NO.

IN THE SUPREME COURT OF THE UNITED STATES

THE STATE OF MISSOURI, EX REL. JOSHUA D. HAWLEY; ET AL.,

Petitioners,

v.

XAVIER BECERRA, ATTORNEY GENERAL OF CALIFORNIA; ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a State has *parens patriae* standing to challenge another State's commercial regulations on the ground that those regulations violate the Commerce Clause by impermissibly discriminating against out-of-state commerce, unduly burdening interstate commerce, and purporting to regulate commercial activity that occurs entirely outside the borders of the regulating State.

PARTIES TO THE PROCEEDING

Petitioners the State of Missouri, ex rel. Joshua D. Hawley; the State of Alabama, ex rel. Steven T. Marshall; the Commonwealth of Kentucky, ex rel. Andy Beshear; the State of Nebraska, ex rel. Douglas J. Peterson; the State of Oklahoma; and Terry E. Branstad, Governor of the State of Iowa, were appellants in the United States Court of Appeals for the Ninth Circuit.

Kamala Harris, in her official capacity as Attorney General of the State of California, was an appellee in the United States Court of Appeals for the Ninth Circuit. Respondent Xavier Becerra is the successor in office to Kamala Harris.

Respondents Karen Ross, in her official capacity as Secretary of the California Department of Food and Agriculture; the Humane Society of the United States; and the Association of California Egg Farmers were appellees in the United States Court of Appeals for the Ninth Circuit.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases (Continued) **Page(s)**

Cases (Continued) **Page(s)**

Statutes **Page(s)**

Other Authorities **Page(s)**

OPINIONS BELOW

The amended opinion of the United States Court of Appeals for the Ninth Circuit (App. 1-20, *infra*) is available at 2017 WL 361934. The order of the United States District Court for the Eastern District of California (App. 21-57, *infra*) is published at 58 F. Supp. 3d 1059.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on November 17, 2016. Petitioners invoke the Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT

This case arises from an extraordinary attempt by the State of California to regulate agriculture in every other State in the Union—and for the express purpose of protecting California farmers from interstate competition. That is precisely the sort of State interference with interstate commerce the Constitution does not permit. Six States—Missouri, Nebraska, Oklahoma, Alabama, Kentucky, and Iowa (the "Plaintiff States")—challenged this affront to their sovereignty and to their role in the federal system. Both the district court and the United States Court of Appeals for the Ninth Circuit erroneously held that the Plaintiff States lacked *parens patriae* standing to assert a challenge to California's extraterritorial regulations under the Commerce Clause. The Ninth

Circuit's ruling decides an important question of federal law in a way that contradicts this Court's jurisprudence, creates a split in the Circuits, and demeans the ability of the States to protect their vital interests in the federal system. The decision thus warrants this Court's review.

In November 2008, California voters enacted Proposition 2 ("Prop 2"), a ballot initiative that imposed onerous new restrictions on California farmers. App. 67, ¶ 3; App. 76-78, ¶¶ 56-62;[1] App. 58-61; Cal. Health & Safety Code §§ 25990-25993. Prop 2's restrictions effectively prohibited California's egg producers from using nationally accepted, industry-standard cage systems. App. 67, ¶ 3. After the passage of Prop 2, California farmers, economists, and other commentators raised concerns that the initiative's restrictions would place California egg farmers at a competitive disadvantage with respect to non-California egg farmers in the California egg market. App. 67-68, ¶ 5; App. 77, ¶¶ 58-59. In addition to the initial capital outlays necessary for California egg farmers to comply with Prop 2—projected by one study to run to $385 million—these commentators further projected that complying with Prop 2 would increase prospective egg-production costs by at least 20%. App. 67-68, ¶ 5; App. 77, ¶¶ 58-59.

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[1] Because the Plaintiff States' claims were resolved on a motion to dismiss, the Court treats the allegations in the States' Complaint as true. *See Ashcroft* v. *Al-Kidd*, 563 U.S. 731, 734 (2011) ("Because this case arises from a motion to dismiss, we accept as true the factual allegations in [the plaintiff's] complaint.").

Faced with these facts, the California Assembly quickly set to work on measures to improve the relative economic competitiveness of California farmers by saddling out-of-state egg farmers with the same burdensome restrictions imposed by Prop 2. In early 2010, the Assembly passed Assembly Bill 1437 ("AB 1437"). App. 78-79, ¶ 63-67; App. 62-64. AB 1437 provides that all eggs sold in California, whether produced in California or in other States, must comply with Prop 2's requirements. App. 78, ¶ 64; Cal. Health & Safety Code § 25996. Because Prop 2 already had imposed these restrictions on California farmers, AB 1437 in reality applied exclusively to egg farmers outside the state. *See* App. 62-64; App. 86, ¶ 83.

The California Assembly made no secret of its intentions. It expressly recognized that the primary purpose of the law was to impose agricultural regulations on out-of-state egg producers in order to protect California egg farmers and improve their economic position. App. 80, ¶ 70. An analysis prepared by the California Assembly's Appropriations Committee explained AB 1437's rationale:

> With the passage of Proposition 2 in November 2008, 63% of California's voters determined that it was a priority for the state to ensure the humane treatment of farm animals. *However, the proposition only applies to in-state producers. The intent of this legislation is to level the playing*

> *field so that in-state producers are not disadvantaged.*

App. 81, ¶ 70 (emphasis added). By its own admission, the California legislature enacted AB 1437 solely to burden out-of-state egg producers and improve the competitive position of producers in California. *See id.* Likewise, in a report recommending that then-Governor Schwarzenegger sign AB 1437, the California Department of Agriculture ("CDFA") emphasized that "35% of shell eggs consumed in California are imported from out of state," and that enacting AB 1437 would "ensure a level playing field for California's shell egg producers" in their competition against out-of-state farmers. App. 82-83, ¶ 73.

Moreover, because AB 1437 applies only to out-of-state egg production, the law purports to regulate agriculture that occurs entirely outside California, including within the borders of the Plaintiff States. *See* App. 86-87, ¶¶ 82-85.[2] And the impact of AB 1437 has now extended beyond

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[2] AB 1437's most vocal advocates outside the legislature clearly envisioned the law as a means to impose burdensome new regulations on farmers across the country. *See, e.g.*, *Gov. Schwarzenegger signs bill to require out-of-state egg producers to comply with Proposition 2 space requirements for egg-laying hens*, L.A. TIMES (July 8, 2010), *available at* http://latimesblogs.latimes.com/unleashed/2010/07/gov-schwarzenegger-signs-bill-to-require-outofstate-egg-producers-to-comply-with-proposition-2-space.html (quoting the CEO of the Humane Society of the United States as exclaiming that "it would be hard to overestimate the potential of this bill to change the way laying hens are treated throughout the United States") (last visited Feb. 13, 2017).

extraterrorial regulation, to extraterrorial inspection and enforcement. Media reports published after the filing of this case state that California egg inspectors have begun inspecting farms in other States for the purpose of enforcing AB 1437. *See, e.g.*, Derek Wallbank & Alan Bjerga, *California's Humane-Chicken Act Complicates U.S. Farm Law*, BLOOMBERG (Dec. 23, 2014), *available at* https://www.bloomberg.com/news/articles/2014-12-23/california-s-humane-chicken-act-complicates-u-s-farm-law (last visited Feb. 13, 2017). According to such reports, AB 1437 "has farmers rushing to modify their coops while California agricultural agents crisscross the country certifying operations." *Id.*

The Plaintiff States filed suit in the United States District Court for the Eastern District of California, seeking an injunction against the enforcement of AB 1437 and regulations promulgated under the statute. App. 65-96. In particular, the Plaintiff States contended that these laws violate the Commerce Clause of the Federal Constitution because they have the purpose and effect of discriminating against out-of-state egg producers, they impermissibly burden interstate commerce to a degree that outweighs any putative state interests underlying the laws, and they unlawfully purport to regulate conduct that occurs entirely outside California. App. 90-91, ¶¶ 95-100. The Plaintiff States further contended that the California egg restrictions are preempted by the Federal Egg Products Inspection Act, 21 U.S.C. § 1032. App. 91-92, ¶¶ 102-105.

The district court dismissed the Plaintiff States' First Amended Complaint, holding that the Plaintiff States lacked standing to pursue their claims. App. 34-49. In particular, the district court concluded that the conduct alleged in the First Amended Complaint did not implicate any quasi-sovereign interests of the Plaintiff States, and thus those States could not establish *parens patriae* standing. App. 45-49.

On appeal, the United States Court of Appeals for the Ninth Circuit affirmed the district court's dismissal, holding that the Plaintiff States lacked *parens patriae* standing to pursue their claims. *See Missouri* v. *Harris*, -- F.3d --, 2017 WL 361934 (9th Cir. Jan. 17, 2017) (amended opinion), App. 1-20. Relying on *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico*, 458 U.S. 592 (1982), the Plaintiff States argued in the Ninth Circuit that the California egg regulations violated what this Court has called the States' quasi-sovereign interest in "securing observance of the terms under which [they] participate[] in the federal system" and "ensuring that the State[s] and [their] residents are not excluded from the benefits that are to flow from participation in the federal system." *Id.* at 607-08.

The Ninth Circuit rejected this argument, concluding that the protectionist purpose and effect of California's egg laws and the purportedly extraterritorial reach of those laws did not implicate the State's interests under the federal system. *See Missouri* v. *Harris*, 2017 WL 361934, at *6, App. 16-17. In holding that the Plaintiff States lacked *parens patriae* standing to assert a dormant Commerce Clause challenge to California's egg laws,

the Ninth Circuit placed primary emphasis on the fact that it discerned no impediment to out-of-state egg producers suing on their own behalf: "Here, complete relief would be available to the egg farmers themselves, were they to file a complaint on their own behalf. . . . [L]arge egg producers certainly could file an action like this one on their own." *Id.* at *3, App. 11. The Ninth Circuit reasoned that "private relief" must be "unlikely or unrealistic" before a State can assert *parens patriae* standing to pursue a dormant Commerce Clause challenge. *Id.*

Second, the Ninth Circuit reasoned that the California regulations' anticipated impact on egg prices in the Plaintiff States—thus affecting millions of egg consumers in each State—did not constitute an injury sufficiently specific and direct to support Article III standing. *Id.* at *4-5, App. 12-16. The Ninth Circuit required a "substantial" economic impact on the State to support *parens patriae* standing, and it reasoned that eggs were not sufficiently important to each State's economy to support such a finding: "An ordinary consumer commodity, such as eggs, lacks the central economic significance to a state of a utility's product, such as natural gas." *Id.* at *5, App. 16 (distinguishing *Pennsylvania* v. *West Virginia*, 262 U.S. 553, 592 (1923)).

Finally, the Ninth Circuit rejected the claim that the Plaintiff States' allegation of discriminatory treatment within the federal system could establish *parens patriae* standing. *Id.* at *6-7, App. 16-17. In so holding, the Ninth Circuit previewed the merits of the Plaintiff States' discrimination claim, stating that "[t]he Shell Egg Laws do not distinguish among

eggs based on their state of origin" and thus are "not discriminatory." *Id.* at *6, App. 16 (quotation omitted). The Ninth Circuit's rejection of *parens patriae* standing rested expressly on this improper preview of the merits.[3] The court purported to distinguish *Alfred L. Snapp* on the ground that the California regulations were not discriminatory, holding that "*Snapp* does not assist Plaintiffs because there is no discrimination here." *Id.* at *6, App. 15. Likewise, it purported to distinguish *Georgia* v. *Pennsylvania Railroad Co.*, 324 U.S. 439 (1945), on the ground that "the Shell Egg Laws are not discriminatory." *Id.*, App. 17. On this basis, the Ninth Circuit concluded that "Plaintiffs' allegations of discrimination do not establish *parens patriae* standing." *Id.*

REASONS FOR GRANTING THE PETITION

The Court has recognized that States have a quasi-sovereign interest, sufficient to support *parens*

[3] This review of the merits for the purpose of deciding the Plaintiff States' standing was unquestionably improper. *See, e.g., Warth* v. *Seldin*, 422 U.S. 490, 500 (1975) (holding that "standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal"); *Davis* v. *United States*, 564 U.S. 229, 249 n.10 (2011) (rejecting a party's argument that impermissibly conflated standing with the underlying merits); *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 225 (1974) (reversing lower court's holding on standing, which had been premised on a "premature evaluation of the merits of respondents' complaint"); *Davis* v. *Guam*, 785 F.3d 1311, 1316 (9th Cir. 2015) ("These are merits questions, and standing doesn't depend on the merits of the plaintiff's contention that particular conduct is illegal" (quotation and brackets omitted)).

patriae standing, in "ensuring that the State and its residents are not excluded from the benefits that are to flow from participation in the federal system." *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico*, 458 U.S. 592, 608 (1982). For this reason, a "State need not wait for the Federal Government to vindicate the State's interest in the removal of barriers to the participation by its residents in the free flow of interstate commerce," but instead may bring a *parens patriae* claim to challenge such a barrier. *Id.*

The Ninth Circuit's decision in this case directly contradicts this Court's jurisprudence on a significant question of federal law. The Ninth Circuit's holding—*i.e.*, that States lack *parens patriae* standing to bring Commerce Clause challenges unless there is an impediment to private parties bringing such a challenge—cannot be reconciled with the Court's holding in *Georgia* v. *Pennsylvania Railroad Co.*, 324 U.S. 439 (1945). Moreover, the Ninth Circuit's analysis disregards the Court's holding in *Alfred L. Snapp* that *parens patriae* standing exists so that States can vindicate their own quasi-sovereign interests, not to bring claims on behalf of citizens who are unable to protect their own personal interests. *Alfred L. Snapp*, 458 U.S. at 600.

The lower court's deviation from this Court's rulings has created a Circuit split. Following this Court's precedents, the United States Court of Appeals for the Second Circuit (as well as multiple federal district courts) has stated that States have *parens patriae* standing to challenge laws that violate the Commerce Clause of the United States Constitution. *See Connecticut* v. *Cahill*, 217 F.3d 93

(2d Cir. 2000). By contrast, the Ninth Circuit held in this case that the Plaintiff States had no independent quasi-sovereign interest in challenging California's egg laws under the Commerce Clause. Because the Ninth Circuit's holding here contradicts Second Circuit precedent, the Court should grant review in this case to resolve this split in authority.

Moreover, this case presents a question of significant importance that warrants this Court's review. Federal court review of disputes between States regarding commercial barriers plays an important role in preserving the national unity that the Constitution prescribes. *See Georgia* v. *Pa. R. Co.*, 324 U.S. 439, 450 (1945). Depriving States of a tribunal in which to litigate such disputes both infringes on state sovereignty and also may invite States to respond to perceived Commerce Clause violations through more harmful means, such as retaliatory commercial regulations. *See Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366, 379-80 (1976).

For all these reasons, the Ninth Circuit's decision warrants this Court's review.

A. The Ninth Circuit's Decision Conflicts with This Court's *Parens Patriae* Cases and Decides an Important Question of Federal Law Contrary to This Court's Guidance.

This Court has held that the States have a quasi-sovereign interest in seeing that they and their citizens enjoy the rights and benefits of the federal system. That holding is just what the Ninth Circuit has now denied.

Parens patriae standing has deep roots in the English common law, but the doctrine "has been greatly expanded in the United States beyond that which existed in England." *Hawai'i* v. *Standard Oil Co.*, 405 U.S. 251, 257 (1972). As it has evolved in American law, *parens patriae* standing typically "does not involve the States stepping in to represent the interests of particular citizens who, for whatever reason, cannot represent themselves." *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico*, 458 U.S. 592, 600 (1982). Instead, a State has *parens patriae* standing if it "assert[s] an injury to what has been characterized as a 'quasi-sovereign' interest." *Id.*

This Court has been clear: "[T]he State has an interest in securing observance of the terms under which it participates in the federal system. In the context of *parens patriae* actions, this means ensuring that the State and its residents are not excluded from the benefits that are to flow from participation in the federal system." *Id.* at 607-08. A State has "an interest, independent of the benefits that might accrue to any particular individual, in assuring that the benefits of the federal system are not denied to its general population." *Id.* at 608.

The Court has expressly recognized that a State's quasi-sovereign interest in preserving the benefits of the federal system includes an interest in challenging burdens on interstate commerce. In *Alfred L. Snapp*, the Court explained that "the State need not wait for the Federal Government to vindicate the State's interest in the removal of barriers to the participation by its residents in the free flow of interstate commerce." *Id.* at 608.

