006) (“[Courts] must interpret the statute so that no provision

26
27 ² Plaintiffs appear to have abandoned their claim that the Ordinance is void for
28 vagueness. They seek summary judgment on all the claims listed in their complaint
except their vagueness claim, which they do not discuss. *See* Doc. 108, ¶¶ 38-78. The
Court will assume that Plaintiffs have abandoned this claim.

1 is rendered meaningless, insignificant, or void.”).

2 **III. Legal Standards.**

3 **A. Summary Judgment.**

4 Summary judgment is appropriate if the evidence, viewed in the light most
5 favorable to the nonmoving party, shows “that there is no genuine dispute as to any
6 material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P.
7 56(a). Summary judgment is also appropriate against a party who “fails to make a
8 showing sufficient to establish the existence of an element essential to that party’s case,
9 and on which that party will bear the burden of proof at trial.” *Celotex Corp. v. Catrett*,
10 477 U.S. 317, 322 (1986). Only disputes over facts that might affect the outcome of the
11 suit will preclude the entry of summary judgment, and the disputed evidence must be
12 “such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson v.*
13 *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). When presented with cross-motions for
14 summary judgment, “the court must consider each party’s evidence, regardless under
15 which motion the evidence is offered.” *Las Vegas Sands, LLC v. Nehme*, 632 F.3d 526,
16 532 (9th Cir. 2011).

17 **B. Dormant Commerce Clause.**

18 The Commerce Clause grants Congress the power to “regulate Commerce . . .
19 among the several States[.]” U.S. Const. art. I, § 8, cl. 3. The Clause also contains a
20 “‘negative’ aspect that denies the States the power unjustifiably to discriminate against or
21 burden the interstate flow of articles of commerce.” *Oregon Waste Sys., Inc. v. Dep’t of*
22 *Env’tl. Quality of State of Or.*, 511 U.S. 93, 98 (1994). This negative aspect has come to
23 be known as the “dormant Commerce Clause.” *Dep’t of Revenue of Ky. v. Davis*, 553
24 U.S. 328, 337 (2008). Courts “analyze dormant Commerce Clause claims using the
25 Supreme Court’s two-tiered approach.” *Pharm. Research & Mfrs. of Am. v. Cnty. of*
26 *Alameda*, 768 F.3d 1037, 1041 (9th Cir. 2014). “The first tier asks whether the
27 Ordinance ‘either discriminates against or directly regulates interstate commerce.’” *Id.*
28 (quoting *Greater L.A. Agency on Deafness, Inc. v. Cable News Network, Inc.*, 742 F.3d

1 414, 432 (9th Cir. 2014)). If so, the Ordinance is subject to strict scrutiny – a “virtually
2 *per se* rule of invalidity[.]” *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624
3 (1978). The second tier has come to be known as the *Pike* balancing test. *See Pike v.*
4 *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Under *Pike*, the Court asks whether the
5 burden the Ordinance imposes on interstate commerce is “clearly excessive in relation to
6 the putative local benefits.” *Id.*

7 The restraints of the dormant Commerce Clause do not apply when a “local
8 government enters the market as a participant,” *White v. Mass. Council of Const.*
9 *Employers, Inc.*, 460 U.S. 204, 208 (1983), or Congress has authorized “regulations that
10 burden or discriminate against interstate commerce,” *Hillside Dairy Inc. v. Lyons*, 539
11 U.S. 59, 66 (2003).

12 **IV. Dormant Commerce Clause Analysis.**

13 Plaintiffs argue that the Ordinance directly regulates interstate commerce,
14 discriminates against interstate commerce by its effect and purpose, and unduly burdens
15 interstate commerce. Plaintiffs’ reasoning relies not on the Ordinance’s effect on local
16 pet shops, but on the fact that it bars out-of-state breeders from selling animals through
17 pet shops in the City of Phoenix. Plaintiffs assert that the practical effect of this bar is to
18 grant an advantage to local breeders and impose a disadvantage on out-of-state breeders
19 in the sale of puppies.³ The City and HSUS dispute Plaintiffs’ various arguments about
20 the effect of the Ordinance. They also argue that the dormant Commerce Clause does not
21 apply to the Ordinance because Congress has allowed local governments to burden
22 interstate commerce when regulating animal welfare, and because the City itself is a
23 participant in the relevant market. The Court will begin with these last two arguments.

24
25 ³ Although not raised by the parties, the Court notes that Plaintiffs have standing
26 to base their argument on the interests of out-of-state breeders. “[C]ognizable injury
27 from unconstitutional discrimination against interstate commerce does not stop at
28 members of the class against whom a State ultimately discriminates, and customers of
that class may also be injured[.]” *Gen. Motors Corp.*, 519 U.S. at 286. Here, Puppies ‘N
Love is a customer of out-of-state breeders. The store has suffered an injury because it is
no longer able to sell dogs obtained from out-of-state breeders, against whom the
Ordinance allegedly discriminates.

1 **A. Congressional Authorization of Local Regulations.**

2 The City argues that even if the Ordinance discriminates against interstate
3 commerce, the AWA permits the City to discriminate. As already noted, the AWA sets
4 standards for the humane care and treatment of certain animals that are bred for sale,
5 exhibited to the public, used in research, or transported commercially. *See* 7 U.S.C.
6 §§ 2131-59. When passing and amending the AWA, Congress envisioned the
7 cooperation of federal and state officials “in carrying out the purposes of this chapter and
8 of any State, local, or municipal legislation or ordinance on the same subject.” *Id.*
9 § 2145(b). The AWA contains a subsection that requires the Secretary of Agriculture to
10 “promulgate standards to govern the humane handling, care, treatment, and transportation
11 of animals by dealers, research facilities, and exhibitors.” *Id.* § 2143(a)(1). In a savings
12 clause, the AWA clarifies that this subsection – § 2143(a)(1) – “shall not prohibit any
13 State (or a political subdivision of such State) from promulgating standards in addition to
14 those standards promulgated by the Secretary under [§ 2143(a)(1)].” *Id.* § 2143(a)(8).
15 Under this provision, a state or municipality may “promulgate standards” regarding the
16 “handling, care, treatment, and transportation” of animals, and presumably those
17 standards may be more restrictive than standards promulgated by the Secretary of
18 Agriculture.

19 The City argues that the savings clause expresses a congressional intent to
20 authorize local regulations of the sale of pets, even if those regulations discriminate
21 against interstate commerce. Although it is true that Congress “has the power to
22 authorize state regulations that burden or discriminate against interstate commerce,”
23 courts “will not assume that it has done so unless such an intent is clearly expressed.”
24 *Hillside Dairy*, 539 U.S. at 66 (2003) (citations omitted). A court may exempt a local
25 law from the requirements of the dormant Commerce Clause “only when the
26 congressional direction to do so has been ‘unmistakably clear,’” *Maine v. Taylor*, 477
27 U.S. 131, 139 (1986) (quoting *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82,
28 91 (1984)), and the defendant has demonstrated “a clear and unambiguous intent on

1 behalf of Congress to permit the discrimination against interstate commerce,” *Wyoming*
2 *v. Oklahoma*, 502 U.S. 437, 458 (1992).

3 The AWA’s savings clause does not clearly and unambiguously authorize Phoenix
4 to enact an ordinance that discriminates against interstate commerce. It provides that the
5 City may adopt standards for the humane handling, care, treatment, and transportation of
6 animals by dealers, research facilities, and exhibitors, but it does not explicitly say that
7 the City may enact an ordinance that discriminates against out-of-state breeders in
8 purpose or effect. The City argues that the Court should give the savings clause a “broad
9 interpretation” (Doc. 151 at 10), but the Supreme Court has made clear that a broad
10 interpretation is not permitted. Courts may not find that Congress has authorized local
11 laws that discriminate against interstate commerce unless Congress’s intent is “clearly
12 expressed,” *Hillside Dairy*, 539 U.S. at 66, “unmistakably clear,” *Maine*, 477 U.S. at 139,
13 and “clear and unambiguous,” *Wyoming*, 502 U.S. at 458. The savings clause does not
14 meet this exacting standard.