States have relied on this interest in several of the Court's seminal *parens patriae* cases. For example, in *Georgia* v. *Pennsylvania Railroad Co.*, the State of Georgia challenged an alleged conspiracy to steer shipping traffic to the ports of certain other States. 324 U.S. 439, 443-45 (1945). The Court recognized that this "restraint of trade and commerce among the States" injured the State's quasi-sovereign interests. *Id.* at 443; *see also id.* at 450-51. By burdening interstate commerce, *id.* at 450, the defendants' conspiracy had "relegate[d] [Georgia] to an inferior economic position among her sister States," *id.* at 451. The State's interest in the free flow of interstate commerce guaranteed under the federal system gave the State *parens patriae* standing to challenge the conspiracy. *Id.* at 450-51. As the Court explained, "[t]hese are matters of grave public concern in which Georgia has an interest apart from that of particular individuals who may be affected." *Id.* at 451.

Similarly, in *Pennsylvania* v. *West Virginia*, the Court held that the Commonwealth of Pennsylvania had *parens patriae* standing to challenge a West Virginia statute restricting the interstate sale of natural gas on the ground that the statute "directly interfere[d] with interstate commerce and therefore contravene[d] the commerce clause." 262 U.S. 553, 582, 592 (1923); *see also Great Atl. & Pac. Tea Co.* v. *Cottrell*, 424 U.S. 366, 380 (1976) (recognizing that if the State of Mississippi believed that another State had enacted laws that violated the Commerce Clause, "Mississippi and its [milk] producers may pursue their constitutional remedy by suit in state or federal court challenging

[the other State's] actions as violative of the Commerce Clause").

The Ninth Circuit's decision directly conflicts with the Court's *parens patriae* cases by holding that the Plaintiff States lack their own interest, distinct from the personal economic interests of private parties, in challenging California laws that allegedly erect impermissible barriers to interstate commerce. *See Missouri* v. *Harris*, 2017 WL 361934, at *6, App. 16-17. The interests underlying the Plaintiff States' claims implicate precisely the concern regarding the States' role in the federal system that the Court has recognized as sufficient to support *parens patriae* standing. The Commerce Clause "reflected a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Hughes* v. *Oklahoma*, 441 U.S. 322, 325-26 (1979). "Under the Articles of Confederation, state taxes and duties hindered and suppressed interstate commerce; the Framers intended the Commerce Clause as a cure for these structural ills. It is in this light that we have interpreted the negative implication of the Commerce Clause." *Quill Corp.* v. *North Dakota*, 504 U.S. 298, 312 (1992) (internal citation omitted). "The Commerce Clause is a foundation for the proper balance between state and federal responsibilities, a balance designed to protect states against economic injuries inflicted by other states' impositions on interstate commerce." Peter D. Enrich, *Saving the*

States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business, 110 HARV. L. REV. 377, 419 (1996). "Infringements against this structural protection threaten states' abilities to fulfill their sovereign functions and to promote their citizens' well-being." *Id.*

Enforcing the limits of the Commerce Clause thus directly implicates the States' quasi-sovereign interest in preserving their role and rights under the federal system. *See Alfred L. Snapp*, 458 U.S. at 607-08. Because the "primary focus [of the Commerce Clause] concerns the structural dangers posed to the federal system by excessive state interference with the dynamics of the national economy," "states are particularly appropriate parties to bring Commerce Clause issues before the courts." Enrich, *Saving the States from Themselves*, 110 HARV. L. REV. at 419.

The Commerce Clause does not merely preserve the balance of authority among the States and the Federal Government. Its structural limitations also preserve individual liberty. *See Bond* v. *United States*, 564 U.S. 211, 221-22 (2011). "State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power." *Id.* at 221 (quoting *New York* v. *United States*, 505 U.S. 144, 181 (1992)). Which is to say, the States have a quasi-sovereign interest in promoting the liberty of their individual citizens by policing the boundaries of the Commerce Clause.

Contrary to all of this, the Ninth Circuit held that only individuals and businesses—and not States—have an interest in challenging California's

protectionist agricultural laws under the Commerce Clause's structural constraints. *See Missouri* v. *Harris*, 2017 WL 361934, at *3-6, App. 10-17. This conclusion ignores the fact that a State's challenge to protectionist laws "under the Commerce Clause precisely 'implicates serious and important concerns of federalism.'" *Wyoming* v. *Oklahoma*, 502 U.S. 437, 451 (1992) (quoting *Maryland* v. *Louisiana*, 451 U.S. 725, 744 (1981)). "[T]he Commerce Clause . . . [is] informed not so much by concerns about fairness for the individual defendant as by structural concerns about the effects of state regulation on the national economy." *Quill Corp.*, 504 U.S. at 312-13. Under this Court's cases, the States, not private litigants, have primary standing and responsibility to enforce the negative Commerce Clause against discriminatory and overreaching regulation by their sister States.

Moreover, this Court's cases foreclose the Ninth Circuit's particular reasoning in this case. As noted above, in denying the Plaintiff States' quasi-sovereign interest in bringing this suit, the Ninth Circuit placed primary emphasis on its conclusion that there was no impediment preventing private egg producers from filing suit to challenge California's regulations. *Missouri* v. *Harris*, 2017 WL 361934, at *3, App. 11 ("Here, complete relief would be available to the egg farmers themselves, were they to file a complaint on their own behalf . . . . [L]arge egg producers certainly could file an action like this one on their own.").

The Ninth Circuit's holding that a State lacks *parens patriae* standing where private litigants could bring a Commerce Clause challenge cannot be

squared with this Court's cases permitting States to vindicate their quasi-sovereign interest in preserving their rights under the federal system. For example, the Ninth Circuit's holding contradicts this Court's decision in *Georgia* v. *Pennsylvania Railroad Co.*, 324 U.S. 439 (1945). In that case, Georgia sued twenty railroad companies, alleging an illegal price-fixing scheme that placed Georgia-based businesses at a competitive disadvantage. *Id.* at 443-45. Undoubtedly, these Georgia businesses could have brought private claims on their own, and the alleged losses resulting from the conspiracy gave them every economic incentive to do so. *See id.* at 444, 450-51. Nevertheless, the Court emphasized that conspiring to limit Georgia's participation in interstate commerce implicated "an interest [of the State] apart from that of particular individuals who may be affected." *Id.* at 451. For that reason, the Court did not consider whether Georgia businesses affected by the conspiracy could bring their own claims. *Id.*

The Ninth Circuit's reasoning also contradicts the Court's analysis in *Alfred L. Snapp*. As this Court explained, "the concept of *parens patriae* standing . . . does not involve the States stepping in to represent the interests of particular citizens who, for whatever reason, cannot represent themselves. In fact, if nothing more than this is involved—*i.e.*, if the State is only a nominal party without a real interest of its own—then it will not have standing under the *parens patriae* doctrine." *Alfred L. Snapp*, 458 U.S. at 600. The Ninth Circuit's requirement of an impediment to private suit before a state may assert a quasi-sovereign interest is therefore a throwback to the "common-law approach" under

which *parens patriae* standing arose from the "royal prerogative" to care for those who are "legally unable" to care for themselves. *Id.* As this Court recognized in *Alfred L. Snap*p—and in the specific context of dormant Commerce Clause challenges, nonetheless—this "common-law approach . . . has relatively little to do with the concept of *parens patriae* standing that has developed in American law." *Id.*

The Ninth Circuit's holding also runs counter to the Court's analysis in *Wyoming* v. *Oklahoma*, 502 U.S. 437 (1992). In that case, this Court held that Wyoming had standing to bring a dormant Commerce Clause challenge to an Oklahoma regulation requiring Oklahoma's coal-fired power plants to burn a mixture containing at least 10 percent of Oklahoma-mined coal. *Id.* at 440, 446-54. The Court rejected the argument on which the Ninth Circuit principally relied below: "Oklahoma makes much of the fact that the mining companies affected in Wyoming could bring suit raising the Commerce Clause challenge, as private parties aggrieved by state action often do." *Id.* This Court held that the opportunity for such well-financed private parties to bring suit did not undermine the State's distinct standing: "Even if such an action [by private parties] were proceeding, however, Wyoming's interests would not be directly represented. . . . Wyoming brings suit as a sovereign seeking declaration from this Court that Oklahoma's Act is unconstitutional." *Id.* at 452; *see also id.* at 462 (Scalia, J., dissenting) (noting that the majority's opinion "recognize[s] . . . a *State's* standing to bring a negative Commerce Clause action," notwithstanding that "coal

companies with sales allegedly affected by the Oklahoma law have, for whatever reason, chosen not to litigate").

For all these reasons, the Ninth Circuit's decision warrants review because it decides an important question of federal law contrary to this Court's precedents.

B. The Ninth Circuit's Holding Conflicts with the Second Circuit's Decision That a State Has *Parens Patriae* Standing to Assert Dormant Commerce Clause Challenges.

The Ninth Circuit's decision opens a split in Circuit authority, one that can only be resolved by this Court. In *Connecticut* v. *Cahill*, 217 F.3d 93 (2d Cir. 2000), the State of Connecticut sued to enjoin a New York statute regulating commercial lobstering. *Id.* at 96. Connecticut contended that the statute violated the Commerce Clause by discriminating against out-of-state lobstermen, and it premised its standing on a *parens patriae* theory. *Id.*

The Second Circuit acknowledged, as the parties in the case conceded, that "Connecticut has standing to bring this suit in its *parens patriae* capacity." *Id.* at 97. As the court explained, "[a] state possesses a quasi-sovereign interest . . . in 'not being discriminatorily denied its rightful status within the federal system.'" *Id.* (quoting *Alfred L. Snapp*, 458 U.S. at 607). This interest is at issue, the court noted, in "claims that a law of the defendant State violated the Commerce Clause." *Id.* Thus, Connecticut had *parens patriae* standing to

pursue its Commerce Clause claim challenging the New York statute. *Id.*

The Ninth Circuit's decision in this case squarely conflicts with the Second Circuit's analysis in *Cahill*. The interests raised by the Plaintiff States here are identical to those on which Connecticut relied: by enacting laws that discriminate against out-of-state egg producers in both purpose and effect, California has violated the Commerce Clause. *Compare* App. 68-69, ¶¶ 7-8, App. 90-91, ¶¶ 95-100, *with Cahill*, 217 F.3d at 96 (noting that Connecticut had *parens patriae* standing to bring a claim that a New York statute was "discriminatory against non-New Yorkers"). Contradicting the Second Circuit,[4] the court below held that this interest does not support *parens*

[4] While the Second Circuit in *Cahill* noted that the parties had not disputed Connecticut's *parens patriae* standing to assert its dormant Commerce Clause challenge in that case, the court held that its review of the applicability of *parens patriae* law to Connecticut's claim was essential to its holding. *Cahill*, 217 F.3d at 96. The *Cahill* Court stated that "a review of the interests that plaintiff-States have sought to protect in the federal courts will illuminate our discussion of whether this suit is a controversy between two States," and then noted that "[t]he Supreme Court has exercised original jurisdiction over suits brought by States acting as *parens patriae* against other States, sometimes adjudicating claims that a law of the defendant State violated the Commerce Clause." *Id.* Accordingly, there can be no doubt that the law of the Second Circuit—consistent with this Court's precedents—endorses exactly the *parens patriae* standing of States to assert dormant Commerce Clause challenges that the Ninth Circuit has now denied. *Id.*

patriae. *See Missouri* v. *Harris*, 2017 WL 361934, at *6.

Multiple federal district courts have reached the same conclusion as the Second Circuit. In *Minnesota ex rel. Hatch* v. *Hoeven*, the district court concluded that the State of Minnesota had *parens patriae* standing to challenge North Dakota regulations on the ground that the regulations violated the Commerce Clause. 331 F. Supp. 2d 1074, 1077-78 (D.N.D. 2004). The court recognized that this Commerce Clause claim implicated Minnesota's quasi-sovereign interest in preserving the State's place in the federal system and in preserving the flow of interstate commerce involving the State's citizens. *Id.* at 1080-81. Similarly, in *Beyer Farms, Inc.* v. *Brown*, the district court concluded that the State of New York had *parens patriae* standing to challenge New Jersey statutes and regulations regarding the sale of milk. 721 F. Supp. 644, 646 (D.N.J. 1989). The court explained that "suits under the Commerce Clause are particularly apt for *parens patriae* standing since that clause is one of the key elements of our federalist system." *Id.* at 646.

The square split between the Second and Ninth Circuits means that the ability of a State to preserve its role under the federal system now depends on where the State is located and whose regulation it challenges. If the State of Connecticut, New York, or Vermont were to enact a law that violates the Commerce Clause, then other States whose quasi-sovereign interests are implicated by the laws have *parens patriae* standing to challenge those laws. *See Cahill*, 217 F.3d at 97. But if

precisely the same law were enacted by a State in the Ninth Circuit, the law would evade *parens patriae* challenges. *See Missouri* v. *Harris*, 2017 WL 361934, at *6, App. 16-17. This disparity leads to an inequitable situation in which some States have a greater ability to exercise their sovereignty than do other States. The Court should grant this Petition to ensure uniform application of *parens patriae* standing and to resolve the split in authority.

C. This Case Presents a Question of National Importance That Warrants the Court's Review.

The lower court's denial of *parens patriae* standing deprives States of a judicial forum in which to resolve their commercial disputes with other States, demeaning the States' sovereign right to vindicate their interests in preserving their role under the federal system.

The Framers recognized that commercial disputes between the States nearly pulled the Nation apart under the Articles of Confederation. The future integrity of the Union, they reasoned, depended on an orderly method for resolving such disputes. *See Quill Corp.*, 504 U.S. at 312; THE FEDERALIST No. 7, at 57 (Alexander Hamilton) (Clinton Rossiter ed., 2003) (recognizing the potentially fatal risks that "[e]ach State . . . would pursue a system of commercial policy peculiar to itself," or that "some States would . . . render[] others tributary to them by commercial regulations").

This Court has said a key purpose for the doctrine of *parens patriae* standing is to provide a

judicial forum for resolving disputes between States regarding commercial barriers. *See Georgia* v. *Pa. R. Co.*, 324 U.S. at 450 (recognizing that "[t]rade barriers, recriminations, intense commercial rivalries had plagued the colonies," and explaining that *parens patriae* standing exists "as an alternative" to resolving such disputes through "diplomacy and war"); *see also Great Atl. & Pac. Tea*, 424 U.S. at 379-80 (explaining that if one State believes that the regulations of another State impermissibly burden interstate commerce, the proper approach is to bring suit in federal court under the Commerce Clause). That is why this Court has held that "the State need not wait for the Federal Government to vindicate the State's interest in the removal of barriers to the participation by its residents in the free flow of interstate commerce." *Alfred L. Snapp*, 458 U.S. at 608.

The Ninth Circuit's holding in this case frustrates the mechanism for resolving disputes between the States that the Framers worked to create. If allowed to stand, the decision invites just the sort of retaliatory commercial measures the Framers feared, ultimately undermining the federal system. *See, e.g.*, *Great Atl. & Pac. Tea*, 424 U.S. at 379 (describing an instance in which one State might enact laws burdening interstate commerce to retaliate against another State's laws); *I.M. Darnell & Son Co. v. City of Memphis*, 208 U.S. 113, 124 (1908) (recognizing that barriers to interstate commerce "cannot fail to beget irritation and to lead to retaliation"). This Court should grant review to preserve a forum for States to resolve their commercial disputes without resort to means that

undermine the unity envisioned by the Constitution. "The Constitution . . . was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not in division." *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935).

CONCLUSION

For the reasons stated, the Court should grant the Plaintiff States' Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX

TABLE OF CONTENTS

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 14-17111

D.C. No. 2:14-cv-00341-KJM-KJN

[Filed January 17, 2017]

STATE OF MISSOURI EX REL. CHRIS KOSTER, Attorney General; STATE OF NEBRASKA EX REL. JON BRUNING, Attorney General; STATE OF OKLAHOMA EX REL. E. SCOTT PRUITT, Attorney General; STATE OF ALABAMA EX REL. LUTHER STRANGE, Attorney General; COMMONWEALTH OF KENTUCKY EX REL. JACK CONWAY, Attorney General; TERRY E. BRANSTAD, Governor of State of Iowa, *Plaintiffs-Appellants*,	)
v.	)
KAMALA D. HARRIS, in her official capacity as Attorney General of the State of California; KAREN ROSS, in her official capacity as Secretary of the California Department of Food	)

and Agriculture, *Defendants-Appellees*,

and

HUMANE SOCIETY OF THE UNITED STATES; ASSOCIATION OF CALIFORNIA EGG FARMERS, *Intervenor-Defendants-Appellees.*

ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Eastern District of California
Kimberly J. Mueller, District Judge, Presiding

Argued and Submitted October 19, 2016
San Francisco, California

Filed November 17, 2016
Amended January 17, 2017

Before: Susan P. Graber and Mary H. Murguia,
Circuit Judges, and Raner C. Collins,[*]
Chief District Judge.

Order;
Opinion by Judge Graber

[*] The Honorable Raner C. Collins, Chief United States District Judge for the District of Arizona, sitting by designation.

SUMMARY[**]

Civil Rights

The panel affirmed the district court's dismissal of an action for lack of *parens patriae* standing but remanded with instructions to dismiss without prejudice.

Plaintiffs are six states seeking to block enforcement of California laws and regulations prescribing standards for the conditions under which chickens must be kept in order for their eggs to be sold in the state. Plaintiffs sought to block the laws before they took effect. The panel held that the plaintiffs failed to establish *parens patriae* standing because: (1) they failed to articulate an interest apart from the interests of private egg producers, who could have filed an action on their own behalf; (2) the allegations about potential economic effects of the challenged laws, after implementation, were necessarily speculative; and (3) the allegations of discrimination were misplaced because the laws do not distinguish among eggs based on their state of origin. The panel further held that the district court did not err by denying leave to amend because plaintiffs would be unable to assert *parens patriae* standing in an amended complaint.

The panel held that because in theory, plaintiffs could allege post-effective-date facts that might support

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

standing, the complaint should have been dismissed without prejudice.

COUNSEL

J. Andrew Hirth (argued), Deputy General Counsel, Office of the Missouri Attorney General, Jefferson City, Missouri, for Plaintiffs-Appellants.

Paul Stein (argued) and Stephanie F. Zook, Deputy Attorneys General; Constance L. LeLouis, Supervising Deputy Attorney General; Douglas J. Woods, Senior Assistant Attorney General; Kamala D. Harris, Attorney General; Office of the Attorney General, San Francisco, California; for Defendants-Appellees.

Bruce Wagman (argued), Schiff Hardin LLP, San Francisco, California; Rebecca Cary and Peter A. Brandt, Humane Society of the United States, Washington, D.C.; Jonathan Y. Ellis and J. Scott Ballenger, Latham & Watkins LLP, Washington, D.C.; for Intervenor-Defendant-Appellee Humane Society of the United States.

Carl Nichols (argued), Thomas G. Sprankling, Adam I. Klein, and Francesco Valenti, Wilmer Cutler Pickering Hale and Dorr LLP, Washington, D.C.; Randall R. Lee, Wilmer Cutler Pickering Hale and Dorr LLP, Los Angeles, California; for Intervenor-Defendant-Appellee Association of California Egg Farmers.

Sean D. Reyes, Utah Attorney General; Parker Douglas, Utah Federal Solicitor; Utah Attorney General's Office, Salt Lake City, Utah; for Amicus Curiae State of Utah.

Timothy S. Bishop, Michael B. Kimberly, and James F. Tierney, Mayer Brown LLP, Washington, D.C.; Ellen B. Steen and Danielle Hallcom Quist, America Farm Bureau Federation, Washington, D.C.; for Amicus Curiae American Farm Bureau Federation.

Diane L. McGimsey, Edward E. Johnson, Janet Y. Galeria, and Jonathon D. Townsend, Sullivan & Cromwell LLP, Los Angeles, California, for Amici Curiae Animal Legal Defense Fund; Compassion Over Killing, Inc.; and Farm Sanctuary, Inc.

ORDER

The opinion filed November 17, 2016, and published at 842 F.3d 658, is amended by the opinion filed concurrently with this order. No further petitions for rehearing or rehearing en banc may be filed.

OPINION

GRABER, Circuit Judge:

California enacted laws and regulations prescribing standards for the conditions under which chickens must be kept in order for their eggs to be sold in the state. Plaintiffs are six states, which sued to block enforcement of those laws and regulations before they took effect. We agree with the district court that Plaintiffs lacked standing to bring this case as *parens patriae*. We also hold that the district court did not err in denying Plaintiffs leave to amend their complaint. But because the action should have been dismissed without prejudice, we affirm but remand with instructions to dismiss the action without prejudice.

In the 2008 general election, California voters adopted Proposition 2, which enacted new standards beginning on January 1, 2015, for housing farm animals within California including, as relevant here, egg-laying hens. Cal. Health & Safety Code §§ 25990–94. Under Proposition 2, hens may not be confined for the majority of any day "in a manner that prevents [them] from: (a) Lying down, standing up, and fully extending [their] limbs; and (b) Turning around freely." *Id.* § 25990. A violation of these standards is punishable by a $1,000 fine or imprisonment of 180 days in county jail, or both. *Id.* § 25993.

In 2010, California's legislature adopted Assembly Bill 1437 ("AB1437"), which mandated, also beginning on January 1, 2015, that "a shelled egg shall not be sold or contracted for sale for human consumption in California if the seller knows or should have known that the egg is the product of an egg-laying hen that was confined on a farm or place that is not in compliance with animal care standards set forth in [Proposition 2]." Cal. Health & Safety Code § 25996. Therefore, all eggs sold in California must comply with Proposition 2. In 2013, the California Department of Food and Agriculture promulgated egg-related regulations, including salmonella prevention measures and minimum cage sizes for egg-laying hens, all of which also carried an effective date of January 1, 2015. Cal. Code Regs. tit. 3, § 1350(d)(1).

On February 3, 2014, the State of Missouri filed a complaint in the Eastern District of California, asking the court to declare AB1437 and California Code § 1350(d)(1) (collectively the "Shell Egg Laws") invalid, as violating the Commerce Clause or as preempted by

federal statute, and to enjoin California from enforcing the laws. Plaintiffs then filed their First Amended Complaint (the "complaint"), joining the States of Nebraska, Oklahoma, Alabama, and Kentucky and the Governor of Iowa as additional plaintiffs. The Humane Society of the United States and the Association of California Egg Farmers ("Intervenors") moved to intervene as defendants, which the court allowed. Defendants filed a motion to dismiss for lack of subject matter jurisdiction; Intervenors filed their own, similar motions. The district court granted the motions to dismiss, with prejudice. The court concluded that Plaintiffs lacked standing as *parens patriae*, held that their claim was not justiciable, and denied leave to amend as futile. Plaintiffs timely appeal.

A. *Parens Patriae Standing*

States asserting *parens patriae* standing must meet both the basic requirements of Article III standing and the unique requirements of that doctrine. *Table Bluff Reservation (Wiyot Tribe) v. Philip Morris, Inc.*, 256 F.3d 879, 885 (9th Cir. 2001). "To establish Article III standing, an injury must be concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013) (internal quotation marks omitted). In a *parens patriae* case, there are two additional requirements. First, "the State must articulate an interest apart from the interests of particular private parties, *i.e.*, the State must be more than a nominal party." *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez ("Snapp")*, 458 U.S. 592, 607 (1982). Second, "[t]he State must express a quasi-sovereign interest."

Id. On de novo review, *Habeas Corpus Res. Ctr. v. U.S. Dep't of Justice*, 816 F.3d 1241, 1247 (9th Cir. 2016), we conclude that Plaintiffs have not met the first requirement. We therefore need not, and do not, reach the second part of the test, nor do we reach the issue of ripeness.

There are no "definitive limits on the proportion of the population of the State that must be adversely affected." *Snapp*, 458 U.S. at 607. But "more must be alleged than injury to an identifiable group of individual residents." *Id.* "[T]he indirect effects of the injury must be considered as well in determining whether the State has alleged injury to a sufficiently substantial segment of its population." *Id.*[1]

Concerning the parties, the complaint alleges: "Missouri farmers produced nearly two billion eggs in 2012 and generated approximately $171 million in revenue for the state"; "Nebraska is one of the top ten largest egg producers in the United States"; "Alabama is one of the top fifteen largest egg producers in the United States"; "Kentucky farmers produced

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[1] It is unclear whether "substantial segment of the population" and "interest apart from the interest of particular private parties" are separate elements of standing. *See, e.g.*, *Washington v. Chimei Innolux Corp.*, 659 F.3d 842, 847 (9th Cir. 2011) (describing these as separate requirements). *Snapp* itself suggests that "substantial segment" may be merely an additional explanation of the need for the State to be "more than a nominal party." 458 U.S. at 607. The district court likewise combined these concepts into one element. Given the close similarity of the parties' arguments under these headings, we discuss the two formulations as a single element, but we would reach the same conclusion even if we treated them separately.

approximately 1.037 billion eggs in 2012 and generated approximately $116 million in revenue for the state"; "Oklahoma farmers produced more than 700 million eggs in 2012 and generated approximately $90 million in revenue for the state"; and "Iowa is the number one state in egg production[,] Iowa farmers produce over 14.4 billion eggs per year," and "[t]he cost to Iowa farmers to retrofit existing housing or build new housing that complies with AB1437 would be substantial."

The laws "forc[e] Plaintiffs' farmers either to forgo California's markets altogether or accept significantly increased production costs just to comply." That is, "Plaintiffs' egg farmers must choose either to bring their entire operations into compliance . . . or else simply leave the California marketplace." "[T]he necessary capital improvements [would] cost Plaintiffs' farmers hundreds of millions of dollars," and, without access to the California market, "supply would outpace demand by half a billion eggs, causing the price of eggs—as well as egg farmers' margins—to fall throughout the Midwest and potentially forc[e] some Missouri producers out of business. The same goes for egg producers in Nebraska, Alabama, Oklahoma, Kentucky, and Iowa."

In short, the complaint alleges the importance of the California market *to egg farmers* in the Plaintiff States and the difficult choice that *egg farmers* face in deciding whether to comply with the Shell Egg Laws. The complaint contains no specific allegations about

the statewide magnitude of these difficulties[2] or the extent to which they affect more than just an "identifiable group of individual" egg farmers. *Snapp*, 458 U.S. at 607.

Plaintiffs advance several theories to demonstrate "an interest apart from the interests of particular private parties" and an effect on "a sufficiently substantial segment of [the] population." *Id.* First, Plaintiffs allege harm to their egg farmers. Second, Plaintiffs argue that the Shell Egg Laws will cause harmful fluctuations in the price of eggs. Finally, Plaintiffs allege that they will suffer discrimination from the Shell Egg Laws. For the reasons that follow, none of these theories establishes standing.

1. *Alleged Harm to Egg Farmers*

Alleging harm to the egg farmers in Plaintiffs' States is insufficient to satisfy the first prong of *parens patriae* standing. Other courts have recognized that *parens patriae* standing is inappropriate where an aggrieved party could seek private relief. The Second Circuit, for example, held that "*[p]arens patriae* standing . . . requires a finding that individuals could not obtain complete relief through a private suit." *N.Y. ex rel. Abrams v. 11 Cornwell Co.*, 695 F.2d 34, 40 (2d Cir. 1982), *vacated in part on other grounds*, 718 F.2d 22 (2d Cir. 1983) (en banc); *see also Connecticut v.*

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[2] At a hearing, the district court asked Plaintiffs where in their complaint they alleged harm to more than just egg producers. Plaintiffs' lawyer pointed to paragraphs 7 and 13. Paragraph 7 describes harm to egg farmers. Paragraph 13 includes no specific facts, stating only, in conclusory fashion, that "Missouri's economy and status within the federal system will be irreparably injured."

Physicians Health Servs. of Conn., Inc., 103 F. Supp. 2d 495, 504 (D. Conn. 2000) (noting that "the Second Circuit has interpreted *Snapp* to require a finding that the State act on behalf of individuals who could not obtain complete relief through a private suit"). Here, complete relief would be available to the egg farmers themselves, were they to file a complaint on their own behalf.

Supreme Court cases in which private relief was held to be unlikely or unrealistic illustrate why *parens patriae* standing does not lie here. In *Missouri v. Illinois*, 180 U.S. 208 (1901), though never explicitly calling it a *parens patriae* case, the Supreme Court heard a sewage dispute between two states. The Court observed that "the nature of the injury complained of is such that an adequate remedy can only be found in this court at the suit of the state of Missouri." *Id.* at 241. The Court emphasized that the "health and comfort of the large communities inhabiting those parts of the state situated on the Mississippi River are not alone concerned, but contagious and typhoidal diseases introduced in the river communities may spread themselves throughout the territory of the state." *Id.*; *see also Snapp*, 458 U.S. at 603 (describing "a line of cases . . . in which States successfully sought to represent the interests of their citizens in enjoining public nuisances"). In other words, Missouri alleged that a public health hazard affected its entire population. By contrast, the Shell Egg Laws are not alleged to threaten the health of the entire population (or, indeed of anyone), and those directly affected—egg farmers—are capable of pursuing their own interests.

A rationale similar to that in *Missouri v. Illinois* supported *parens patriae* standing in *Maryland v. Louisiana*, 451 U.S. 725 (1981). There, Louisiana imposed a "First-Use Tax" on natural gas piped into the state from federal offshore drilling areas. A group of states, later joined by the federal government and several pipeline companies, filed an original jurisdiction suit in the Supreme Court challenging the tax under, among other sources, the Commerce Clause. The Court found jurisdiction on several theories, including the States' interest as *parens patriae*. *Id.* at 737. The Court observed that

> the incidence of the Tax [does not] fall on a small group of citizens who are likely to challenge the Tax directly. Rather, a great many citizens in each of the plaintiff States are themselves consumers of natural gas and are faced with increased costs aggregating millions of dollars per year. As the Special Master observed, individual consumers cannot be expected to litigate the validity of the First-Use Tax given that the amounts paid by each consumer are likely to be relatively small.

Id. at 739. *Maryland v. Louisiana*'s logic counsels the opposite result here: Whereas millions of consumers probably cannot challenge another state's tax on their commodities, large egg producers certainly could file an action like this one on their own.

2. *Alleged Fluctuation in the Price of Eggs*

Plaintiffs argue that fluctuations in the price of eggs will harm consumers, thereby affecting a substantial segment of their populations and establishing *parens*

patriae standing. Plaintiffs filed their complaint before the Shell Egg Laws took effect. As a result, their allegations about the potential economic effects of those laws, after implementation, were necessarily speculative. Indeed, Plaintiffs' allegations are inconsistent; the complaint alleges that prices will go either up or down. On the one hand, Plaintiffs allege that farmers must bring all egg facilities into compliance with the Shell Egg Laws, regardless of the proportion of their product actually bound for California, because the demand across markets fluctuates. The cost of "compliant" eggs will thus increase across the board. On the other hand, Plaintiffs allege that, if farmers decline to comply and they exit the California market, "the price of eggs . . . [would] fall throughout the Midwest." Neither of these alleged results is sufficient to support *parens patriae* standing.

At the outset, the unavoidable uncertainty of the alleged future changes in price makes the alleged injury insufficient for Article III standing. In *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992), the Supreme Court explained that it is "substantially more difficult" for a plaintiff to establish standing when the plaintiff "is not himself the object of the government action or inaction he challenges":

> [C]ausation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction—and perhaps on the response of others as well. The existence of one or more of the essential elements of standing depends on the unfettered choices made by independent actors not before the courts and whose exercise of

> broad and legitimate discretion the courts cannot presume either to control or to predict, and it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury.

Id. (citations and internal quotation marks omitted). Although *Lujan* describes facts that must be averred on summary judgment, the complaint here cannot allege, even under the more permissive standards at the pleading stage, that the choices leading to consumer price increases "have been or will be made." *Id.* Instead, the allegations in the complaint are "too speculative for Article III purposes," and Plaintiffs have failed to explain how the injury is "*certainly* impending." *Id.* at 565 n.2 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)); *see also Clapper*, 133 S. Ct. at 1147 (rejecting the Second Circuit's "objectively reasonable likelihood" standard as "inconsistent with our requirement that threatened injury must be certainly impending to constitute injury in fact" (internal quotation marks omitted)); *Ass'n of Pub. Agency Customers v. Bonneville Power Admin.*, 733 F.3d 939, 952 (9th Cir. 2013) (finding concrete, particularized injury when utility price increases will affect customer-plaintiffs indirectly due to "'pass-through' contracts" that "almost certainly" pass along increases). Unlike the First-Use Tax in *Maryland v. Louisiana* or the threatened withdrawal of West Virginia gas in *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923)—both of which presented state actions with nearly certain price effects for many or all of the plaintiffs' citizens—here, the alleged price effects for

consumers are remote, speculative, and contingent upon the decisions of many independent actors in the causal chain in response to California laws that have no direct effect on either price or supply. The Supreme Court has been "reluctant to endorse standing theories that require guesswork as to how independent decisionmakers will exercise their judgment." *Clapper*, 133 S. Ct. at 1150.