15 The clause says nothing about interstate commerce. It provides that another
16 provision, § 2143(a)(1), does not “prohibit” states and local governments from
17 promulgating standards. 7 U.S.C. § 2143(a)(8). This appears to be a clear indication that
18 § 2143(a)(1)’s grant of standard-making authority to the Secretary of Agriculture does
19 not preempt state or local standards that go beyond the Secretary’s standards. But saying
20 that the statute does not prohibit such additional standards is not the same as saying that
21 the dormant Commerce Clause does not prohibit burdens on interstate commerce. The
22 savings clause speaks only about the effect of § 2143(a)(1); it says nothing about any
23 other provision of law. It certainly is not an unmistakably clear statement that the
24 dormant Commerce Clause – a different provision of law – does not bar local laws that
25 discriminate against interstate commerce.

26 In only a few instances has the Supreme Court found congressional authorization
27 of discrimination against interstate commerce. For example, the Court found that the
28 following statutory language approved discrimination:

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

- “The Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.” *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 429 (1946) (quoting the McCarran Act).
- “Nothing in this Act or any other provision of law shall be construed to preempt, prohibit, or otherwise limit the authority of the State of California, directly or indirectly, to establish or continue to effect any law, regulation, or requirement regarding [milk products].” *Hillside Dairy*, 539 U.S. at 65-66 (quoting Federal Agriculture Improvement and Reform Act).

In contrast, the Court construed the following language as not approving discrimination:

- “[N]othing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation.” *Sporhase v. Nebraska, ex rel. Douglas*, 458 U.S. 941, 959-60 (1982) (quoting Reclamation Act).
- “[The Federal Power Act] shall not . . . deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line.” *New England Power Co. v. New Hampshire*, 455 U.S. 331, 341 (1982).
- “The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.” *Granholm v. Heald*, 544 U.S. 460, 487 (2005) (quoting Twenty-First Amendment).

Although the distinction is not crystal clear, these comparisons suggest that congressional authorization to discriminate exists when a federal law quite clearly disavows the dormant Commerce Clause (*Prudential*) or provides that nothing in any provision of law “either directly or indirectly” limits the states’ authority to regulate an aspect of commerce (*Hillside Dairy*). In contrast, authorization to discriminate does not exist when a federal law merely clarifies that it does not preempt state law or deprive a state of its existing authority, or when it expressly recognizes laws enacted by the states (*Sporhase, New England Power, Granholm*). The AWA’s savings clause aligns more closely with the latter category of cases.⁴

⁴ The City cites two district court cases that have found that the AWA’s savings clause authorized discrimination against interstate commerce. *Maryeli’s Lovely Pets, Inc. v. City of Sunrise*, No. 81:14-CV-61391-Scola (S.D. Fla. June 24, 2015); *Zimmerman v.*

1 The City highlights the AWA’s opening policy statement in which Congress
2 declares that (1) the regulation of animals is necessary “to prevent and eliminate burdens”
3 upon interstate commerce, and (2) “it is essential” to regulate the sale of animals as pets.
4 *Id.* § 2131. The Court fails to see how these statements – which identify the basis for
5 Congress’s action under the Commerce Clause – show that Congress intended to
6 authorize local discrimination. Indeed, Congress’s declaration that the regulation of
7 animals is necessary “to prevent and eliminate burdens” upon interstate commerce
8 suggests that Congress did not desire local governments to regulate animals in a way that
9 would burden interstate commerce.

10 **B. City as a Market Participant.**

11 The City next argues that the Ordinance is exempt from Commerce Clause
12 scrutiny because the City was acting as a market participant when it passed the
13 Ordinance. “Nothing in the purposes animating the Commerce Clause prohibits a State,
14 in the absence of congressional action, from participating in the market and exercising the
15 right to favor its own citizens over others.” *Hughes v. Alexandria Scrap Corp.*, 426 U.S.
16 794, 810 (1976). “[I]f a State is acting as a market participant, rather than as a market
17 regulator, the dormant Commerce Clause places no limitation on its activities.” *South-*
18 *Central Timber Dev.*, 467 U.S. at 93 (plurality).⁵

19 The critical inquiry is “whether the challenged program constitute[s] direct state
20 participation in the market.” *White*, 460 U.S. at 208 (quoting *Reeves, Inc. v. Stake*, 447
21 U.S. 429, 435 n.7 (1980) (internal quotations omitted)). The Supreme Court has applied

23 *Wolff*, 622 F. Supp. 2d 240, 245 (E.D. Pa. 2008). Both cases analyze the issue only
24 briefly, and the Court finds them unpersuasive. They do not cite or discuss the Supreme
25 Court’s instruction that congressional authorization of discrimination must be
unmistakably clear.

26 ⁵ When the market-participant exception applies, the law is unsettled as to whether
27 further commerce-clause analysis is necessary. The Supreme Court has stated that “when
28 a state or local government enters the market as a participant it is not subject to the
restraints of the Commerce Clause.” *White*, 460 U.S. at 208. But in *United Haulers*, 550
U.S. 330, a plurality of the Court engaged in *Pike* balancing after finding that the
government was acting as a market participant. Because the Ordinance does not fall
under the market-participant exception, the Court need not attempt to resolve this issue.

1 the market-participant exception where a state operated a cement plant and restricted the
2 sale of the plant's cement to in-state purchasers (*Reeves*); where a city required all city-
3 funded construction projects to be performed by crews that included city residents
4 (*White*); and where counties established a waste-processing facility and required all solid
5 waste generated within the counties to be delivered to that facility (*United Haulers*).

6 The Court is unable to discern, nor does the City adequately explain, how the
7 market-participant exception applies to this case. The City emphasizes that, through its
8 financial support for MCACC and in other ways, the City participates in the market of
9 rescuing and adopting out homeless animals. This may be true, and the Ordinance may
10 benefit the City's participation in parts of that market, but in attempting to re-configure
11 the market for pets the City is acting as a market regulator, not as a market participant.
12 The City has not adopted a policy that it, as a market participant, will do business only
13 with certain pet shops. It has not stipulated that pet shops within the City must buy
14 animals solely from City-sponsored operations. The Ordinance reaches more broadly,
15 driving private pet shops like Puppies 'N Love out of business regardless of whether they
16 do business with the City and potentially benefiting non-governmental animal shelters
17 and private breeders alike. Thus, this case is not like *Reeves*, where a state operated a
18 cement plant and restricted the sale of its cement to in-state purchasers, or *White*, where a
19 city required all city-funded construction projects to be performed substantially by city
20 residents, or *United Haulers*, where the counties re-directed all solid-waste business to a
21 government facility. The City has failed to point to a case where a court has applied the
22 market-participant exception to a local law that regulated private businesses in a way that
23 arguably benefitted both government entities and local businesses. The Court will not
24 apply the market-participant exception here.

25 **C. Extraterritorial Regulation.**

26 The dormant Commerce Clause precludes "extraterritorial" regulation of
27 commerce, that is, "the application of a state statute to commerce that takes place wholly
28 outside of the State's borders, whether or not the commerce has effects within the State."

1 *Edgar v. MITE Corp.*, 457 U.S. 624, 642-43 (1982) (plurality). “[A] statute that directly
2 controls commerce occurring wholly outside the boundaries of a State exceeds the
3 inherent limits of the enacting State’s authority and is invalid regardless of whether the
4 statute’s extraterritorial reach was intended by the legislature.” *Healy v. Beer Inst., Inc.*,
5 491 U.S. 324, 336 (1989). “The critical inquiry is whether the practical effect of the
6 regulation is to control conduct beyond the boundaries of the State.” *Id.* (citing *Brown-*
7 *Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986)).⁶

8 Plaintiffs argue that the Ordinance regulates conduct occurring outside of the City.
9 Specifically, Plaintiffs argue that the City is attempting “to do indirectly what it lacked
10 authority to do directly – that is, change regulatory standards in other jurisdictions by
11 restricting access to its own local market.” Doc. 143 at 18.