In one of the proposed scenarios Plaintiffs suggest could occur, the egg farmers in Plaintiffs' states do not bring their farms into compliance with the Shell Egg Laws. If Plaintiffs' allegation correctly predicts that egg prices in the Midwest would drop due to excess supply, no ill effects for egg consumers would come to pass. Indeed, such a change would benefit Plaintiffs' consumers. It would be only egg farmers, not consumers, who might suffer an injury in that scenario. But, as we have explained, an injury to egg farmers alone is not sufficient to sustain *parens patriae* standing. In short, Plaintiffs' price-related allegations do not support Article III standing.

The result in *Maryland v. Louisiana* is not to the contrary. There, explaining that a state "may act as the representative of its citizens in original actions where the injury alleged affects the general population of a State *in a substantial way*," 451 U.S. at 737 (emphasis added), the Court found that the plaintiff states had alleged injury both to their proprietary interests as gas consumers and to their citizens "from *substantial* economic injury presented by imposition of the First-Use Tax," *id.* at 739 (emphasis added). Plaintiffs do not allege a similarly substantial injury here. Natural gas is a commodity so universally critical to state

governments, businesses, and ordinary consumers that the Supreme Court has twice granted *parens patriae* standing to challenge state actions that directly threaten shortages or price increases. *Id.*; *Pennsylvania*, 262 U.S. at 592 (describing a cut-off in gas as "a matter of grave public concern"). An ordinary consumer commodity, such as eggs, lacks the central economic significance to a state of a utility's product, such as natural gas.

3. *Alleged Discrimination*

Finally, Plaintiffs' reliance on cases granting *parens patriae* standing to challenge discrimination against a state's citizens is misplaced. The Shell Egg Laws do not distinguish among eggs based on their state of origin. A statute that treats "both intrastate and interstate products" alike "is not discriminatory." *Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 948 (9th Cir. 2013).

In *Snapp*, Puerto Rico, acting as *parens patriae*, sued on behalf of its workers who allegedly suffered discrimination under a federal hiring program. The Court rejected "too narrow a view of the interests at stake." *Snapp*, 458 U.S. at 609. Although only 787 jobs were at issue, the nature of the discrimination affected all Puerto Ricans, so Puerto Rico could pursue relief for all residents under a *parens patriae* theory. *Id.* But *Snapp* does not assist Plaintiffs because there is no discrimination here, whether to the few or to the many. As noted, California egg farmers are subject to the same rules as egg farmers from all other states, including California itself.

Georgia v. Pennsylvania R. Co., 324 U.S. 439 (1945), is no more helpful to Plaintiffs than is *Snapp*. There, Georgia sued a collection of southern railroads, alleging discriminatory price-fixing to the detriment of the entire economy of Georgia. The Court held that the State was not a mere nominal plaintiff, with "individual shippers being the real complainants." *Id.* at 452. Instead, the implications of price discrimination against Georgia-based commerce were "matters of grave public concern in which Georgia ha[d] an interest apart from that of particular individuals who may be affected," *id.* at 451, because rail rates "may arrest the development of a State or put it at a decided disadvantage in competitive markets," *id.* at 450. By contrast, Plaintiffs allege no trade barriers erected against their broader economies and, again, the Shell Egg Laws are not discriminatory. Accordingly, Plaintiffs' allegations of discrimination do not establish *parens patriae* standing.

B. *Leave to Amend*

Plaintiffs urge us to reverse the district court's denial of leave to amend their complaint. They seek "[a]t the very least . . . to plead the additional information [that they have] gathered since the Shell Egg Laws went into effect."[3] "Denial of leave to amend is reviewed for an abuse of discretion." *Dougherty v. City of Covina*, 654 F.3d 892, 897 (9th Cir. 2011). "Dismissal without leave to amend is improper unless

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[3] As construed by the district court and as argued on appeal, Plaintiffs seek to amend their complaint. They do not seek to supplement the pleadings pursuant to Federal Rule of Civil Procedure 15(d).

it is clear, upon *de novo* review, that the complaint could not be saved by any amendment." *Thinket Ink Info Res., Inc. v. Sun Microsystems, Inc.*, 368 F.3d 1053, 1061 (9th Cir. 2004). But a "district court does not err in denying leave to amend where the amendment would be futile." *Id.* (internal quotation marks omitted). An amendment is futile when "no set of facts can be proved under the amendment to the pleadings that would constitute a valid and sufficient claim or defense." *Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988). We find no abuse of discretion.

First, Plaintiffs cannot satisfy the requirements of standing by adding events that have occurred after the Shell Egg Laws took effect. "[S]tanding is determined as of the commencement of litigation." *Yamada v. Snipes*, 786 F.3d 1182, 1203 (9th Cir.), *cert. denied*, 136 S. Ct. 569 (2015) (internal quotation marks omitted); *accord D'Lil v. Best W. Encina Lodge & Suites*, 538 F.3d 1031, 1036 (9th Cir. 2008). Plaintiffs brought this action *before* the Shell Egg laws took effect. Accordingly, later developments cannot save the complaint.

Second, Plaintiffs argue that certain allegations *were* available when the complaint was filed and that they should be allowed to include them now. In particular, Plaintiffs wish to allege that eggs are an important, affordable source of protein with which the Shell Egg Laws threaten to interfere, and that the threat of increased egg prices affects not just egg farmers, but also "grocers, bakers, and restaurant owners." But Plaintiffs also allege that the price of eggs might drop. Again, as discussed above, the contingent and uncertain nature of the alternatives available to

plead when this complaint was filed are inadequate to support Article III standing.

In short, Plaintiffs would be unable to assert *parens patriae* standing in an amended complaint. The district court did not err by denying leave to amend.

C. *Dismissal With Prejudice*

Finally, Plaintiffs argue that, because the district court dismissed the complaint for lack of subject matter jurisdiction, the dismissal should have been *without* prejudice. "We review for abuse of discretion a district court's decision to dismiss with prejudice." *Okwu v. McKim*, 682 F.3d 841, 844 (9th Cir. 2012).

In general, dismissal for lack of subject matter jurisdiction is without prejudice. *See Kelly v. Fleetwood Enters., Inc.,* 377 F.3d 1034, 1036 (9th Cir. 2004) (dismissing a complaint without prejudice when the amount in controversy requirement was not met); *Freeman v. Oakland Unified Sch. Dist.*, 179 F.3d 846, 847 (9th Cir. 1999) (order) ("Dismissals for lack of jurisdiction should be without prejudice so that a plaintiff may reassert his claims in a competent court." (internal quotation marks and ellipsis omitted)). The theory undergirding the general rule is that "the merits have not been considered" before dismissal. *Cooper v. Ramos*, 704 F.3d 772, 777 (9th Cir. 2012). Plaintiffs have not satisfied the requirements of *parens patriae* standing. In theory, Plaintiffs could allege post-effective-date facts that might support standing. As a result, the complaint should have been dismissed *without* prejudice. *See City of Oakland v. Hotels.com LP*, 572 F.3d 958, 962 (9th Cir. 2009) (affirming dismissal but remanding to dismiss without prejudice);

Kelly, 377 F.3d at 1040 (affirming with instructions to enter order of dismissal without prejudice).

The judgment of the district court is **AFFIRMED** and the case is **REMANDED** with instructions to dismiss this action without prejudice.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

No. 2:14-cv-00341-KJM-KJN

[Filed October 2, 2014]

STATE OF MISSOURI, et al.,

Plaintiffs,

v.

KAMALA D. HARRIS, et al.,

Defendants.

ORDER

This case raises constitutional challenges to California legislation governing the sale of shell eggs. The legislation, scheduled to take effect on January 1, 2015, bans the sale of shell eggs within California by producers or handlers if the eggs are the product of an egg-laying hen that was confined in an enclosure that fails to comply with certain animal care standards. Plaintiffs are six states who challenge the legislation as unconstitutional, saying it violates the Commerce and Supremacy Clauses of the United States Constitution.

On August 11, 2014, the court heard the separate motions to dismiss brought by defendants Kamala Harris and Karen Ross ("defendants") and defendant-intervenors the Association of California Egg Farmers ("ACEF") and the Humane Society of the United States ("HSUS"). John Hirth and Peggy Whipple appeared for plaintiffs; Susan Smith appeared for defendants; Brian Boynton appeared for defendant-intervenor ACEF; and Bruce Wagman and Rebecca Cary appeared for defendant-intervenor HSUS.[1]

After carefully considering the parties' papers and arguments, defendants' motions to dismiss are GRANTED for lack of standing, without leave to amend.

I. PROCEDURAL HISTORY

On February 3, 2014, the State of Missouri initiated this action asserting two alternative causes of action under the federal Commerce and Supremacy Clauses. Compl., ECF No. 2 (relying on U.S. CONST. art. I, § 8, cl. 3 and U.S. CONST. art. VI, cl. 2).

On March 5, 2014, a first amended complaint was filed by the State of Missouri, the State of Nebraska, the State of Oklahoma, the State of Alabama, the

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[1] The court notes the following parties were identified as present in the audience and observing the August 11, 2014 hearing: Edward Johnson and Jonathon Townsend were present for amici Animal Legal Defense Fund, Compassion Over Killing, Inc. and Farm Sanctuary, Inc. (collectively "Amici I") and Paige Tomaselli was present for amici Center For Food Safety, Consumers Union, Food & Water Watch, Food Animal Concerns Trust, Healthy Food Action, the Institute for Agriculture and Trade Policy and Public Justice, P.C. (collectively "Amici II").

Commonwealth of Kentucky and Terry Branstad, the Governor of the State of Iowa (collectively "plaintiffs"). First Am. Compl. ("FAC"), ECF No. 13.

HSUS and ACEF filed motions to intervene on March 26, 2014 and April 8, 2014, respectively. ECF Nos. 27, 33. On June 3, 2014, following the parties' briefing on the motions to intervene, the court granted HSUS's alternative motion for permissive intervention and ACEF's motion to intervene as of right. ECF No. 57.

On April 9, 2014, defendants filed a motion to dismiss. ECF No. 36. HSUS moved to dismiss plaintiffs' first amended complaint on March 26, 2014, ECF No. 27-2, and ACEF moved to dismiss or alternatively for judgment on the pleadings on April 25, 2014, ECF No. 45. Plaintiffs filed a combined opposition to all three motions to dismiss on May 16, 2014. ECF No. 54. Defendants and defendant-intervenors HSUS and ACEF filed separate replies on June 5, 2014. ECF Nos. 58–60.

Amici I and Amici II filed motions for leave to file amicus curiae briefs on April 22, 2014 and June 10, 2014, respectively. ECF Nos. 44, 63. On July 1, 2014, the court granted the motions. ECF No. 70. On July 2, 2014, both amici filed briefs in support of the outstanding motions to dismiss. ECF Nos. 71, 72. On July 15, 2014, plaintiffs responded to the amici briefs, ECF No. 75, and on July 22, 2014, ACEF and Amicis I and II filed a response thereto. ECF Nos. 76, 77.

On July 25, 2014, amicus Missouri Liberty Project filed a motion for leave to file an amicus curiae brief in opposition to defendants' motion to dismiss, which was

granted by the court on July 28, 2014. ECF Nos. 82, 84. Amicus Missouri Liberty Project filed its brief on July 29, 2014. ECF No. 88.

II. ALLEGATIONS OF THE FIRST AMENDED COMPLAINT

Plaintiffs allege as follows in their first amended complaint. The California Legislature passed AB 1437, "which requires egg farmers in other states to comply with behavior-based enclosure standards identical to those in [Proposition] 2 if they want to continue selling their eggs in California."[2] FAC ¶ 5. As a result, "[e]gg producers in Missouri, Nebraska, Oklahoma, Alabama, Kentucky, and Iowa face a difficult choice": "[e]ither they can incur massive capital improvement costs to build larger habitats for some or all of their egg-laying hens, or they can walk away from the largest egg market in the country." *Id.* ¶ 6. "[T]he people most directly affected by California's extraterritorial regulation—farmers in our states who must either comply with AB 1437 or lose access to the largest market in the United States—have no representatives in California's Legislature and no voice in determining California's agricultural policy." *Id.* ¶ 7.

Plaintiffs bring this action and assert standing under the *parens patriae* doctrine[3] because each

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[2] As explained below, Proposition 2 ("Prop 2") addresses the use of conventional cage-systems for housing egg-laying hens. *See* FAC ¶¶ 56–57.

[3] The *parens patriae* doctrine is defined as: "A doctrine by which a government has standing to prosecute a lawsuit on behalf of a

plaintiff state "has quasi-sovereign interests in protecting its citizens' economic health and constitutional rights as well as preserving its own rightful status within the federal system." *Id.* ¶¶ 10, 17, 22, 27, 32. All plaintiffs posit each state's "economy and status within the federal system will be irreparably injured if the California Legislature—who were not elected by, and are not answerable to, the people of [each plaintiff state]—is allowed to regulate and increase the cost of egg production in [each plaintiff state]." *Id.* ¶¶ 13, 19, 24, 29, 34. With regard to the State of Missouri, "[a]lmost one third of [the] eggs" produced by Missouri's farmers are sold in California. *Id.* ¶ 12. With regard to the State of Iowa, it is the "number one state in egg production" and "[a]pproximately 9.1% of [the state's] eggs . . . are sold in California." *Id.* ¶¶ 37–38, 53-54. "The cost to Iowa farmers to retrofit existing housing or build new housing that complies with [AB 1437] would be substantial." *Id.* ¶ 41. The increased cost of production "will have a detrimental impact upon and cause irreparable harm to Iowa's economy." *Id.* ¶ 43. The States of Nebraska and Alabama are among the top fifteen largest egg producers in the United States. *Id.* ¶¶ 18, 23. The States of Kentucky and Oklahoma produced 1.037 billion and 700 million eggs in 2012, respectively. *Id.* ¶¶ 28, 33. "Precise figures on the number of eggs imported into California from other states are scarce, but University of California Poultry Specialist Don Bell identifies Alabama, Nebraska, and

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citizen, esp. on behalf of someone who is under a legal disability to prosecute the Suit." BLACK'S LAW DICTIONARY 1221 (9th ed. 2009).

Kentucky among the states whose eggs account for another 5.6% of total California imports." *Id.* ¶ 55.

In 2008, California voters approved Prop 2 "'to prohibit the cruel confinement of farm animals' within California." *Id.* ¶ 56 (quoting FAC Ex. A, ECF No. 13-1). Starting in 2015, Prop 2 will prohibit California egg producers from housing egg-laying hens in enclosures that prevent them from standing, lying down, turning around and fully extending their limbs, effectively banning the use of conventional cage-systems. *Id.* ¶ 57. The cost of complying with Prop 2 "would have placed California egg producers at a significant competitive disadvantage when compared to egg producers in Missouri and other states." *Id.* ¶ 61. "Faced with the negative impact Prop 2 would have on California's egg industry," the California Legislature passed AB 1437 in 2010, which requires out-of-state egg farmers to comply with the same requirements set forth in Prop 2. *Id.* ¶¶ 63–64. The California Department of Food and Agriculture promulgated regulations establishing minimum dimensions, set forth in section 1350 of title 3 of the California Code of Regulations ("section 1350"). *Id.* ¶ 65. Prop 2 provides "California egg farmers 2,249 days to come into compliance with its mandate" and AB 1437 provides plaintiffs' "egg farmers only 1,640 days" to comply. *Id.* ¶ 67. "The stated purpose of AB 1437 is 'to protect California consumers from the deleterious, health, safety, and welfare effects of the sale and consumption of eggs derived from egg-laying hens that are exposed to significant stress that may result in increased exposure to disease pathogens including salmonella.'" *Id.* ¶ 68. Plaintiffs allege the purpose of AB 1437 "was not to protect public health but rather to protect California farmers from the market effects of

Prop 2 by 'leveling the playing field' for out-of-state egg producers." *Id.* ¶ 70.

Even assuming AB 1437 serves a legitimate public health purpose within California by limiting the methods of production of California-bound eggs outside California, plaintiffs allege the statute is "expressly and implicitly preempted by the Federal Egg Products Inspection Act," 21 U.S.C. § 1031, because one of its express purposes "is to protect human health in connection with the consumption of shell eggs." *Id.* ¶¶ 76–81.