12 The Court is not persuaded. Plaintiffs would have a better argument if the
13 Ordinance provided that out-of-state breeders may sell to Phoenix pet shops only if they
14 change their business to conform to the City’s standards. The Ordinance does not do
15 that. It instead prohibits the sale of commercially-bred animals in local pet stores
16 regardless of the conditions under which they were bred or the regulations of their local
17 jurisdictions. Because out-of-state breeders and their governing cities and states can do
18 nothing to gain access to Phoenix pet shops, the Ordinance is not an attempt to change
19 their conduct. Plaintiffs have not shown that “the practical effect of the regulation is to
20 control conduct beyond the boundaries of the [City].” *Healy*, 491 U.S. at 336.

21 **D. Discrimination Against Interstate Commerce.**

22 “The principal objects of dormant Commerce Clause scrutiny are statutes that
23 discriminate against interstate commerce.” *CTS Corp. v. Dynamics Corp. of Am.*, 481
24 U.S. 69, 87 (1987). A law “can discriminate against out-of-state interests in three
25 different ways: (a) facially, (b) purposefully, or (c) in practical effect.” *Nat’l Ass’n of*
26

27 ⁶ These principles of law have been criticized, *Healy*, 491 U.S. at 345 (Scalia, J.,
28 concurring), and “[i]n the modern era . . . the Supreme Court has rarely held that statutes
violate the extraterritoriality doctrine,” *Rocky Mountain Farmers Union v. Corey*, 730
F.3d 1070, 1101 (9th Cir. 2013).

1 *Optometrists & Opticians v. Brown (Nat’l Ass’n of Optometrists I)*, 567 F.3d 521, 525
2 (9th Cir. 2009) (quoting *LensCrafters, Inc. v. Robinson*, 403 F.3d 798, 802 (6th Cir.
3 2005)). “The party challenging the statute bears the burden of showing discrimination.”
4 *Black Star Farms, LLC v. Oliver*, 600 F.3d 1225, 1230 (9th Cir. 2010). A law
5 discriminates against interstate commerce when it gives differential treatment to similarly
6 situated “in-state and out-of-state economic interests” in a way “that benefits the former
7 and burdens the latter.” *Oregon Waste Sys.*, 511 U.S. at 99. “[A]ny notion of
8 discrimination assumes a comparison of substantially similar entities.” *Gen. Motors*
9 *Corp. v. Tracy*, 519 U.S. 278, 298 (1997). Once a state law is shown to discriminate, the
10 burden falls on the state to show that it had “no other means to advance a legitimate local
11 purpose.” *United Haulers*, 550 U.S. at 338-39. This is a form of strict scrutiny, a
12 “virtually *per se* rule of invalidity[.]” *City of Philadelphia*, 437 U.S. at 624.

13 Plaintiffs do not contend that the Ordinance is facially discriminatory. On its face,
14 the Ordinance treats in-state and out-of-state breeders the same – none of them can sell to
15 Phoenix pet stores. Plaintiffs do assert that the Ordinance discriminates in effect and
16 purpose. The Court will consider these alleged forms of discrimination separately.

17 **1. Does the Ordinance Discriminate in Effect?**

18 **a. Analytical Framework.**

19 Although the general principles for identifying practical-effect discrimination are
20 rather easily stated, they are difficult to apply. Supreme Court cases considering whether
21 laws have the effect of discriminating against interstate commerce have produced a wide
22 variety of results, and the language of these cases at times appears inconsistent. Justice
23 Scalia has observed that “once one gets beyond facial discrimination our negative-
24 Commerce-Clause jurisprudence becomes (and long has been) a quagmire.” *W. Lynn*
25 *Creamery, Inc. v. Healy*, 512 U.S. 186, 210 (1994) (Scalia, J., concurring) (internal
26 quotation marks omitted). As another commentator has noted, the Supreme Court “never
27 has articulated clear criteria for deciding when proof of a discriminatory purpose and/or
28 effect is sufficient for a state or local law to be discriminatory. Indeed, the cases in this

1 area seem quite inconsistent.” E. Chemerinsky, *Constitutional Law, Principles and*
2 *Policies* 444-45 (4th ed. 2011).

3 The central question is whether Plaintiffs have shown that the effect of the
4 Ordinance is to burden out-of-state breeders and benefit in-state breeders. Plaintiffs must
5 bring “substantial evidence of an actual discriminatory effect[.]” *Black Star*, 600 F.3d
6 at 1231 (quoting *Black Star Farms, LLC v. Oliver*, 544 F. Supp. 2d 913, 928 (D. Ariz.
7 2008)). An incidental burden on out-of-state interests and a “*de minimis* benefit” to local
8 interests is “insufficient to trigger strict scrutiny.” *Id.* at 1235. “Courts examining a
9 ‘practical effect’ challenge must be reluctant to invalidate a state statutory scheme . . .
10 simply because it *might* turn out down the road to be at odds with our constitutional
11 prohibition against state laws that discriminate against Interstate Commerce.” *Id.* at 1232
12 (emphasis in original). Furthermore, “[t]he fact that the burden of a state regulation falls
13 on some interstate companies does not, by itself, establish a claim of discrimination
14 against interstate commerce.” *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 126
15 (1978). Rather, Plaintiff must show that “the effect of [the] regulation is to cause local
16 goods to constitute a larger share, and goods with an out-of-state source to constitute a
17 smaller share, of the total sales in the market.” *Id.* at 126 n.16.

18 In demonstrating a discriminatory effect, Plaintiff must also show that the
19 Ordinance has differing effects on similarly situated in-state and out-of-state entities.
20 *Gen. Motors*, 519 U.S. at 298. The only similarly situated entities in this case are local
21 breeders and out-of-state breeders, both of which breed and sell dogs. Plaintiffs argue
22 that local animal shelters and rescue organizations are also similarly situated because they
23 typically charge a price for the animals they offer to the public, and some take in dogs
24 from other states. *See* Doc. 157, ¶¶ 140-48. But these organizations do not breed new
25 dogs or operate on a for-profit basis as do breeders. Although these organizations may
26 compete in the same market, this does not make them similarly situated to out-of-state
27 breeders. *See Nat’l Ass’n of Optometrists I*, 567 F.3d at 525-26 (“The Court [in *General*
28 *Motors*] acknowledged that local utility companies and independent out-of-state natural

1 gas marketers competed or wished to compete in one of the same markets, but still
2 concluded that they were not similarly situated, and there was thus no discriminatory
3 effect.”) (citing *Gen. Motors*, 519 U.S. at 302-10). The Court will therefore confine its
4 analysis to the effects of the Ordinance on local and out-of-state breeders.

5 The Court also restricts its analysis to the effects of the Ordinance within the
6 boundaries of the City of Phoenix. The Supreme Court has instructed that “a State (or
7 one of its political subdivisions) may not avoid the strictures of the Commerce Clause by
8 curtailing the movement of articles of commerce through subdivisions of the State, rather
9 than through the State itself.” *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep’t of*
10 *Natural Res.*, 504 U.S. 353, 361 (1992); *see also BFI Med. Waste Sys. v. Whatcom Cnty.*,
11 983 F.2d 911, 913 (9th Cir. 1993) (“[L]aws that discriminate against out-of-state business
12 interests are *per se* unconstitutional even if it is a county rather than the state itself that
13 discriminates[.]”). Thus, “discrimination is appropriately assessed with reference to the
14 specific subdivision in which applicable laws reveal differential treatment.” *Associated*
15 *Indus. of Missouri v. Lohman*, 511 U.S. 641, 650 (1994).

16 **b. The Effects of the Ordinance.**

17 The crux of Plaintiff’s discriminatory-effect argument is as follows. Under the
18 Ordinance, no breeder is allowed to sell its animals through retail pet stores, but every
19 breeder is allowed to sell its animals directly to the public. Most customers like to see
20 and interact with an animal before buying it as a pet. Because an out-of-state breeder is
21 unable under the Ordinance to sell its animals through pet stores, customers can interact
22 with that breeder’s animals only by travelling across state-lines to the breeder’s location.
23 The effect of this, Plaintiffs argue, is to impose a competitive disadvantage *vis-à-vis* local
24 breeders because customers seeking to interact with commercially-bred pets are more
25 likely to visit a local breeder that is closer. The primary means for out-of-state breeders
26 to offset this advantage was to sell their animals through local pet stores. Because the
27 Ordinance closes off this distribution channel, Plaintiffs reason, consumers within the
28 city will buy fewer dogs from out-of-state breeders and more dogs from local breeders.