AB 1437 "imposes a substantial burden on interstate commerce by forcing Plaintiffs' farmers either to forgo California's markets altogether or accept significantly increased production costs just to comply with California law." *Id.* ¶ 84.

> Those higher production costs will increase the price of eggs outside California as well as in. Because demand for eggs varies greatly throughout the year, egg producers in other states cannot simply maintain separate facilities for their California-bound eggs. In high-demand months, Plaintiffs' farmers may not have enough eggs to meet California demand if only a fraction of their eggs are produced in compliance with AB1437. In low-demand months, there may be insufficient California demand to export all compliant eggs, forcing Plaintiffs' farmers to sell those eggs in their own states at higher prices than their competitors. Given those inefficiencies, Plaintiffs' egg farmers must choose either to bring their entire operations into compliance with AB1437 so that they

> always have enough supply to meet California demand, or else simply leave the California marketplace.

Id. ¶ 85. The "necessary capital improvements" to comply with AB 1437 and section 1350 (collectively "shell egg laws") "will cost Plaintiffs' farmers hundreds of millions of dollars." *Id.* ¶ 86. Even choosing to forgo the California market will impose a substantial burden on interstate commerce because plaintiffs' farmers would produce a surplus of eggs resulting in a decrease in the price of eggs "and potentially forcing some [of plaintiffs' egg] producers out of business." *Id.* ¶ 88.

Plaintiffs' action is ripe for review because "the injury to Plaintiffs' farmers is certainly impending" as "any of [plaintiffs'] farmers who continue to export their eggs to California will face criminal sanctions beginning January 1, 2015 unless they take action now to come into compliance by the law's effective date." *Id.* ¶ 89 (quotations and citation omitted). "Whichever path they follow, an incorrect choice spells doom for their businesses. Coming into compliance will necessarily increase productions [sic] costs; if the law is eventually struck down, the farmer will not be able to compete with egg producers still using cage-systems." *Id.* ¶ 92.

With regard to a violation of the Commerce Clause, plaintiffs allege (1) AB 1437 and section 1350 "are protectionist measures intended to benefit California egg producers at the expense of Plaintiffs' egg producers by eliminating the competitive advantage [their] producers would enjoy once Prop 2 becomes effective;" (2) the provisions "have the purpose and effect of regulating conduct" outside California; and (3) they "impose a substantial burden on interstate

commerce by forcing Plaintiffs' egg producers either to increase their production costs . . . or forgo the largest market in the United States" with no legitimate state purpose. *Id.* ¶¶ 96–101.

With regard to plaintiffs' alternative Supremacy Clause claim, plaintiffs allege even if the court finds AB 1437 and section 1350 serve a legitimate, non-discriminatory purpose, "the statute and regulations would be in conflict with the express terms of 21 U.S.C. § 1052(b)." *Id.* ¶ 103. "[B]ecause Congress evidenced its intention to occupy the entire field of regulations governing the quality and condition of eggs by imposing uniform national standards, the Federal Egg Products Inspection Act . . . implicitly preempts" AB 1437 and section 1350. *Id.* ¶ 104.

III. THE SHELL EGG LAWS

A. Section 1350

California's shell egg food safety regulation provides for the implementation of specified requirements "to assure that healthful and wholesome eggs of known quality are sold in California . . . ." FAC Ex. H, ECF No. 2-8; *see also* Cal. Code Regs. tit. 3, § 1350. Under section 1350(c), egg producers or handlers shall incorporate three specified provisions aimed at the prevention of *Salmonella* contamination in shell eggs:

> (1) Implement *Salmonella enterica* serotype Enteritidis (SE) prevention measures in accordance with the Food and Drug Administration, Department of Health and Human Services' requirements for the production, storage, and transportation of shell eggs as specified in 21 CFR Part 118;

> (2) Implement a SE environmental monitoring program . . .; and
>
> (3) Implement and maintain a vaccination program to protect against infection with SE . . . .

Cal. Code Regs. tit. 3, § 1350(c)(1)–(3).

Section 1350 also provides for specific confinement specifications for egg-laying hens:

> (d) Commencing January 1, 2015, no egg handler or producer may sell or contract to sell a shelled egg for human consumption in California if it is the product of an egg-laying hen that was confined in an enclosure that fails to comply with the following standards. For purposes of this section, an enclosure means any cage, crate, or other structure used to confine egg-laying hens:
>
> > (1) An enclosure containing nine (9) or more egg-laying hens shall provide a minimum of 116 square inches of floor space per bird. Enclosures containing eight (8) or fewer birds shall provide a minimum amount of floor space per bird as follows, using formula 322+[(n-1) x 87.3]/n, where "n" equals the number of birds:

Number of Birds	*Square Inches Per Bird*
1	322
2	205
3	166
4	146
5	135

6	127
7	121
8	117

Id. § 1350(d).

B. Assembly Bill 1437

Assembly Bill 1437 was approved by the Governor of California on July 6, 2010. FAC Ex. D, ECF No. 13-4; *see also* CAL. HEALTH & SAFETY CODE § 25995. The legislative findings and declarations regarding treatment of egg-laying hens read as follows:

> (a) According to the Pew Commission on Industrial Farm Production, food animals that are treated well and provided with at least minimum accommodation of their natural behaviors and physical needs are healthier and safer for human consumption.
>
> (b) A key finding from the World Health Organization and Food and Agricultural Organization of the United Nations Salmonella Risk Assessment was that reducing flock prevalence results in a directly proportional reduction in human health risk.
>
> (c) Egg-laying hens subjected to stress are more likely to have higher levels of pathogens in their intestines and the conditions increase the likelihood that consumers will be exposed to higher levels of food-borne pathogens.
>
> (d) Salmonella is the most commonly diagnosed food-borne illness in the United States.

> (e) It is the intent of the Legislature to protect California consumers from the deleterious, health, safety, and welfare effects of the sale and consumption of eggs derived from egg-laying hens that are exposed to significant stress and may result in increased exposure to disease pathogens including salmonella.

CAL. HEALTH & SAFETY CODE § 25995. Beginning on January 1, 2015, "a shelled egg shall not be sold or contracted for sale for human consumption in California if the seller knows or should have known that the egg is the product of an egg-laying hen that was confined on a farm or place that is not in compliance with animal care standards set forth in Chapter 13.8 (commencing with Section 25990)." *Id.* § 25996. The prohibitions set forth in Chapter 13.8, titled "Farm Animal Cruelty," state:

> In addition to other applicable provisions of law, a person shall not tether or confine any covered animal, on a farm, for all or the majority of any day, in a manner that prevents such animal from:
>
> (a) Lying down, standing up, and fully extending his or her limbs; and
>
> (b) Turning around freely.

CAL. HEALTH & SAFETY CODE § 25990. An "egg-laying hen" is defined as "any female domesticated chicken, turkey, duck, goose, or guinea fowl kept for the purpose of egg production." *Id.* § 25991(c). "Enclosure" is defined as "any cage, crate, or other structure (including what is commonly described as . . . a 'battery cage' for egg-laying hens) used to confine a covered

animal." *Id.* § 25991(d). "Farm" is defined as "the land, building, support facilities, and other equipment that are wholly or partially used for the commercial production of animals or animal products used for food or fiber; and does not include live animal markets." *Id.* § 25991(e).

A violation of the law constitutes a misdemeanor and is punishable with a fine of not more than $1,000 or imprisonment for not more than 180 days or both. *Id.* § 25997. The regulation states the provisions "are in addition to, and not in lieu of, any other laws protecting animal welfare, including the Penal Code. This chapter shall not be construed to limit any state law or regulation protecting the welfare of animals, nor shall anything in this chapter prevent a local governing body from adopting and enforcing its own animal welfare laws and regulations." *Id.* § 25997.1.

IV. LEGAL STANDARDS FOR A MOTION TO DISMISS FOR LACK OF STANDING

The jurisdiction of the federal courts is limited to resolving cases and controversies. U.S. CONST. art. III, § 2, cl. 1; *Warth v. Seldin*, 422 U.S. 490, 499 (1975). Because of this limited jurisdiction, cases lie outside the jurisdiction of the court unless proven otherwise. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 376–78 (1994). There are a number of "doctrines that cluster about Article III," including standing and ripeness, that may support a challenge to subject matter jurisdiction raised by either party or sua sponte by the court. *Allen v. Wright*, 468 U.S. 737, 750 (1984) (quotations and citation omitted); Fed. R. Civ. P. 12(b)(1). A Rule 12(b)(1) jurisdictional attack may be either facial or factual. *White v. Lee*, 227 F.3d 1214,

1242 (9th Cir. 2000) (citation omitted). In a facial attack, as in this action, the complaint is challenged on its face as failing to support federal jurisdiction, whereas, in a factual attack, the challenger provides evidence, through affidavits or otherwise, that an alleged fact is false resulting in a lack of subject matter jurisdiction. *See Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). In a facial attack, allegations in the complaint are taken as true and construed in the light most favorable to a plaintiff.

V. ANALYSIS

A. Standing Under The *Parens Patriae* Doctrine

i. The Parties' Arguments

Plaintiffs bring this action in their capacity as *parens patriae*, asserting they have standing because each plaintiff State "has quasi-sovereign interests in protecting its citizens' economic health and constitutional rights as well as preserving its own rightful status within the federal system." FAC ¶¶ 10, 17, 22, 27, 32. Defendants challenge plaintiffs' standing to pursue their Commerce Clause and Supremacy Clause claims as *parens patriae*, arguing they fail to allege an "interest apart from the private egg producers." ECF No. 36 at 13. Defendants assert plaintiffs fail to allege a quasi-sovereign interest because the first amended complaint does not properly allege an injury to a sufficiently substantial segment of the plaintiff states' populations. *Id.* at 14 (quoting *Table Bluff Reservation (Wiyot Tribe) v. Philip Morris, Inc.* (*Table Bluff*), 256 F.3d 879, 885 (9th Cir. 2001)).

HSUS and ACEF also move to dismiss plaintiffs' first amended complaint for lack of standing. HSUS

argues, in part, plaintiffs cannot bring this case "on behalf of an unspecified number of unnamed egg producers from their states." ECF No. 27-2 at 11–13. Similarly, ACEF argues "to the extent the complaint alleges any injury at all, . . . it is limited to the economic harm that would allegedly befall some unspecified egg farmers residing within their borders who may intend to sell eggs in California after January 1, 2015 . . . ." ECF No. 45-1 at 16 (noting "for all their emphasis on the egg producers within their territories, [p]laintiffs never disclose how many companies belong in this limited group").

Plaintiffs oppose, arguing they have "sufficiently alleged injury to quasi-sovereign interests" because they "have alleged an effort to restrain interstate commerce by imposing higher costs on [their] producers if they want to compete in California." ECF No. 54 at 21. Plaintiffs further argue, "California's disruption of the egg supply and the fluctuation of egg prices that disruption will cause in [p]laintiff States are 'matter[s] of grave public concern . . . .'" *Id.* at 22 (quoting *Pennsylvania v. West Virginia*, 262 U.S. 553, 591 (1923)). Plaintiffs also rely on *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez* (*Snapp*), 458 U.S. 592 (1982), in support of their argument "challeng[ing] the violation of [their] citizens' right under the Commerce Clause to the free flow of goods across state lines without undue burdens imposed by individual states." ECF No. 54 at 22.

During the hearing on the motions to dismiss, plaintiffs averred they are not bringing this action on behalf of the egg industry alone, but rather on behalf of each state's residents, explaining "all of the

quantifiable things that we could allege in the complaint will affect the production of eggs . . . [b]ut our claim is larger than . . . simply harm to the egg producers." Hr'g Tr. at 3, ECF No. 91.[4] Plaintiffs argued "this case is actually about . . . one state's decision to protect its farmers from competition by closing its borders to its sister states unless they submit to regulation without representation." *Id.* at 4. Plaintiffs posited during the hearing "that the California egg laws that [they] are challenging effectively remove from the people of Missouri the ability to set public policy themselves regarding agricultural regulations. And -- if they want to participate in the California marketplace." *Id.* at 4–5. Plaintiffs offered *Snapp* as their best authority in support of their argument, explaining that in this action, "we are talking about a statute that effectively blocks, at the California border, eggs from out of state that don't comply with California's own notions of proper animal husbandry." *Id.* at 7. In that regard, plaintiffs argued non-residents do not have "political recourse" if they disagree with the policy. *Id.* at 8. Plaintiffs further clarified the issue they raise in this action is "the right of the people to participate in the laws that govern them." *Id.* Plaintiffs provided the following analogy to best explain their position:

> [I]magine that the State of Missouri decides to enact legislation that requires all grapes to be harvested by people with Bachelor's degrees or greater in horticulture or viticulture and, in addition to that, passes a law that says you can't

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[4] References to the motion hearing transcript use the transcript page number, not the corresponding ECF page number.

> sell the product of a grape unless it was harvested by someone with a Bachelor's degree or a Master's degree in Missouri.
>
> . . . .
>
> So if you had a California farmer or a California wine producer who sells a third of its wine into Missouri . . . what does that person do? Do they -- they have several options. They can reduce their production . . . [t]hey can lower all of their prices . . . [o]r they can acquiesce to Missouri's regulations.
>
> . . . .
>
> The problem there is because they cannot -- they have no way -- that vintner has no way of challenging Missouri law in a political process, the only thing they can do is urge their own legislature to retaliate.

Id. at 9–10. Plaintiffs argued AB 1437 is "an attempt by California to say in Missouri you have to follow this set of procedures so that when your eggs show up at the border, we will let them in." *Id.* at 37. Plaintiffs pointed to paragraphs seven and thirteen of the first amended complaint in support of their standing argument.[5] *Id.* at 40. Plaintiffs argued they cannot

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[5] Paragraph seven alleges:

> By conditioning the flow of goods across its state lines on the method of their production, California is attempting to regulate agricultural practices beyond its own borders. Worse, the people most directly affected by California's extraterritorial regulation-farmers in our states who must

point to "how much money our folks have lost because the law hasn't gone into effect yet," but they have sufficiently alleged "we have to make a choice now" and "it would cost about 120 million dollars in capital improvements." *Id.* at 41–42. Plaintiffs explained to the court the egg producers in their states already "have gambled one way or another," either choosing to come into compliance with California's law or choosing not to come into compliance. *Id.* at 43. Finally, plaintiffs argued, "the other issue here with having no voice in the law is if our folks spend 120 million dollars to come into compliance, and then next year the California legislature amends the law again, well, then we'd have to go through the whole process, and we have no political way of blocking that law from being changed." *Id.* at 44.

ii. Legal Standards

"Whether a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy is what has traditionally been referred to as the question of standing to sue."

> either comply with AB1437 or lose access to the largest market in the United States-have no representatives in California's Legislature and no voice in determining California's agricultural policy.

FAC ¶ 7. Paragraph thirteen alleges:

> Missouri's economy and status within the federal system will be irreparably injured if the California Legislature-who were not elected by, and are not answerable to, the people of Missouri-is allowed to regulate and increase the cost of egg production in Missouri.

FAC ¶ 13.

Sierra Club v. Morton, 405 U.S. 727, 731–32 (1972). "[A] plaintiff must demonstrate standing for each claim he seeks to press" and "separately for each form of relief sought." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 335 (2006) (citations omitted). In *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), the Supreme Court defined "the irreducible constitutional minimum of standing." First, there must be an invasion of plaintiffs' legally protected interest, an injury-in-fact, which is both concrete and particularized and actual and imminent; second, there must be a causal connection between the injury and the challenged conduct; and third, it must be likely that the injury will be redressed by a decision in plaintiffs' favor. *Id.* at 560–61; *see also Cigarettes Cheaper! v. State Bd. of Equalization*, No. 2:11–CV–00631–JAM–EFB, 2011 WL 2560214, at *1 (E.D. Cal. June 28, 2011). It is plaintiffs' burden to establish their standing to sue. *Lujan*, 504 U.S. at 560.

"The Supreme Court has recognized that 'States are not normal litigants for the purposes of invoking federal jurisdiction,' and have interests and capabilities beyond those of an individual by virtue of their sovereignty." *Oregon v. Legal Servs. Corp.*, 552 F.3d 965, 970 (9th Cir. 2009) (quoting *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007)).