1 Although Plaintiffs’ argument has logical appeal, the Court ultimately concludes
2 that Plaintiffs have failed to present evidence with which they could carry their burden of
3 proof at trial. As noted above, “[t]he party challenging the statute bears the burden of
4 showing discrimination.” *Black Star*, 600 F.3d at 1230. Discrimination occurs when a
5 law treats similarly situated “in-state and out-of-state economic interests” in a way “that
6 benefits the former and burdens the latter.” *Oregon Waste Sys.*, 511 U.S. at 99. And
7 these benefits and burdens must be more than *de minimis*. *Black Star*, 600 F.3d at 1235.
8 Thus, to avoid summary judgment on their Commerce Clause discriminatory effects
9 claim, Plaintiffs must present sufficient evidence for a reasonable factfinder to conclude
10 that the Ordinance will confer more than *de minimis* benefits on local breeders and
11 impose more than *de minimis* burdens on out-of-state breeders. Plaintiffs have failed to
12 do so.

13 First, Plaintiffs have demonstrated no more than an incidental or *de minimis*
14 burden on out-of-state breeders. Plaintiffs have proffered numerous affidavits of such
15 breeders. These affidavits show that the effect of the Ordinance will be to impede out-of-
16 state breeders’ ability to sell their dogs in the Phoenix market. The breeders state that
17 “[w]ithout access to a local pet store in Phoenix I would be unable to compete with local
18 breeders” because the only practical way for Phoenix residents to “see and play with a
19 prospective pet” from an out-of-state breeder is for them to visit a local pet store. *See*,
20 *e.g.*, Doc. 137-36 at 20, 25, 31, 35. Furthermore, the affidavits state that selling over the
21 internet is not the equivalent of selling dogs through a local pet store. As one breeder
22 explained, “consumers would much prefer to see and play with their puppy before they
23 buy. People are wary of buying a puppy sight unseen over the internet. The potential for
24 fraud is too high, and there is no way for consumers to know for sure that they are
25 purchasing a healthy, quality puppy.” *Id.* at 41. And several breeders affirm that
26 “[a]dopting an internet sales model would require me to completely change how I do
27 business and would require the expenditure of substantial sums to set up and run a
28 website, hire retail staff, and market to consumers in Arizona.” *Id.* at 21, 26, 32, 36.

1 The problem with this evidence is that it does nothing to establish the magnitude
2 of the Ordinance’s burden on out-of-state breeders. True, it suggests that some breeders
3 will lose their Phoenix sales, but the mere “fact that the burden of a state regulation falls
4 on some interstate companies does not, by itself, establish a claim of discrimination
5 against interstate commerce.” *Exxon Corp.*, 437 U.S. at 126. To establish a
6 discriminatory effect, Plaintiff must show that the Ordinance will create more than an
7 incidental burden on interstate commerce. Plaintiff has come forward with no evidence
8 proving such a burden.

9 The undisputed evidence is that Puppies ‘N Love sells approximately 500 dogs a
10 year. Doc. 137, ¶ 67; Doc. 152-1 at 32. Almost all of these dogs are obtained from out-
11 of-state breeders. Doc. 167-1 at 3. Even if out-of-state breeders were unable to sell these
12 dogs through other Arizona pet stores, Plaintiff has not shown that this is a substantial or
13 significant burden on interstate commerce. Indeed, Plaintiffs have provided no evidence
14 from which a factfinder could determine whether this effect on out-of-state breeders
15 would be substantial or *de minimis*.

16 Based on the number of puppies that were licensed in Maricopa County,
17 Defendant’s expert has estimated Puppies ‘N Love’s share of the local puppy market.
18 Doc. 152-1 at 32. The expert estimates that the 500 dogs sold annually through Puppies
19 ‘N Love’s Phoenix store constitutes just 2.2% of the total dog market in Maricopa
20 County and 1.2% of the dog market in Arizona. *Id.* Plaintiff does not dispute this point.
21 Doc. 152, ¶ 8; Doc. 157 at 27. Admittedly, this is an imperfect comparison because it
22 includes dogs sold by entities other than commercial breeders. But it is at least one data
23 point from which to assess the magnitude of 500 sales, and Plaintiffs provide no other.
24 They do not provide evidence concerning the number of commercially bred dogs sold
25 each year in Phoenix or nationwide. Nor do they provide evidence showing what the loss
26 of 500 Phoenix sales would mean to the out-of-state breeders from whom they obtained
27 affidavits. The Court – and a factfinder at trial – is left with no means of determining
28 whether the loss of 500 sales is significant or merely incidental.

1 The same is true with respect to the benefits conferred by the Ordinance on local
2 breeders. Those breeders will not necessarily be making 500 more sales each year as a
3 result of the Ordinance. A Phoenix resident who is no longer able to buy a dog from the
4 Puppies 'N Love store in Phoenix might make a number of decisions. She might adopt a
5 puppy from a local animal shelter or humane society, travel to a pet store located a few
6 miles away in one of the many neighboring cities in the greater Phoenix area, or decide
7 not to buy a puppy at all.⁷ None of these decisions would benefit breeders located within
8 the City of Phoenix – the persons who are similarly situated to out-of-state breeders.

9 Plaintiffs do argue that the Ordinance creates a competitive advantage for local
10 breeders because they do not have to compete with out-of-state breeders selling through a
11 nearby pet store. But an abstract competitive advantage for in-state businesses is not
12 discrimination under the dormant Commerce Clause. Rather, Plaintiff must present
13 evidence from which a reasonable factfinder could conclude that the effect of the
14 Ordinance will be to confer more than a *de minimis* benefit on local breeders. In addition
15 to providing no evidence from which to quantify in any reasonable degree the number of
16 sales that will be gained by local breeders under the Ordinance, Plaintiffs have failed to
17 present evidence from which a jury could determine whether that benefit is more than *de*
18 *minimis* when compared to the total volume of business done by local breeders. Plaintiffs
19 present no evidence of that volume.⁸ The Court thus finds that Plaintiffs have failed to
20 present evidence that would satisfy their burden of proof at trial.

21 **c. *De Minimis* Rule.**

22 Plaintiffs argue that there is no *de minimis* exception to the dormant Commerce
23 Clause. This argument is foreclosed by the Ninth Circuit. In *Black Star*, the Ninth
24

25 ⁷ As Defendant's expert notes, a Phoenix resident might be more likely to do one
26 of these things than visit a local breeder. For many Phoenix residents, travelling to a
27 local breeder would take longer than travelling to a pet store outside of the City of
Phoenix. Doc. 152-1 at 34.

28 ⁸ Plaintiffs' expert opines that the Ordinance will result in a diversion of sales to
local breeders and shelters, but he does not attempt to quantify the extent of that benefit.
Doc. 137-38 at 20.

1 Circuit considered a state law that allowed wineries, wherever located, to ship two cases
2 of wine per year directly to consumers, so long as the consumers were physically present
3 at the wineries when they purchased the wine. 600 F.3d at 1228. Out-of-state wineries
4 argued – no doubt with the same logical appeal that Plaintiffs present here – that the law
5 gave an unfair advantage to in-state wineries because customers were likely to visit those
6 wineries in person, but unlikely to visit out-of-state wineries. In rejecting this argument,
7 the Ninth Circuit held that “potential” harm to interstate commerce is not enough to
8 trigger strict scrutiny under the dormant Commerce Clause, and that “[a] de minimis
9 benefit to in-state wineries is also insufficient to trigger strict scrutiny.” *Id.* at 1235.

10 Thus, the law of this Circuit appears to be that *de minimis* effects on interstate
11 commerce are not discriminatory. Other courts apply the same rule. *See Cherry Hill*
12 *Vineyard, LLC v. Baldacci*, 505 F.3d 28, 38 (1st Cir. 2007) (rejecting argument that *de*
13 *minimis* effects on commerce trigger strict scrutiny); *Brown & Williamson Tobacco Corp.*
14 *v. Pataki*, 320 F.3d 200, 216 (2d Cir. 2003) (finding a “de minimis advantage to in-state
15 [companies] . . . insufficient to establish a discriminatory effect”); *Int’l Franchise Ass’n,*
16 *Inc. v. City of Seattle*, No. C14-848 RAJ, 2015 WL 1221490, at *10 (W.D. Wash. Mar.
17 17, 2015) (same).

18 The Court finds this *de minimis* rule to be appropriate for several reasons. First, it
19 appears to be the law of this Circuit. Second, it respects the sovereignty and power of
20 local governments, leaving room for them to regulate on matters of legitimate local
21 concern in ways that do not significantly burden interstate commerce. Indeed, the
22 Supreme Court has observed that “the States retain ‘broad power’ to legislate protection
23 for their citizens in matters of local concern such as public health, and . . . not every
24 exercise of local power is invalid merely because it affects in some way the flow of
25 commerce between the States.” *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366, 371
26 (1976) (citations omitted). Third, as one court has noted, “[w]ere we to require no
27 showing beyond the de minimis level, no distinction would exist between the
28 discriminatory effect test and the incidental burden test employed by the Supreme Court

1 in *Pike*.” *Cherry Hill Vineyard*, 505 F.3d at 38-39. The *Pike* balancing test would
2 become a nullity if the incidental effect required for *Pike* to apply were sufficient to
3 trigger strict scrutiny.

4 Supreme Court cases do contain language suggesting that the extent of the burden
5 on interstate commerce does not matter in dormant Commerce Clause analysis. For
6 example, the Court has stated that “[t]he volume of commerce affected measures only the
7 extent of the discrimination; it is of no relevance to the determination whether a State has
8 discriminated against interstate commerce.” *Wyoming*, 502 U.S. at 455 (emphasis in
9 original). But this statement concerned a facially discriminatory law, and it makes sense
10 that a facially discriminatory law would be deemed invalid without an examination of its
11 effects. See *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 276 (1988) (“Our
12 cases . . . indicate that where discrimination is patent, as it is here, neither a widespread
13 advantage to in-state interests nor a widespread disadvantage to out-of-state competitors
14 need be shown.”); *Cherry Hill Vineyard*, 505 F.3d at 38 (“It strikes us as implausible that
15 the same de minimis standard would apply when evaluating whether a facially neutral
16 statute has a discriminatory effect on interstate commerce.”).⁹ When the very existence
17 of discrimination turns upon the local law’s effect on commerce, requiring more than a *de*
18 *minimis* effect comports with the deference that should be accorded local laws and the
19 existence of the *Pike* balancing test.

20 The Court recognizes that some Supreme Court cases have struck down local laws
21 as discriminatory in effect without expressly addressing the extent of laws’ effect on
22 commerce. But these cases involved laws that in effect created an embargo on out-of-
23 state goods or services. See, e.g., *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511
24 U.S. 383 (1994) (invalidating law that allowed only one local company to process and

25
26 ⁹ This is what distinguishes *Granholm*, 544 U.S. 460, on which Plaintiffs also rely.
27 In *Granholm*, the Court invalidated laws that allowed in-state wineries to ship wine
28 directly to in-state customers and prevented out-of-state wineries from so doing. If the
Ordinance here had allowed local breeders but not out-of-state breeders to sell their dogs
through pet shops, then *Granholm* would be on point. But that is not the case. The
Ordinance prevents all breeders from selling through pet shops and therefore is more
similar to the law upheld in *Black Star*.

1 separate waste); *City of Philadelphia*, 437 U.S. 617 (invalidating law that prohibited the
2 importation of waste from other states). They also include cases where a significant
3 effect on commerce was apparent to the Court. For instance, *Dean Milk Company v. City*
4 *of Madison*, 340 U.S. 349 (1951), invalidated a local ordinance requiring all pasteurized
5 milk sold in the city to be processed and bottled at pasteurization plants located within
6 five miles of the city. *Dean Milk* did not expressly evaluate the extent to which the
7 ordinance would burden out-of-state milk producers and benefit local producers, but it
8 had little difficulty in finding the ordinance discriminatory: “[T]his regulation . . . in
9 practical effect excludes from distribution in Madison wholesome milk produced and
10 pasteurized [elsewhere]. . . . In thus erecting an economic barrier *protecting a major*
11 *local industry against competition from without the State*, Madison plainly discriminates
12 against interstate commerce.” *Id.* at 354 (emphasis added).

13 As already noted, dormant Commerce Clause cases are not entirely clear or
14 consistent. But the Court concludes that these Supreme Court cases – which can be
15 explained either as addressing facially discriminatory laws or effective embargoes in
16 significant industries – are not inconsistent with the *de minimis* rule adopted by the Ninth
17 Circuit and applied in this case.¹⁰

18 **d. Conclusion.**

19 In sum, the Court concludes that more than a *de minimis* effect must be shown to
20 prove that a local law has the effect of discriminating against interstate commerce,
21 invoking strict scrutiny. Plaintiffs have not presented evidence that would allow a
22 factfinder to find such an effect. The Court will enter summary judgment against
23 Plaintiffs’ claim that the Ordinance has a discriminatory effect on interstate commerce.

24 _____
25 ¹⁰ Plaintiffs also rely heavily on *Hunt v. Washington State Apple Adver. Comm’n*,
26 432 U.S. 333 (1977), where the Supreme Court invalidated a North Carolina law that
27 required all apple containers sold in the state to bear a single grade rather than the grades
28 established by their states of origin. As another court has amply explained, the facts in
Hunt make clear that the effect on interstate commerce was substantial. See *Int’l*
Franchise Ass’n, Inc., 2015 WL 1221490, at *12-13. And the Court in *Hunt* also noted
that “not every exercise of state authority imposing some burden on the free flow of
commerce is invalid.” *Hunt*, 432 U.S. at 349.

1 **2. Does the Ordinance Discriminate in Purpose?**

2 Plaintiffs also argue that the Ordinance was passed with the discriminatory
3 purpose of favoring local over out-of-state breeders. The Supreme Court has stated that a
4 “‘finding that state legislation constitutes ‘economic protectionism’ may be made on the
5 basis of . . . discriminatory purpose[.]” *Chem. Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334,
6 344 n.6 (1992) (quoting *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270 (1984)); *see*
7 *also Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471 n.15 (1981). And the
8 Supreme Court has found in several cases that a law had both a discriminatory purpose
9 and a discriminatory effect. *See, e.g., W. Lynn Creamery*, 512 U.S. at 194 (finding a
10 law’s “avowed purpose and its undisputed effect are to enable higher cost Massachusetts
11 dairy farmers to compete with lower cost dairy farmers in other States”); *Bacchus*, 468
12 U.S. at 270-71; *Hunt*, 432 U.S. at 352-33. But this Court is unaware of a Supreme Court
13 or Ninth Circuit case in which a law was invalidated under the dormant Commerce
14 Clause solely on the ground of having a discriminatory purpose. Other circuits, however,
15 have found a discriminatory purpose as being sufficient to strike down a law. *See S.*
16 *Dakota Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583 (8th Cir. 2003); *Waste Mgmt.*
17 *Holdings, Inc. v. Gilmore*, 252 F.3d 316 (4th Cir. 2001).

18 The Court finds it incongruous to say that a law violates the dormant Commerce
19 Clause merely by having a discriminatory purpose. As another court noted, “there is
20 some reason to question whether a showing of discriminatory purpose alone will
21 invariably suffice to support a finding of constitutional invalidity under the dormant
22 Commerce Clause.” *Alliance of Auto. Mfrs. v. Gwadosky*, 430 F.3d 30, 36 n.3 (1st Cir.
23 2005). If local lawmakers intend to discriminate in favor of local interests, but
24 mistakenly pass a law that does not so discriminate, did those lawmakers violate the
25 dormant Commerce Clause simply by their mistaken intentions? The Court doubts it.
26 The dormant Commerce Clause is aimed at deflecting *acts* of economic protectionism,
27 not mere intent. *See Wal-Mart Stores, Inc. v. City of Turlock*, 483 F. Supp. 2d 987, 1012-
28 13 (E.D. Cal. 2006) (suggesting that discriminatory intent alone does not suffice to

1 invalidate a law under the dormant commerce clause). Nevertheless, the Supreme Court
2 has approved analyzing a law’s purpose, and the Ninth Circuit has engaged in such
3 analysis in dormant Commerce Clause cases. *See, e.g., Nat’l Ass’n of Optometrists I*, 567
4 F.3d at 525 (concluding the law did not have a discriminatory purpose). The Court
5 therefore finds itself obliged to do so here.