Under the doctrine of *parens patriae*, a State cannot establish standing if it is "only a nominal party without a real interest of its own." *Snapp*, 458 U.S. at 600. "Rather, to have such standing the State must assert an injury to what has been characterized as a 'quasi-sovereign' interest, which is a judicial construct that does not lend itself to a simple or exact definition." *Id.*

at 601. "Although the Supreme Court has never clearly defined what constitutes a quasi-sovereign interest, it does not include 'sovereign interests, proprietary interests, or private interests pursued by the State as a nominal party.'" *Dep't of Fair Emp't & Hous. v. Lucent Techs., Inc.*, 642 F.3d 728, 737 n.2 (9th Cir. 2011) (quoting *Snapp*, 458 U.S. at 602). Rather, it "consist[s] of a set of interests that the State has in the well-being of its populace." *Snapp*, 458 U.S. at 602. "A quasi-sovereign interest must be sufficiently concrete to create an actual controversy between the State and the defendant." *Id.* In other words, "'[*p*]*arens patriae*' standing allows a sovereign to bring suit on behalf of its citizens when the sovereign 'allege[s] injury to a sufficiently substantial segment of its population,' 'articulate[s] an interest apart from the interests of particular private parties,' and 'express[es] a quasi-sovereign interest.'" *Table Bluff*, 256 F.3d at 885 (quoting *Snapp*, 458 U.S. at 607). While such interests are "a matter for case-by-case development,"

> [t]hese characteristics fall into two general categories. First, a State has a quasi-sovereign interest in the health and well-being-both physical and economic-of its residents in general. Second, a State has a quasi-sovereign interest in not being discriminatorily denied its rightful status within the federal system.

Snapp, 458 U.S. at 602. As the Ninth Circuit has explained:

> Generally, a state has been granted standing under the *parens patriae* doctrine in situations involving the abatement of public nuisances, such as global warming, flooding, or noxious

gases. *See Massachusetts*, 549 U.S. 497, 127 S. Ct. 1438 (2007) (Massachusetts had standing to sue the EPA for failing to issue rules regarding the emission of greenhouse gases); *North Dakota v. Minnesota*, 263 U.S. 365, 44 S. Ct. 138, 68 L. Ed. 342 (1923) (North Dakota had standing to sue Minnesota for allegedly creating conditions leading to flooding of farmland); *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 27 S. Ct. 618, 51 L. Ed. 1038 (1907) (Georgia had standing to sue for an injunction to prevent the defendant copper companies from discharging noxious gases over Georgia's territory). In other cases, states have been granted standing to represent the economic interests of their residents. *See Snapp*, 458 U.S. 592, 102 S. Ct. 3260 (Puerto Rico had standing to sue defendant apple farmers for subjecting its workers to conditions more burdensome than those established for temporary foreign workers in violation of the Wagner–Peyser Act); *Georgia v. Pa. R. Co.*, 324 U.S. 439, 65 S. Ct. 716, 89 L. Ed. 1051 (1945) (Georgia had standing to bring suit against railroads for conspiracy to fix freight rates in a manner that discriminated against Georgia shippers in violation of federal antitrust law); *Pennsylvania v. West Virginia*, 262 U.S. 553, 43 S. Ct. 658, 67 L. Ed. 1117 (1923) (Pennsylvania had standing to sue for an injunction preventing West Virginia from giving other states a preferential right of purchase and curtailing the supply of gas carried to Pennsylvania).

As the Supreme Court noted in *Snapp*, the common thread among these cases is each

> state's quasi-sovereign interest in the health and well-being of its residents and a quasi-sovereign interest in "not being discriminatorily denied its rightful status within the federal system." 458 U.S. at 607 . . . .

Oregon, 552 F.3d at 970–71. Before establishing these requirements, plaintiffs "still must allege injury in fact to the citizens they purport to represent as *parens patriae*." *Table Bluff*, 256 F.3d at 885.

iii. Analysis

a. Injury in Fact to Citizenry

With regard to the threshold requirement, that plaintiffs "must allege injury in fact to the citizens they purport to represent as *parens patriae*," *id.*, plaintiffs fail to allege how the citizens of each state are in fact injured by AB 1437. While plaintiffs allege the egg farmers in each state may suffer an injury in the form of increased costs of production, this injury does not affect the citizens plaintiffs purport to represent. *See, e.g.*, Hr'g Tr. at 4 (explaining during oral argument plaintiffs are "appearing as *parens patriae* in the interest of [their] citizens"). In fact, as plaintiffs allege, AB 1437 applies only to egg producers, not plaintiffs' residents in general. FAC ¶ 5 (alleging California passed AB 1437, "which requires egg farmers in other states to comply with behavior-based enclosure standards identical to those in Prop 2 if they want to continue selling their eggs in California"); *see also id.* ¶ 61 (alleging AB 1437 requires out-of-state egg farmers to comply with the same requirements set forth in Prop 2). To the extent plaintiffs argue the implementation of AB 1437 may result in an increase

in the cost of eggs, which may injure their citizens who are egg consumers, this argument is without merit. First, the allegations in plaintiffs' complaint point to a potential decrease in the cost of eggs, FAC ¶ 88, which may benefit plaintiffs' citizens rather than injure them. Second, even assuming plaintiffs' citizens may be faced with an increase in the cost of eggs, this speculative argument alone does not satisfy the requirement of showing an injury in fact. *Table Bluff*, 256 F.3d at 885 (citing with approval the reasoning in *Hise v. Philip Morris, Inc.*, 46 F. Supp. 2d 1201, 1209–10 (N.D. Okla. 1999), "that no constitutional injury occurs when a manufacturer passes on higher costs in the form of price increases").

With regard to whether plaintiffs have sufficiently alleged interests apart from those of private parties, *see Table Bluff*, 256 F.3d at 885, the allegations in the first amended complaint amount only to generalized grievances on behalf of plaintiffs' egg farmers and potential injuries the farmers face as a result of the shell egg laws. Other than plaintiffs' conclusory allegation that each plaintiff State "has quasi-sovereign interests in protecting its citizens' economic health and constitutional rights as well as preserving its own rightful status within the federal system," FAC ¶¶ 10, 17, 22, 27, 32, plaintiffs fail to set forth any allegations that support a finding they are bringing this action to protect their citizens' economic health or the well-being of each state's populace. *Snapp*, 458 U.S. at 602. Rather, the allegations throughout the first amended complaint specifically focus on the impact of AB 1437 on plaintiffs' egg farmers. *See, e.g.*, FAC ¶ 7 ("the people most directly affected by California's extraterritorial regulation [are the] farmers in our

states"). If there were any doubt, plaintiffs clarify in their opposition brief that "[p]laintiffs here have alleged an effort to restrain interstate commerce by imposing higher costs on our producers if they want to compete in California." ECF No. 54 at 21.

A finding that plaintiffs are not bringing this action on behalf of a substantial segment of their populations is further bolstered by plaintiffs' representations to the court during oral argument, that not all of their egg farmers have chosen to forgo compliance with AB 1437. Hr'g Tr. at 43–44 ("All of the producers in our states have gambled one way or another. They've -- if they have not come into compliance, they have gambled that the law will be struck down . . . . If they have come into compliance, they have gambled that the statute will be upheld because they would have invested hundreds of millions of dollars in the bringing their -- their facilities into compliance . . . . And because of the lag time, I think a lot of them have made the choice one way or the other."). In other words, a fair construction of the complaint is that plaintiffs bring this action on behalf of only those egg farmers who have not brought their farming procedures into compliance with California's laws and regulations. A subset of plaintiffs' egg farmers is not tantamount to the citizenry of plaintiffs' states and the court "cannot accept such a claim as 'an interest apart from the interests of particular private parties.'" *Oregon*, 552 F.3d at 974 (quoting *Snapp*, 458 U.S. at 607); *see also Estados Unidos Mexicanos v. DeCoster*, 229 F.3d 332, 335 (1st Cir. 2000) (*parens patriae* "is a judicially created exception that has been narrowly construed"). The court concludes plaintiffs have not brought this action on behalf of their interest in the physical or economic well-being of their residents

in general, but rather on behalf of a discrete group of egg farmers whose businesses will allegedly be impacted by AB 1437. Plaintiffs are therefore only nominal parties without real interests of their own. *Snapp*, 458 U.S. at 600.

b. Quasi-Sovereign Interests

With regard to whether plaintiffs have sufficiently articulated quasi-sovereign interests, *see Table Bluff*, 256 F.3d at 885, they argue "[a]s in [*Georgia v. Pa. R. Co.*], . . . Plaintiffs here have alleged an effort to restrain interstate commerce by imposing higher costs on our producers if they want to compete in California." ECF No. 54 at 21. Further, plaintiffs state that, similar to *Georgia*, these restraints will shackle each state's industries and relegate the states to an inferior economic position compared to states unaffected by California's shell egg laws. *Id.* Plaintiffs also claim, as in *Pennsylvania*, 262 U.S. at 592, the health, comfort, and welfare of plaintiffs' citizens are "seriously jeopardized by the threatened [disruption of] the supply of [a vital commodity] in the interstate stream." *Id.* at 22 (alterations in original). Finally, plaintiffs argue "[t]he gravamen of the Amended Complaint is that California is attempting to regulate conduct that occurs in [plaintiffs' states]," and, consequently, plaintiffs' citizens have been left "at the mercy of legislators they did not elect and cannot vote out of office." *Id.* In response to this attempted regulation in violation of the Commerce Clause, plaintiffs claim they "assert the same quasi-sovereign interest identified by Puerto Rico in *Alfred L. Snapp & Son*—preserving our rightful place as co-equal sovereigns in our federal system." *Id.*

Plaintiffs' analogies are inapt. In *Georgia*, the plaintiff set forth numerous allegations concerning the general effects the defendants' conduct would have on the state's citizens and economy, including "limit[ing] in a general way the Georgia economy to staple agricultural products, . . . restrict[ing] and curtail[ing] opportunity in manufacturing, shipping and commerce, and . . . prevent[ing] the full and complete utilization of the natural wealth of the State." *Georgia*, 324 U.S. at 444. Unlike the extensive allegations made in *Georgia*, plaintiffs here have presented no allegations concerning the effects of California's shell egg laws on the states' general populations beyond fluctuating egg prices that may in fact result in lower egg prices for consumers in the Midwest. ECF No. 13 at 20. As already noted, plaintiffs' remaining allegations exclusively concern plaintiffs' farmers, which plaintiffs have not demonstrated are a "sufficiently substantial segment" of their populations. *Snapp*, 458 U.S. at 607. Far from "shackling" plaintiffs' industries, plaintiffs have alleged nothing to suggest California's shell egg laws will detrimentally affect anyone outside of an identifiable group of individual egg farmers.

Plaintiffs also attempt to equate the withdrawal of gas in *Pennsylvania* to a potential "disruption" in the supply of eggs within plaintiffs' borders. However, *Pennsylvania* concerned the total withdrawal of gas by West Virginia from the Pennsylvania market; gas was a vital commodity used and depended upon by millions of citizens. *Pennsylvania*, 262 U.S. at 553. To change to another fuel source would have cost more than $100 for each domestic consumer and more than $100 million in 1923 dollars between the plaintiff states of Pennsylvania and Ohio. *Id.* Plaintiffs here allege

nothing to suggest eggs are a vital commodity necessary to preserve plaintiffs' citizens' health, comfort and welfare. Even if plaintiffs had alleged such additional facts, plaintiffs fundamentally allege only potential "disruptions" in the supply of eggs, not the total withdrawal of this commodity from the plaintiff states. As noted, potential changes in supply and demand could result in price fluctuations that may even benefit the majority of plaintiffs' citizens at times. These allegations do not establish an inability for citizens to obtain a vital resource or purchase a substitute good.

Similarly, plaintiffs' comparison to *Snapp* is premised on defendants' alleged violation of the Commerce Clause. However, in *Snapp*, the Commonwealth of Puerto Rico established *parens patriae* standing to "pursue the interests of its residents in the Commonwealth's full and equal participation in the federal employment service scheme established pursuant to the Wagner-Peyser Act and the Immigration and Nationality Act of 1952." *Snapp*, 458 U.S. at 609. The Commonwealth brought its claim based on allegations of a violation of certain federal acts that guaranteed employment benefits. *Id.* at 609–10. Here, plaintiffs do not assert a quasi-sovereign interest in assuring their residents benefit from identifiable federal legislation. *Cf. Maryland v. Louisiana*, 451 U.S. 725, 737–39 (1981) (finding Maryland maintained a quasi-sovereign interest in securing benefits of the Natural Gas Act for its residents). Indeed, as noted above, plaintiffs bring this action on behalf of egg farmers, not the general populace of their states. Plaintiff states' conclusory allegation that each has a quasi-sovereign interest in

"preserving its own rightful status within the federal system," FAC ¶¶ 10, 17, 22, 27, 32, without more, is insufficient to establish *parens patriae* standing.

Finally, plaintiffs argue that if their egg farmers choose to withdraw from the California egg market, resulting in a flood of the "markets in the remaining 49 states with surplus eggs while artificially driving up the price of eggs in California," this would "negatively impact anyone employed in egg production or sales" in plaintiffs' states. ECF No. 54 at 25; *see also* Hr'g Tr. at 39–40 (arguing other people such as egg transporters and distributers are affected by the price of eggs). Plaintiffs continue that while the number of egg producers in one plaintiff state may be small, "the number of egg consumers in each state numbers in the millions" and those consumers are affected by California's shell egg laws. ECF No. 54 at 25 (emphasis omitted).

To the extent plaintiffs argue the first amended complaint establishes a quasi-sovereign interest based on each state's egg consumers' economic well-being, this argument fails. As noted, the first amended complaint does not allege an injury to consumers as a result of the shell egg laws but rather an injury to plaintiffs' egg farmers. The section of the first amended complaint where plaintiffs address a potential increase in the price of eggs focuses on the impact of a potential increase on plaintiffs' egg farmers, alleging the higher production costs may ultimately "forc[e] Plaintiffs' farmers to sell those eggs in their own states at higher prices than their competitors," FAC ¶ 85, which "will cost Plaintiffs' farmers hundreds of millions of dollars," *id.* ¶ 86. At the same time, plaintiffs allege a decrease

in the market price of eggs, which would presumably benefit plaintiffs' consumers, that will potentially force some of plaintiffs' egg producers out of business. *Id.* ¶ 88. These allegations fail to establish a quasi-sovereign interest in the economic well-being of plaintiffs' egg consumers but rather assert an interest in plaintiffs' egg farmers' businesses. In sum, plaintiffs fail to articulate how this action would benefit plaintiffs' residents in general as egg consumers. *See, e.g.*, *Ohio v. GMAC Mortg., LLC*, 760 F. Supp. 2d 741, 784 (N.D. Ohio 2011) (noting "[t]he fact that the State chose to act on behalf of a group of residents . . . does not, by itself, automatically turn the action into an action that benefits all Ohio consumers" (quotations omitted)). Plaintiffs therefore lack standing to pursue their claims in this action under the *parens patriae* doctrine. *Oregon*, 552 F.3d at 974.

B. Justiciability

1. Arguments and Relief Requested

Plaintiffs argue their complaint "presents a case or controversy ripe for review," FAC at 21, because California's shell egg laws "have already caused 'concrete, particularized, and actual' injury to Plaintiffs, and additional injury is 'clearly impending.'" ECF No. 54 at 23. Plaintiffs claim that, "[a]bsent some additional action by . . . this Court, any of our farmers who continue to export their eggs to California will face criminal sanctions beginning January 1, 2015 unless they take action now to come into compliance by the law's effective date." FAC ¶ 89. They argue at least 1.5 billion eggs were exported by plaintiffs' farmers to California in 2012 and, thus, "it is hardly speculative for Plaintiffs to allege that a similar number would be

shipped to California again in 2015." ECF No. 54 at 23. Further, plaintiffs argue it is not speculative "to allege that the vast majority of eggs produced in Plaintiff States . . . do not comply with AB1437 and §1350." *Id.* Rather, plaintiffs claim "[i]f history is any predictor of future events, it is eminently reasonable for the court to infer that egg producers in Plaintiffs [sic] States would continue to ship 1.5 billion eggs to California per year but for AB1437 and §1350." *Id.* at 23 (emphasis omitted). Plaintiffs also make reference to the criminal provisions of AB 1437, noting the law "provides that a violation of § 25996 shall constitute a misdemeanor punishable by up to a $1,000 fine and 180 days in county jail." FAC ¶ 64. Finally, plaintiffs contend it is not "speculative that AB1437 and §1350 will become effective on January 1, 2015 or that Defendants will carry out their oaths to enforcement [sic] them." ECF No. 54 at 23.