6 In arguing that the Ordinance has a discriminatory purpose, Plaintiffs rely on
7 statements from the HSUS, records of City Council meetings, and a newspaper editorial.
8 Assuming that this evidence is admissible and relevant to the Ordinance’s purpose, the
9 Court finds that Plaintiffs have not shown that the purpose of the Ordinance was to
10 burden out-of-state breeders in favor of local breeders. Rather, the stated purpose was to
11 help eliminate animal cruelty by preventing puppy mills from selling their dogs through
12 local pet stores. And although supporters were aware that local breeders might stand to
13 benefit from the Ordinance, this was not the primary reason for its passage. A sampling
14 of the evidence cited by Plaintiffs shows this to be true.

15 In support of the Ordinance, City of Phoenix Councilmembers Simplot and
16 Williams wrote in a newspaper editorial:

17 There is no excuse for animal abuse, and that includes inhumane breeding
18 practices used at ‘puppy mills’. . . . That is why we are working together to
19 end the sale of puppy mill dogs in Phoenix and to require pet retailers to get
20 their inventory from animal shelters or rescue organizations. . . . If a puppy
comes from out of state, it’s a big red flag. . . . [T]he ordinance [is] aimed
at eliminating inhumane treatment of animals.

21 Doc. 137-37 at 4. The formal agenda for the City Council meeting regarding the
22 Ordinance stated that the Ordinance was aimed at eliminating “practices that are abusive
23 to animals” and discussed the problems of puppy mills. Doc. 137-24 at 5. During the
24 City Council meeting, proponents similarly argued that the Ordinance’s purpose was to
25 eliminate “practices that are abusive to animals, [including] selling animals bred in puppy
26 and kitten mills[.]” Doc. 137-23 at 24. Councilwoman Williams emphasized that puppy
27 mills are abusive to animals and worried that “the public gets ripped off oftentimes when
28 they buy some of these dogs because they are not in good condition[.]” *Id.* at 25. She

1 also noted that “[y]ou can get purebred dogs from breeders locally and not off the
2 Internet. There’s a very good system here in Phoenix.” *Id.* at 60.

3 The HSUS lobbied for the Ordinance and helped draft it. After the City Council
4 passed the Ordinance, the HSUS issued a press release:

5 The new ordinance will help move the marketplace away from puppy mills,
6 and toward consumers buying directly from responsible breeders and pet
7 stores holding in-store adoptions of animals that come from shelters and
8 rescue groups. . . . We commend the humane leaders of Phoenix . . . for
9 working to crack down on inhumane puppy mills. By shrinking the supply
of puppy mill dogs flowing into our market, the ordinance is expected to
boost animal adoptions for homeless animals and increase sales for small,
responsible breeders.

10 Doc. 137-36 at 44. In another statement, the HSUS noted that “[i]f the trend of rejecting
11 puppy mill dogs continues, it is reasonable to expect an expansion in the number of
12 small, home-based breeders. While the potential for inhumane conditions exists within
13 the local breeder community, the smaller scale of home-based operations makes adequate
14 care much easier to provide.” Doc. 137-23 at 5.

15 As stated by its proponents, the purpose of the Ordinance was to help eliminate the
16 inhumane treatment of animals by preventing puppy mills from selling their animals in
17 Phoenix pet stores. The proponents were aware that the Ordinance might burden out-of-
18 state businesses because most of the alleged puppy mills were located in other states.
19 They were also aware that local breeders might benefit from the Ordinance because these
20 breeders could continue to operate in the Phoenix market. But the Court cannot conclude
21 that the proponents supported the Ordinance *because* it would shift sales from out-of-
22 state breeders to local breeders or because puppy mills were usually located in other
23 states.¹¹ Plaintiffs have not indicated that local breeders lobbied for the Ordinance.

24
25 ¹¹ Courts have not clearly identified the degree to which a discriminatory purpose
26 must be a cause of the challenged law for a Commerce Clause violation to arise.
27 Commentators have suggested “substantial contribution” and “but for” tests. *See* Donald
28 H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant
Commerce Clause*, 84 Mich. L. Rev. 1091, 1148-49 (1986) (arguing that a court should
examine whether a discriminatory purpose was a “substantial contribution” to the passage
of the law); Julian Cyril Zebot, *Awakening A Sleeping Dog: An Examination of the
Confusion in Ascertainig Purposeful Discrimination Against Interstate Commerce*, 86
Minn. L. Rev. 1063, 1090-94 (2002) (recommending that a court examine whether a

1 Rather, there is evidence that the proponents hoped the Ordinance would shift sales from
2 pet stores to animal shelters, not local breeders. Doc. 137-23 at 5, 49; Doc. 137-36 at
3 44.¹²

4 In analyzing the intent behind a law, the Court must “assume that the objectives
5 articulated by the legislature are actual purposes of the statute, unless an examination of
6 the circumstances forces [the court] to conclude that they could not have been a goal of
7 the legislation.” *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1097 (9th
8 Cir. 2013) (quoting *Clover Leaf Creamery*, 449 U.S. at 463 n.7). The articulated
9 objective of the Ordinance was to help eliminate animal cruelty that might be occurring at
10 puppy mills. This is not a purpose of discriminating against interstate commerce, and the
11 circumstances surrounding the passage of the Ordinance do not suggest otherwise.¹³

12 **E. Pike Balancing.**

13 A law that does not discriminate against interstate commerce, but “burden[s]
14 interstate transactions only incidentally,” is subject to what has come to be known as the
15 *Pike* balancing test. *See Maine*, 477 U.S. at 138. Under this test, “[w]here the statute
16 regulates even-handedly to effectuate a legitimate local public interest, and its effects on
17 interstate commerce are only incidental, it will be upheld unless the burden imposed on
18 such commerce is clearly excessive in relation to the putative local benefits.” *Pike*, 397
19 U.S. at 142. The burdens to be weighed are those that a local law imposes on the
20 “interstate flow of goods, not the share of profits obtained by . . . interstate corporations.”
21

22 discriminatory purpose was a “but for” cause of the challenged law). The Court
23 concludes that the alleged discriminatory purpose of favoring local breeders was neither a
substantial contribution to, nor a but-for cause of, the Ordinance’s passage.

24 ¹² Plaintiffs stress that the City Council did not study the effectiveness of the
25 Ordinance in reducing sales from puppy mills. But this failure tells little about the
26 Ordinance’s purpose beyond the fact that its proponents felt that such studies were
unnecessary.

27 ¹³ The Court is not clear on whether the discriminatory purpose of the Ordinance is
28 a matter of construction for the Court or a matter that would be submitted to a factfinder
at trial, and the parties do not address this issue in their briefs. If the latter is the case, the
Court finds that Plaintiffs have failed to present sufficient evidence for a reasonable
factfinder to conclude that the purpose of the Ordinance is protectionist.

1 *Nat'l Ass'n of Optometrists & Opticians v. Harris (Nat'l Ass'n of Optometrists II)*, 682
2 F.3d 1144, 1155 (9th Cir. 2012). The benefits to be weighed are the “putative” benefits
3 of the law, not the actual benefits. *Id.* at 1155. Although the *Pike* test is deferential,
4 courts have applied it to strike down nondiscriminatory laws “where such laws
5 undermined a compelling need for national uniformity in regulation.” *Gen. Motors*
6 *Corp.*, 519 U.S. at 299 n.12 (collecting cases).