Plaintiffs seek declaratory and injunctive relief based on the Declaratory Judgment Act. FAC ¶ 105. The Act provides in "a case of actual controversy within its jurisdiction, . . . any court of the United States, upon the filing of any appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration." 28 U.S.C. § 2201(a). However, "[t]he mere existence of a statute, which may or may not ever be applied to plaintiffs, is not sufficient to create a 'case or controversy' within the meaning of Article III, and is thus insufficient to satisfy the 'actual controversy' requirement of the Declaratory Judgment Act." *W. Mining Council v. Watt*, 643 F.2d 618, 627 (9th Cir. 1981).

When questioned during the hearing regarding any imminent injury flowing from AB 1437, plaintiffs argued they do not have an affidavit itemizing which egg farmers intend to sell eggs in California; but the court "should take everything that we allege as true and then decide whether there is a -- whether we've stated a claim." Hr'g Tr. at 23. Plaintiffs referred the court to egg sales from last year, arguing the court can infer, for example, Missouri egg farmers will continue to sell one third of their eggs in California. *Id.* Finally, plaintiffs argued:

> The -- if we were required, in order to bring this claim, to predict in advance the harm that will occur next year in a quantifiable number, you know, if -- and, in fact, to some extent I have done that by saying 120 million dollars is the cost of doing this. That is one potential harm. But there are also harms related to the loss of sale [sic]. Those are things that have not happened but they are clearly impending.

Id. at 44.

2. Analysis

Regarding questions of justiciability, "[w]hether framed as an issue of standing or ripeness, the inquiry is largely the same: whether the issues presented are 'definite and concrete, not hypothetical or abstract.'" *Wolfson v. Brammer*, 616 F.3d 1045, 1058 (9th Cir. 2010) (quoting *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000)). "Where a dispute hangs on future contingencies that may or may not occur, it may be too impermissibly speculative to present a justiciable controversy." *In re Coleman*,

560 F.3d 1000, 1005 (9th Cir. 2009) (citation and internal quotations omitted). "[W]hile it is well-established that an individual need not await prosecution under a law or regulation before challenging it, we require a genuine threat of imminent prosecution and not merely an imaginary or speculative fear of prosecution." *Sacks v. Office of Foreign Assets Control*, 466 F.3d 764, 772–73 (9th Cir. 2006) (citation and internal quotations marks omitted).

When evaluating whether a claimed threat of prosecution is genuine, we consider:

> (1) whether the plaintiff has articulated a concrete plan to violate the law in question; (2) whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings; and (3) the history of past prosecution or enforcement under the challenged statute.

Wolfson, 616 F.3d at 1058 (citing *San Diego Cnty. Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1126–28 (9th Cir. 1996)). "Plaintiffs bear the burden of showing that the [law in question] is actually being enforced. A specific warning of an intent to prosecute under a criminal statute may suffice to show imminent injury and confer standing," but "a general threat of prosecution is not enough to confer standing." *San Diego*, 98 F.3d at 1127 (citation omitted). Further, allegations amounting to a "chilling effect" on plaintiffs' desire and ability to engage in conduct prohibited by the law in question "are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." *Id.* at 1129 (quoting *Laird v. Tatum*, 408 U.S. 1, 13–14 (1972)).

As noted, plaintiffs' argument as to harm focuses on the potential harm plaintiffs' egg farmers will face. *See, e.g.*, Hr'g Tr. at 44. Plaintiffs allege nothing additionally to suggest their claimed threat of prosecution is genuine. Plaintiff states fail to articulate any concrete plan by their egg farmers to violate California's shell egg laws. Plaintiffs allege in conclusory fashion their "farmers who continue to export their eggs to California will face criminal charges," FAC ¶ 89, but plaintiffs allege nothing to indicate any of their egg farmers will or intend to continue to export their eggs to California. Further, that plaintiffs' farmers would likely prefer exporting their eggs to California as they have done in the past or that their enclosures do not currently comply with California's shell egg laws does not amount to a "concrete plan to violate the law[s] in question." *Wolfson*, 616 F.3d at 1058 (citing *San Diego*, 98 F.3d at 1126–28). Indeed, plaintiffs assume some of their egg farmers have chosen to comply with AB 1437. Hr'g Tr. at 43–44. Though California's shell egg laws may create a "chilling effect" in that plaintiffs' egg producers must "[e]ither . . . incur massive capital improvement costs . . . or . . . walk away from the largest egg market in the country," FAC ¶ 6, rather than violate California law by supplying California with eggs that do not meet required standards, this generalized effect does not amount to a threat of specific future harm. As the Ninth Circuit has recognized, "[e]very criminal law, by its very existence, may have some chilling effect on personal behavior. That was the reason for its passage." *San Diego*, 98 F.3d at 1129 (alteration in original) (quoting *Doe v. Duling*, 782 F.2d 1202, 1206 (4th Cir. 1986)).

Plaintiffs also do not identify any threat to initiate proceedings made against their egg farmers. Within their complaint, plaintiffs reference only the language of AB 1437 itself. This is far from a specific warning of an intent to prosecute. Plaintiffs also reference defendants' "oaths," but, as noted above, "a general threat of prosecution is not enough to confer standing." *San Diego*, 98 F.3d at 1127. Lastly, as California's shell egg laws have not yet gone into effect, there is no history of past prosecution or enforcement under the challenged statute. Defendants are correct in arguing "[t]he court can thus make no reasonable inference that any of the states or their producers would suffer prosecution." ECF No. 36 at 16.

To the extent plaintiffs argue their claims are brought on behalf of the residents of their states in general because they do not have a "voice in the law," Hr'g Tr. at 44, this argument also fails. Plaintiffs' arguments focus on the potential harm each state's egg farmers face. The alleged imminent injury, however, does not involve an injury the citizens of each state face but rather a potential injury each state's egg farmers face when deciding whether or not to comply with AB 1437. Nothing before the court supports the conclusion this action is brought by plaintiffs because their residents face imminent injury as a result of California's shell egg laws, or that their residents in general intend to or are even capable of violating California's shell egg laws. Plaintiffs also point to nothing to show the threat of prosecution of their egg farmers is imminent.

Plaintiffs' claims are not justiciable.

C. Leave to Amend

In light of the arguments presented by plaintiffs during oral argument, the undersigned has carefully considered whether plaintiffs can amend their complaint to state a claim over which this court would have subject matter jurisdiction. "Valid reasons for denying leave to amend include undue delay, bad faith, prejudice, and futility." *Cal. Architectural Bldg. Prod. v. Franciscan Ceramics*, 818 F.2d 1466, 1472 (9th Cir. 1988); *see also Klamath-Lake Pharm. Ass'n v. Klamath Med. Serv. Bureau*, 701 F.2d 1276, 1293 (9th Cir. 1983) (holding that, while leave to amend shall be freely given, the court does not have to allow futile amendments). For the reasons discussed below, leave to amend would be futile and will therefore not be granted.

To the extent plaintiffs argue their claims are brought on behalf of the general populace of their states because California's law "effectively remove[s] from the people of Missouri the ability to set public policy themselves regarding agricultural regulations," Hr'g Tr. at 4, this argument is unavailing. As noted above, plaintiffs' first amended complaint, their opposition papers and their arguments during the court's hearing all focus on how California's legislation affects or may affect each state's egg farmers. During oral argument, plaintiffs made arguments to strengthen this conclusion. They argued, "we are talking about a statute that effectively blocks . . . eggs from out of state," *id.* at 7, and the issue here is "the right of the people to participate in the laws that govern them," *id.* at 8. Plaintiffs further argued California's regulations are "an attempt by California

to say in Missouri you have to follow this set of procedures so that when your eggs show up at the border, we will let them in." *Id.* at 37. Plaintiffs noted "the other issue here with having no voice in the law is if our folks spend 120 million dollars to come into compliance . . . we have no political way of blocking that law from being changed." *Id.* at 44. These arguments all clearly rest on the plaintiff states' egg farmers purportedly not having a voice during the process leading to passage of a California law that governs their egg farming procedures, and potentially having to expend resources to comply with it; these concerns are not those of each state's residents in general.

As discussed above, AB 1437 does not regulate the general populace of plaintiffs' states. *See, e.g.*, FAC ¶¶ 5, 61. The residents of each state are not participating in the egg market such that their eggs must comply with AB 1437 when they "show up at [California's] border." Hr'g Tr. at 37. Plaintiffs' arguments characterize the issue before the court as the right of citizens to "participate in the laws that govern them," Hr'g Tr. at 8, arguing these citizens will have to spend 120 million dollars to comply with a law whose passage they could not affect, *id.* at 44. The only citizens who may have to spend 120 million dollars to comply with California's legislation are the egg farmers who intend to participate in California's egg market. Likewise, the only citizens who may be "govern[ed]" by California's legislation are egg producers and handlers who intend to sell eggs in California.

Plaintiffs' own grape legislation analogy squarely supports this conclusion. Plaintiffs hypothesize that if

Missouri passed legislation requiring "all grapes to be harvested by people with Bachelor's degrees or greater in horticulture or viticulture . . .," Hr'g Tr. at 9, a California "*vintner* has no way of challenging Missouri law in a political process," *id.* at 10 (emphasis added). It is patently clear plaintiffs are bringing this action on behalf of a subset of each state's egg farmers and their purported right to participate in the laws that govern them, not on behalf of each state's population generally. In light of the nature of the allegations in plaintiffs' first amended complaint and the arguments made at hearing, leave to amend would be futile, as plaintiffs lack standing to bring this action on behalf of each state's egg farmers. *Oregon*, 552 F.3d at 974.

VI. CONCLUSION

For the foregoing reasons, defendants and defendant-intervenors' motions to dismiss for lack of standing are GRANTED without leave to amend. Plaintiffs' first amended complaint is dismissed with prejudice. The Clerk of the Court is directed to close this action.

DATED: October 1, 2014.

/s/
UNITED STATES DISTRICT JUDGE

APPENDIX C

CAL. HEALTH & SAFETY CODE

DIVISION 20. MISCELLANEOUS HEALTH AND SAFETY PROVISIONS [24000 - 26217]

(Division 20 enacted by Stats. 1939, Ch. 60.)

CHAPTER 13.8. Farm Animal Cruelty [25990 - 25994]

(Chapter 13.8 added November 4, 2008, by initiative Proposition 2, Sec. 3.)

25990.

Prohibitions. In addition to other applicable provisions of law, a person shall not tether or confine any covered animal, on a farm, for all or the majority of any day, in a manner that prevents such animal from:

(a) Lying down, standing up, and fully extending his or her limbs; and
(b) Turning around freely.

(Added November 4, 2008, by initiative Proposition 2, Sec. 3. Operative January 1, 2015, by Sec. 5 of Prop. 2.)

25991.

Definitions. For the purposes of this chapter, the following terms have the following meanings:

(a) "Calf raised for veal" means any calf of the bovine species kept for the purpose of producing the food product described as veal.
(b) "Covered animal" means any pig during pregnancy,

calf raised for veal, or egg-laying hen who is kept on a farm.

(c) "Egg-laying hen" means any female domesticated chicken, turkey, duck, goose, or guinea fowl kept for the purpose of egg production.

(d) "Enclosure" means any cage, crate, or other structure (including what is commonly described as a "gestation crate" for pigs; a "veal crate" for calves; or a "battery cage" for egg-laying hens) used to confine a covered animal.

(e) "Farm" means the land, building, support facilities, and other equipment that are wholly or partially used for the commercial production of animals or animal products used for food or fiber; and does not include live animal markets.

(f) "Fully extending his or her limbs" means fully extending all limbs without touching the side of an enclosure, including, in the case of egg-laying hens, fully spreading both wings without touching the side of an enclosure or other egg-laying hens.

(g) "Person" means any individual, firm, partnership, joint venture, association, limited liability company, corporation, estate, trust, receiver, or syndicate.

(h) "Pig during pregnancy" means any pregnant pig of the porcine species kept for the primary purpose of breeding.

(i) "Turning around freely" means turning in a complete circle without any impediment, including a tether, and without touching the side of an enclosure.

(Added November 4, 2008, by initiative Proposition 2, Sec. 3. Operative January 1, 2015, by Sec. 5 of Prop. 2.)

25992.

Exceptions. This chapter shall not apply:

(a) During scientific or agricultural research.
(b) During examination, testing, individual treatment or operation for veterinary purposes.
(c) During transportation.
(d) During rodeo exhibitions, state or county fair exhibitions, 4-H programs, and similar exhibitions.
(e) During the slaughter of a covered animal in accordance with the provisions of Chapter 6 (commencing with Section 19501) of Part 3 of Division 9 of the Food and Agricultural Code, relating to humane methods of slaughter, and other applicable law and regulations.
(f) To a pig during the seven-day period prior to the pig's expected date of giving birth.

(Added November 4, 2008, by initiative Proposition 2, Sec. 3. Operative January 1, 2015, by Sec. 5 of Prop. 2.)

25993.

Enforcement. Any person who violates any of the provisions of this chapter is guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not to exceed one thousand dollars ($1,000) or by imprisonment in the county jail for a period not to exceed 180 days or by both such fine and imprisonment.

(Added November 4, 2008, by initiative Proposition 2, Sec. 3. Operative January 1, 2015, by Sec. 5 of Prop. 2.)

25994.

Construction of Chapter.

The provisions of this chapter are in addition to, and not in lieu of, any other laws protecting animal welfare, including the California Penal Code. This chapter shall not be construed to limit any state law or regulations protecting the welfare of animals, nor shall anything in this chapter prevent a local governing body from adopting and enforcing its own animal welfare laws and regulations.

(Added November 4, 2008, by initiative Proposition 2, Sec. 3. Operative January 1, 2015, by Sec. 5 of Prop. 2.)

CHAPTER 14. Shelled Eggs [25995 - 25996.3]

(Chapter 14 added by Stats. 2010, Ch. 51, Sec. 1.)

25995.

The Legislature finds and declares all of the following:

(a) According to the Pew Commission on Industrial Farm Production, food animals that are treated well and provided with at least minimum accommodation of their natural behaviors and physical needs are healthier and safer for human consumption.

(b) A key finding from the World Health Organization and Food and Agricultural Organization of the United Nations Salmonella Risk Assessment was that reducing flock prevalence results in a directly proportional reduction in human health risk.

(c) Egg-laying hens subjected to stress are more likely to have higher levels of pathogens in their intestines and the conditions increase the likelihood that consumers will be exposed to higher levels of food-borne pathogens.

(d) Salmonella is the most commonly diagnosed food-borne illness in the United States.

(e) It is the intent of the Legislature to protect California consumers from the deleterious, health, safety, and welfare effects of the sale and consumption of eggs derived from egg-laying hens that are exposed to significant stress and may result in increased exposure to disease pathogens including salmonella.

(Added by Stats. 2010, Ch. 51, Sec. 1. Effective January 1, 2011.)

25996.

Commencing January 1, 2015, a shelled egg shall not be sold or contracted for sale for human consumption in California if the seller knows or should have known that the egg is the product of an egg-laying hen that was confined on a farm or place that is not in compliance with animal care standards set forth in Chapter 13.8 (commencing with Section 25990).

(Amended by Stats. 2013, Ch. 625, Sec. 1. Effective January 1, 2014.)

25996.1.

A person who violates this chapter is guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not to exceed one thousand dollars ($1,000) or by imprisonment in the county jail for a period not to exceed 180 days or by both that fine and imprisonment.

(Added by renumbering Section 25997 (as added by Stats. 2010, Ch. 51, Sec. 1) by Stats. 2015, Ch. 303, Sec. 317. Effective January 1, 2016.)

25996.3.

The provisions of this chapter are in addition to, and not in lieu of, any other laws protecting animal welfare, including the Penal Code. This chapter shall not be construed to limit any state law or regulation protecting the welfare of animals, nor shall anything in

this chapter prevent a local governing body from adopting and enforcing its own animal welfare laws and regulations.

(Added by renumbering Section 25997.1 by Stats. 2015, Ch. 303, Sec. 318. Effective January 1, 2016.)