7 *Pike* balancing is another area of some confusion in the law. As suggested above,
8 the Court concludes that a law that has no more than a *de minimis* effect on interstate
9 commerce is properly evaluated under the deferential test from *Pike*. This is consistent
10 with the statement in *Pike* itself that the balancing test applies when the law’s effect on
11 commerce is “incidental.” 397 U.S. at 142. The Ninth Circuit holds, however, that *Pike*
12 balancing applies only when the law’s effect on commerce is significant: “If a regulation
13 merely has an effect on interstate commerce, but does not impose a significant burden on
14 interstate commerce, it follows that there cannot be a burden on interstate commerce that
15 is ‘clearly excessive in relation to the putative local benefits’ under *Pike*.” *Nat'l Ass'n of*
16 *Optometrists II*, 682 F.3d at 1155. Such a significant effect, in the Court’s view, suggests
17 a discriminatory effect that would invoke strict scrutiny, not *Pike* balancing. The Ninth
18 Circuit’s approach thus seems to blur the line between strict scrutiny and *Pike* balancing,
19 but this is not a new development. As other cases have noted, the line between strict
20 scrutiny and *Pike* balancing is not easily discerned. *See Gen. Motors Corp.*, 519 U.S. at
21 298 n.12. The Court need not wrestle with this issue further, however, because it
22 concludes that the Ordinance survives all versions of *Pike* balancing.

23 As noted above, Plaintiffs have failed to present sufficient evidence for a
24 reasonable factfinder to find more than a *de minimis* effect on interstate commerce. It
25 follows that Plaintiffs have failed to present sufficient evidence to establish a significant
26 burden on interstate commerce as required by the Ninth Circuit approach.

27 The Ordinance also survives more traditional *Pike* balancing. Leaving aside the
28 benefit of reducing the market for puppy-mill dogs, which Plaintiffs argue is not a

1 permissible local interest, the Ordinance also has the putative benefit of reducing
2 Phoenix’s problem with animal homelessness and euthanasia. As noted earlier, in 2014
3 MCACC took in 38,235 animals, almost 34,000 of which were dogs. Doc. 157-42 at 5.
4 Although MCACC found new homes for 11,382 dogs and returned another 4,183 to their
5 owners, approximately 10,160 dogs were euthanized. *Id.* at 5. By requiring pet stores to
6 sell dogs from shelters instead of commercially-bred dogs, the Ordinance will have the
7 putative benefits of increasing the number of adoptions and reducing dog homelessness
8 and euthanasia. The Court cannot conclude that the *de minimis* burden imposed on
9 interstate commerce by the Ordinance is “clearly excessive” when compared to this local
10 benefit.¹⁴

11 **F. Dormant Commerce Clause Conclusion.**

12 “The modern law of what has come to be called the dormant Commerce Clause is
13 driven by concern about ‘economic protectionism, that is, regulatory measures designed
14 to benefit in-state economic interests by burdening out-of-state competitors.’” *Dep’t of*
15 *Revenue of Ky.*, 553 U.S. at 337-38 (quoting *New Energy Co.*, 486 U.S. at 273-74). The
16 Ordinance is not an act of economic protectionism. It is a legitimate attempt to curb the
17 problems associated with the inhumane treatment of animals and local dog homelessness
18 and euthanasia. Plaintiffs’ claim that the Ordinance violates the dormant Commerce
19 Clause fails as a matter of law.

20 **V. Equal Protection.**

21 Plaintiffs claim that the Ordinance violates the Equal Protection Clause of the
22 United States Constitution and the Privileges or Immunities Clause of the Arizona
23 Constitution. U.S. Const. amend. XIV; Ariz. Const. art. II, § 13. These clauses are
24 “substantially the same in effect[.]” *Chavez v. Brewer*, 214 P.3d 397, 408 (Ariz. Ct. App.

25

26 ¹⁴ “To the extent that Plaintiffs argue that the [Court] must consider less
27 burdensome alternatives [to the Ordinance], ‘case law requir[es] the consideration of less
28 restrictive alternatives only when heightened scrutiny is required.’ Because the
Ordinance is not discriminatory and does not directly regulate interstate commerce,
heightened scrutiny is not required.” *Pharm. Research*, 768 F.3d at 1046 n.4 (quoting
Nat. Ass’n of Optometrists II, 682 F.3d at 1157).

1 2009). “The Equal Protection Clause guarantees that the government will not classify
2 individuals [and groups] on the basis of impermissible criteria.” *Coal. for Econ. Equity v.*
3 *Wilson*, 122 F.3d 692, 702 (9th Cir. 1997). If a law’s classification does not burden a
4 fundamental right or a protected class of persons, the law must be upheld “if there is any
5 reasonably conceivable state of facts that could provide a rational basis for the
6 classification,” *F.C.C. v. Beach Commc’ns, Inc.*, 508 U.S. 307, 313 (1993), or “if ‘there is
7 a plausible policy reason for the classification, the legislative facts on which the
8 classification is apparently based rationally may have been considered to be true by the
9 governmental decisionmaker, and the relationship of the classification to its goal is not so
10 attenuated as to render the distinction arbitrary or irrational.’” *Armour v. City of*
11 *Indianapolis, Ind.*, 132 S. Ct. 2073, 2080 (2012) (quoting *Nordlinger v. Hahn*, 505 U.S.
12 1, 11 (1992)). “This standard of review is a paradigm of judicial restraint,” *Beach*
13 *Commc’ns, Inc.*, 508 U.S. at 314, and laws not involving fundamental rights or suspect
14 classifications are “accorded a strong presumption of validity,” *Heller v. Doe*, 509 U.S.
15 312, 319 (1993).

16 The parties agree that the Ordinance does not involve fundamental rights or
17 suspect classifications. The relevant class consists of pet stores, which the Ordinance
18 singles out in its regulations. Plaintiffs argue that the purpose of the Ordinance is to
19 eliminate puppy mills, and that the Ordinance bears no rational relationship with this
20 purpose because it targets pet stores like Puppies N’ Love that do not buy dogs from
21 puppy mills. The Court disagrees. Not only is it “reasonably conceivable” that pet stores
22 obtain dogs from puppy mills, but Defendant has produced evidence that Puppies N’
23 Love has bought dogs from a few breeders who have practices that some might view as
24 inhumane. Doc. 148 at 6-12. Thus, “the relationship of the classification to its goal is
25 not so attenuated as to render the distinction arbitrary or irrational.” *Nordlinger*, 505 U.S.
26 at 11. And there is another legitimate purpose to which the Ordinance is rationally
27 related – reducing animal homelessness and euthanasia. As already discussed, by
28 requiring pet stores to sell animals obtained from shelters instead of breeders, the

1 Ordinance could arguably reduce dog homelessness and euthanasia. *See* Doc. 148-1 at
2 245-46. The Ordinance does not violate the Equal Protection Clause or the Privileges or
3 Immunities Clause.

4 **VI. Special Law.**

5 The Arizona Constitution prohibits special laws that grant “to any corporation,
6 association, or individual, any special or exclusive privileges, immunities, or franchises.”
7 Ariz. Const. art. IV, pt. 2 § 19(13). Nor shall a special law be enacted “[w]hen a general
8 law can be made applicable.” *Id.* § 19(20). “While the equal protection clause prohibits
9 unreasonable discrimination *against* a particular class, the special legislation clause
10 prohibits unreasonable discrimination in *favor* of a particular class.” *Lerma v. Keck*, 921
11 P.2d 28, 34 (Ariz. Ct. App. 1996) (emphasis in original). Thus, a law “may withstand
12 equal protection review, yet still be found unconstitutional under the special/local law
13 provision.” *Republic Inv. Fund I v. Town of Surprise*, 800 P.2d 1251, 1257 (Ariz. 1990).
14 A law is general, not special, if: “(1) the classification is rationally related to a legitimate
15 governmental objective, (2) the classification is legitimate, encompassing all members of
16 the relevant class, and (3) the class is elastic, allowing members to move in and out of it.”
17 *Long v. Napolitano*, 53 P.3d 172, 178 (Ariz. Ct. App. 2002) (citing *Republic Inv. Fund I*,
18 800 P.2d at 1257).

19 The essence of Plaintiffs’ special-law argument is that the Ordinance bestows
20 special favors on local breeders and animal shelters. More specifically, Plaintiffs argue
21 that the Ordinance does not encompass all members of the relevant class. Plaintiffs
22 reason that because a goal of the Ordinance is to decrease sales of dogs from puppy mills,
23 and because local breeders may be running puppy mills and shelters may obtain dogs that
24 originated in puppy mills, the Ordinance should apply to local breeders and animal
25 shelters, not just pet stores.

26 The question, however, is whether the Ordinance “applies only to certain members
27 of a class or to an arbitrarily defined class which is not rationally related to a legitimate
28 legislative purpose.” *Arizona Downs v. Arizona Horsemen’s Found.*, 637 P.2d 1053,

1 1060 (Ariz. 1981). The classification must have “a basis founded in reason.” *Arizona v.*
2 *Loughran*, 693 P.2d 1000, 1002 (Ariz. Ct. App. 1985). An Arizona court has upheld
3 against a special-law challenge an Ordinance that regulated smoking inside of restaurants
4 but not bars and bowling alleys. *City of Tucson v. Grezaffi*, 23 P.3d 675, 684 (Ariz. Ct.
5 App. 2001). The court found that that the city could rationally limit the class to
6 restaurants even though bars and bowling alleys contributed to the problem of indoor
7 smoking. *Id.* Here also, the City of Phoenix, in trying to limit the sale of puppy-mill
8 dogs, could rationally limit the Ordinance to pet stores. Pet stores, unlike local breeders
9 and animal shelters, import animals from out-of-state breeders which may be operating
10 puppy mills. While local breeders might also be puppy mills, they are subject to the
11 direct oversight of the City and may therefore be regulated by other means. And while
12 animal shelters might offer for adoption animals that originated at puppy mills, many of
13 the animals that shelters offer did not originate at puppy mills. In sum, the Ordinance’s
14 classifications are not arbitrarily drawn. Because the Ordinance is rationally related to a
15 legitimate government purpose and its classification is elastic, it is not a special law.

16 **VII. Preemption.**

17 Plaintiffs contend that A.R.S. §§ 44-1799 *et seq.* preempts the Ordinance. The
18 City argues that the Ordinance is a lawful exercise of the City’s authority and does not
19 conflict with the statute. “The City of Phoenix, as authorized by the Arizona
20 Constitution, Article 13, Section 2, has adopted a charter permitting it to enact municipal
21 ordinances.” *Arizona v. McLamb*, 932 P.2d 266, 269 (Ariz. Ct. App. 1996). As a charter
22 city, it “may exercise all powers granted by its charter, provided that such exercise is not
23 inconsistent with either the constitution or general laws of the state.” *Jett v. City of*
24 *Tucson*, 882 P.2d 426, 429 (Ariz. 1994); *see also* A.R.S. § 9-284(B). The City of
25 Phoenix “is granted autonomy over matters of local interest.” *City of Tucson v. Arizona*,
26 333 P.3d 761, 763 (Ariz. Ct. App. 2014).

27 The relationship between state statutes and local ordinances has been explained as
28 follows:

1 In matters of solely local concern, a charter city's ordinance supersedes a
2 conflicting state statute. However, in matters of both local and statewide
3 concern, a charter city's ordinance is invalid if it conflicts with a valid state
4 statute. But there must be an actual conflict. Mere commonality of some
5 aspect of subject matter is insufficient, and the ordinance and the statute
6 must not be capable of peaceful coexistence. And, although a city
7 ordinance on a matter of local and statewide concern must not conflict with
8 a statute, it may be more restrictive than the statute, may parallel it, or even
9 go beyond it.

6 *City of Tucson v. Consumers For Retail Choice Sponsored by Wal-Mart*, 5 P.3d 934, 936-
7 37 (Ariz. Ct. App. 2000) (quotation marks and citations omitted). An ordinance may also
8 be invalid if it enters a field occupied by the state. *Id.* at 937. But “to find preemption
9 through state occupation of the field, ‘[t]he existence of a preempting policy must be
10 clear. Also, the assertedly competing provisions in question *must be actually conflicting*
11 *rather than capable of peaceful coexistence.*” *Union Transportes de Nogales v. City of*
12 *Nogales*, 985 P.2d 1025, 1030 (Ariz. 1999) (emphasis in original) (quoting *Jett*, 882 P.2d
13 at 432).¹⁵

14 Assuming that the regulation of pet stores involves a matter of statewide concern,
15 the Court can discern no conflict between the Ordinance and A.R.S. §§ 44-1799 *et seq.*
16 The Ordinance prohibits pet stores from selling animals obtained from commercial
17 breeders. The statute also regulates pet stores, which are defined as “commercial
18 establishment[s] that engage[] in a for-profit business of selling at retail cats, dogs or
19 other animals[.]” *Id.* § 44-1799. The statute requires pet stores to provide adequate
20 housing, food, space, and veterinary care for their animals. *Id.* § 44-1799.04. The statute
21 also requires a pet store to refund the cost of a pet if a veterinarian, within a certain

22
23 ¹⁵ In *Consumers For Retail Choice*, decided after *Union Transportes de Nogales*,
24 the Arizona Court of Appeals stated that “[e]ven if a city ordinance on a matter of local
25 and statewide concern does not conflict with a state statute, however, it may nevertheless
26 be invalid if the state has appropriated the field.” 5 P.3d at 937. Earlier decisions have
27 reached the same conclusion. *See State v. Mercurio*, 736 P.2d 819, 823 (Ariz. Ct. App.
28 1987) (finding that “[w]here there is no direct conflict between state statutes and the
exercise of power authorized by a city’s charter, our inquiry is whether the state
legislation has . . . completely occupied the field”). These decisions appear inconsistent
with the Arizona Supreme Court’s emphasis that, even if the state has occupied a field,
there must be an actual conflict between the statute and Ordinance in order for the
Ordinance to be preempted. *Union Transportes de Nogales*, 985 P.2d at 1030; *see also*
Winkle v. City of Tucson, 949 P.2d 502, 505 (Ariz. 1997) (“To be preempted, a municipal
ordinance must actually conflict with governing state law.”).

1 amount of time, certifies that the animal was ill when sold. *Id.*, § 44-1799.05. The state
2 may assess penalties against a store for violating the statute. *Id.* §44-1799.08.

3 The statute and Ordinance certainly regulate the same subject, but “[m]ere
4 commonality” of subject matter does not create a conflict. *Consumers For Retail Choice*,
5 5 P.3d at 937. “[A] conflict exists only where a statute and ordinance are mutually
6 exclusive, so that compliance with both is impossible.” *Wonders v. Pima Cnty.*, 89 P.3d
7 810, 813 (Ariz. Ct. App. 2004). Here, compliance with both is not impossible. Under the
8 Ordinance, a pet store is unable to purchase animals from commercial breeders for resale,
9 but it may nonetheless comply with the statute by ensuring the health of the animals it
10 acquires from shelters and humane societies. Plaintiffs argue that the statute specifically
11 authorizes the sale of animals bred by USDA-licensed breeders. The Court does not
12 agree. The statute simply requires a pet store to give certain information to a customer “*if*
13 the animal is from a source that is licensed by the [USDA].” A.R.S. §§ 44-1799.02
14 (emphasis added). There being no conflict between the Ordinance and statute, Plaintiffs’
15 preemption claim fails as a matter of law.

16 **VIII. Conclusion.**

17 Puppies ‘N Love appears to be an exemplary pet store. The store avoids buying
18 from puppy mills and works hard to ensure that its puppies have been raised in a humane
19 and caring environment. No doubt, the burden of the Ordinance will fall hard on the
20 Puppies ‘N Love store in Phoenix. But the Court’s place is not to judge the wisdom or
21 fairness of the City’s decision to pass the Ordinance. Rather, the Court may judge only
22 whether the Ordinance conflicts with the constitutional provisions Plaintiffs have cited.
23 There being no conflict between the Ordinance and the United States and Arizona
24 Constitutions, the Court must uphold the Ordinance and grant summary judgment for the
25 Defendant City of Phoenix and the HSUS.

26 **IT IS ORDERED:**

- 27 1. Plaintiffs’ motion for summary judgment (Doc. 143) is **denied**.
28 2. Defendant and Intervenor’s motion for summary judgment (Docs. 147,

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

151) is **granted**.

3. Plaintiffs’ and Intervenor’s motions to seal (Docs. 149, 159) are **granted**.

4. The Clerk is directed to enter judgment and terminate this action.

Dated this 24th day of July, 2015.



David G. Campbell
United States District Judge