APPENDIX D

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT CALIFORNIA
FRESNO DIVISION

Case No. 2:14-cv-00341-KJM-KJN

[Filed March 5, 2014]

THE STATE OF MISSOURI, ex rel., Chris Koster, Attorney General; THE STATE OF NEBRASKA, ex rel. Jon Bruning, Attorney General; THE STATE OF OKLAHOMA, ex rel. E. Scott Pruitt, Attorney General; THE STATE OF ALABAMA, ex rel. Luther Strange, Attorney General; THE COMMONWEALTH OF KENTUCKY ex rel. Jack Conway, Attorney General; and TERRY E. BRANSTAD, Governor of the State of Iowa,

Plaintiffs,

v.)
)
KAMALA D. HARRIS, solely in her)
official capacity as Attorney General of)
California; KAREN ROSS, solely in her)
official capacity as Secretary of the)
California Department of Food and)
Agriculture,)
)
Defendants.)
_____)

FIRST AMENDED COMPLAINT TO DECLARE INVALID AND ENJOIN ENFORCEMENT OF AB1437 AND 3 CA ADC § 1350(d)(1) FOR VIOLATING THE COMMERCE AND SUPREMACY CLAUSES OF THE UNITED STATES CONSTITUTION

The States of Missouri, Nebraska, Oklahoma, and Alabama, and the Commonwealth of Kentucky, through their relators, and Iowa Governor Terry Branstad state the following for their First Amended Complaint to Declare Invalid and Enjoin Enforcement of AB1437 (California Health and Safety Code §§25995-97) and 3 CA ADC § 1350(d)(1) for Violating the Commerce and Supremacy Clauses of the United States Constitution:

JURISDICTION AND VENUE

1. This case presents a federal question arising under the Commerce and Supremacy Clauses of the Constitution of the United States, 42 U.S.C. §1983, and 42 U.S.C. §1988. The Court has subject-matter jurisdiction under 28 U.S.C. §§1331 and 1343(a)(3).

2. Venue is proper in this Court under 28 U.S.C. §1391(b)(1) because both Defendants maintain an office within the Eastern District of California.

NATURE OF THE CASE

3. In 2008, California voters approved Proposition 2 ("Prop 2"), attached as Ex. A, a ballot initiative that will prohibit California farmers from employing a number of agricultural production methods in widespread use throughout the United States. Starting in 2015, for example, California egg producers will no longer be allowed to house that state's 20 million egg-laying hens in any enclosure it provides sufficient room for each hen to stand up, lie down, turn around freely, and fully extend their limbs. Almost all hens on commercial egg farms in California are currently kept in conventional cage-systems that house between 4 and 7 birds per cage and provide about 67 square inches of space per bird. Prop 2 effectively bans the use of these industry-standard cage-systems.

4. Although Prop 2 does not specify what size enclosures will satisfy its new behavior-based standards, animal behavior experts have estimated anywhere from 87.3 square inches to 403 square inches per hen, depending on how the statutory language is interpreted. JOY MENCH ET AL., FINAL REPORT - CDFA AGREEMENT 09-0854, DETERMINATION OF SPACE USE BY LAYING HENS at 5, 7 (2012), attached as Ex. B.

5. Even before the initiative passed, California farmers, economists, and legislators became concerned that Prop 2 would put their state's egg producers at a competitive disadvantage by increasing the cost of egg production *within* California. DANIEL A. SUMNER, ET

AL., UNIVERSITY OF CALIFORNIA AGRICULTURAL ISSUES CENTER, ECONOMIC EFFECTS OF PROPOSED RESTRICTIONS ON EGG-LAYING HEN HOUSING IN CALIFORNIA at iii (2008), attached as Ex. C. To "level the playing field" and protect their own farmers from Prop 2's economic consequences, in 2010 the California Legislature passed AB1437 (attached as Ex. D), which requires egg farmers *in other states* to comply with behavior-based enclosure standards identical to those in Prop 2 if they want to continue selling their eggs in California.

6. Egg producers in Missouri, Nebraska, Oklahoma, Alabama, Kentucky, and Iowa face a difficult choice regarding AB1437. Either they can incur massive capital improvement costs to build larger habitats for some or all of their egg-laying hens, or they can walk away from the largest egg market in the country. For example, Missouri farmers—who export one third of their eggs to California each year—must now decide whether to invest over $120 million in new hen houses or stop selling in California. The first option will raise the cost of eggs *in Missouri* and make them too expensive to export to any state other than California. The second option will flood Missouri's own markets with a half-billion surplus eggs that would otherwise have been exported to California, causing Missouri prices to fall and potentially forcing some Missouri farmers out of business.

7. By conditioning the flow of goods across its state lines on the method of their production, California is attempting to regulate agricultural practices beyond its own borders. Worse, the people most directly affected by California's extraterritorial regulation—farmers in

our states who must either comply with AB1437 or lose access to the largest market in the United States—have no representatives in California's Legislature and no voice in determining California's agricultural policy.

8. AB1437's extraterritorial reach, its undue burden on interstate commerce, and its clear purpose to protect California farmers from out-of-state competition violate the Commerce Clause of the United States Constitution.

THE PARTIES

Plaintiff State of Missouri

9. Missouri is a sovereign state, whose citizens enjoy all the rights, privileges, and immunities inherent in our federal system of government as guaranteed in the United States Constitution.

10. Missouri has standing to bring this case as *parens patriae* because its has quasi-sovereign interests in protecting its citizens' economic health and constitutional rights as well as preserving its own rightful status within the federal system.

11. Missouri farmers produced nearly two billion eggs in 2012 and generated approximately $171 million in revenue for the state. See USDA NATIONAL AGRICULTURAL STATISTICS SERVICE, POULTRY - PRODUCTION AND VALUE 2012 SUMMARY at 12 (April 2013), attached as Ex. O.

12. Almost one third of those eggs are sold in California. DON BELL ET AL., UNIVERSITY OF

CALIFORNIA, EGG ECONOMICS UPDATE #338 APPENDIX at 5, attached as Ex. E.

13. Missouri's economy and status within the federal system will be irreparably injured if the California Legislature—who were not elected by, and are not answerable to, the people of Missouri—is allowed to regulate and increase the cost of egg production in Missouri.

14. As the duly elected, qualified, and acting Attorney General of Missouri, relator Chris Koster is authorized under Mo. Rev. Stat. § 27.060 to institute, in the name and on behalf of the State, all civil proceedings at law or in equity necessary to protect the rights and interests of the State of Missouri.

15. This court can redress that injury by declaring AB1437 invalid and permanently enjoining its enforcement.

Plaintiff State of Nebraska

16. Nebraska is a sovereign state, whose citizens enjoy all the rights, privileges, and immunities inherent in our federal system of government as guaranteed in the United States Constitution.

17. Nebraska has standing to bring this case as *parens patriae* because it has quasi-sovereign interests in protecting its citizens' economic health and constitutional rights as well as preserving its own rightful status within the federal system.

18. The State of Nebraska is one of the top ten largest egg producers in the United States, with

production totaling 2.723 million eggs in 2012. See Ex. O at 12.

19. Nebraska's economy and status within the federal system will be irreparably injured if the California Legislature—who were not elected by, and are not answerable to, the people of Nebraska—is allowed to regulate and increase the cost of egg production in Nebraska.

20. This court can redress that injury by declaring AB1437 invalid and permanently enjoining its enforcement.

Plaintiff State of Alabama

21. Alabama is a sovereign state, whose citizens enjoy all the rights, privileges, and immunities inherent in our federal system of government as guaranteed in the United States Constitution.

22. Alabama has standing to bring this case as *parens patriae* because it has quasi-sovereign interests in protecting its citizens' economic health and constitutional rights as well as preserving its own rightful status within the federal system.

23. The State of Alabama is one of the top fifteen largest egg producers in the United States, with production totaling 2.139 million eggs in 2012. See Ex. O at 12.

24. Alabama's economy and status within the federal system will be irreparably injured if the California Legislature—who were not elected by, and are not answerable to, the people of Alabama—is

allowed to regulate and increase the cost of egg production in Alabama.

25. This court can redress that injury by declaring AB1437 invalid and permanently enjoining its enforcement.

Plaintiff Commonwealth of Kentucky

26. Kentucky is a sovereign commonwealth, whose citizens enjoy all the rights, privileges, and immunities inherent in our federal system of government as guaranteed in the United States Constitution.

27. Kentucky has standing to bring this case as *parens patziae* because it has quasi-sovereign interests in protecting its citizens' economic health and constitutional rights as well as preserving its own rightful status within the federal system.

28. Kentucky farmers produced approximately 1.037 billion eggs in 2012 and generated approximately $116 million in revenue for the state. See Ex. O at 12.

29. Kentucky's economy and status within the federal system will be irreparably injured if the California Legislature—who were not elected by, and are not answerable to, the people of Kentucky—is allowed to regulate and increase the cost of egg production in Kentucky.

30. This court can redress that injury by declaring AB1437 invalid and permanently enjoining its enforcement.

Plaintiff State of Oklahoma

31. Oklahoma is a sovereign state, whose citizens enjoy all the rights, privileges, and immunities inherent in our federal system of government as guaranteed in the United States Constitution.

32. Oklahoma has standing to bring this case as *parens patriae* because it has quasi-sovereign interests in protecting its citizens' economic health and constitutional rights as well as preserving its own rightful status within the federal system.

33. Oklahoma farmers produced more than 700 million eggs in 2012 and generated approximately $90 million in revenue for the state. Ex. O at 12.

34. Oklahoma's economy and status within the federal system will be irreparably injured if the California Legislature—who were not elected by, and are not answerable to, the people of Oklahoma—is allowed to regulate and increase the cost of egg production in Oklahoma.

35. This court can redress that injury by declaring AB1437 invalid and permanently enjoining its enforcement.

Plaintiff Terry E. Branstad, Governor of Iowa

36. Plaintiff Terry E. Branstad is the Governor of the State of Iowa. Governor Branstad has standing to join in this action as parens patriae, because Iowa has quasi-sovereign interests in regulating agricultural activity within its own borders and preserving Iowa's rightful status within the federal system, as the United States Constitution guarantees.

37. Iowa is the number one state in egg production. Iowa farmers produce over 14.4 billion eggs per year. See Ex. O at 12.

38. Approximately 9.1% of those eggs—1.07 billion eggs per year-are sold in California. See Ex. E at 5.

39. Iowa farmers export more eggs to California than any other state. *Id.*

40. Thirty percent of the eggs imported into California are produced in Iowa. *Id.*

41. Iowa famers have more than 51 million egg-laying hens. Ninety percent of those hens are housed in the same conventional cage-systems currently in use in California and throughout the United States, and 10% are in enhanceable cages. The cost to Iowa farmers to retrofit existing housing or build new housing that complies with AB1437 would be substantial.

42. As the number one egg producing state, Governor Branstad believes the California's AB1437, which seeks to regulate Iowa agricultural activity and has the effect of increasing the costs of egg production in Iowa,

43. will have a detrimental impact upon and cause irreparable harm to Iowa's economy.

44. This court can redress that injury by declaring AB1437 invalid and permanently enjoining its enforcement.

Defendant Kamala D. Harris

45. Defendant Kamala D. Harris is the Attorney General of the State of California and the chief law officer for the state. She has all the powers of a district attorney and has a duty to prosecute violations of law of which the superior courts of California shall have jurisdiction. Cal. Const. Art. V, § 13. She also has direct supervision over all district attorneys and sheriffs in California. *Id.*

46. It will be the duty of Attorney General Harris and the district attorneys she supervises to enforce the provisions of AB1437 when they become effective on January 1, 2015.

47. Attorney General Harris is sued solely in her official capacity and is subject to the jurisdiction of this court under *Ex parte Young,* 209 U.S. 123 (1908).

Defendant Karen Ross

48. Defendant Karen Ross is the Secretary of the California Department of Food and Agriculture.

49. It will be the duty of Secretary Ross to enforce the provisions of 3 CA ADC § 1350 when they become effective on January 1, 2015. See Cal Food. & Agric. Code § 407 ("The director may adopt such regulations as are reasonably necessary to carry out the provisions of this code which [she] is directed or authorized to administer or enforce.").

50. Secretary Ross is sued solely in her official capacity and is subject to the jurisdiction of this court under *Ex parte Young,* 209 U.S. 123 (1908).

FACTUAL ALLEGATIONS

Egg producers across the country depend on the California egg market.

51. California produces approximately 5 billion eggs per year and imports another 4 billion eggs from other states. Ex. E at 1.

52. Roughly 30% of the eggs imported to California—about 1.07 billion eggs per year—come from Iowa. Ex. E at 5.

53. In total, California consumes more than 9% of the eggs produced by Iowa farmers each year.

54. Another 13% of California's imports—almost 600 million—come from Missouri and comprise one third of all eggs produced in Missouri annually. *Id.*

55. Precise figures on the number of eggs imported into California from other states are scarce, but University of California Poultry Specialist Don Bell identifies Alabama, Nebraska, and Kentucky among the states whose eggs account for another 5.6% of total California imports. *Id.*

California voters restrict the production methods available to California egg farmers.

56. In 2008, California voters passed Prop 2 "to prohibit the cruel confinement of farm animals" within California. Ex. A, § 2.

57. Prop 2 amended the California Health and Safety Code by adding five new sections numbered 25990 through 25994, which do not become effective until January 1, 2015. Ex. A, § 5. Section 25990(a)-(b)

provides that "a person shall not tether or confine any covered animal [including egg-laying hens], on a farm, for all or the majority of any day, in a manner that prevents such animal from: (a) Lying down, standing up, and fully extending his or her limbs; and (b) Turning around freely." Ex. A, § 3. Section 25993 provides that a violation of §25990 shall constitute a misdemeanor punishable by up to a $1,000 fine and 180 days in county jail. Ex. A, § 1.

58. Researchers at the University of California-Davis have estimated that California egg producers will have to invest upwards of $385 million in capital improvements to bring their operations into compliance with Prop 2. HOY CARMAN, UC-DAVIS DEPARTMENT OF AGRICULTURAL AND RESOURCE ECONOMICS, ECONOMIC ASPECTS OF ALTERNATIVE CALIFORNIA EGG PRODUCTION SYSTEMS ("CARMAN PAPER") at 22 (2012), attached as Ex. F.

59. In addition to increased capital costs, researchers estimate that the larger enclosures required by Prop 2 will increase the ongoing cost of producing eggs in California by at least 20%. Ex. C at 2.

60. Recognizing that it would take several years to implement, Prop 2 gave California egg farmers a total of 2,249 days—from November 4, 2008 until January 1, 2015—to figure out how to comply with the law and to replace their existing cage systems with acceptable alternatives. Ex. A, § 5.

61. The new capital costs and increased production costs associated with complying with Prop 2 would have placed California egg producers at a

significant competitive disadvantage when compared to egg producers in Missouri and other states, and would likely have eliminated virtually all large scale egg-production in California within six years of Prop 2's effective date. Ex. C at 3-4.

62. Article II, section 10, subdivision (c) of the California Constitution prohibits the Legislature from amending or repealing Prop 2 without voter approval.

The California Legislature passes AB1437 to protect California's egg producers from interstate competition.

63. Faced with the negative impact Prop 2 would have on California's egg industry starting in 2015, the California Legislature in 2010 passed—and Governor Schwarzenegger signed—AB1437, which added three additional sections (§§25995 through 25997) to the California Health and Safety Code.

64. Section 25996 provides that, "Commencing January 1, 2015, a shelled egg may not be sold or contracted to sell for human consumption in California if it is the product of an egg-laying hen that was confined on a farm or place that is not in compliance with animal care standards set forth in [§ 25990] ." Ex. D. Section 25997 provides that a violation of §25996 shall constitute a misdemeanor punishable by up to a $1,000 fine and 180 days in county jail. Section 25996 was amended in 2013 to add "the seller knows or should have known" after the word "if." S.B. No. 667 (2013), attached as Ex. G.

65. In addition to the minimum dimensions for hen enclosures based on bird behavior under §§ 25990(a)-(b), the California Department of Food and

Agriculture ("CDFA") has promulgated the following regulations establishing minimum dimensions based on floor space per bird—which may or may not be co-extensive with §§ 25990(a)-(b):

> Commencing January 1, 2015, no egg handler or producer may sell or contract to sell a shelled egg for human consumption in California if it is the product of an egg-laying hen that was confined in an enclosure that fails to comply with the following standards .... An enclosure containing nine (9) or more egg-laying hens shall provide a minimum of 116 square inches of floor space per bird.

3 CA ADC § 1350(d)(1), attached as Ex. H.

66. If egg farmers may satisfy the behavioral requirements of AB1437 with the spatial requirements of 3 CA ADC § 1350(d)(1), the cost of producing eggs will increase by at least 12%. Ex. F at 15. If they must switch to entirely cage-free production to satisfy AB1437, however, production costs will increase by more than 34. %. *Id.*

67. Whereas Prop 2 provided California egg farmers 2,249 days to come into compliance with its mandate, AB1437 gives Plaintiffs' egg farmers only 1,640 days—from July 6, 2010 until January 1, 2015—to do so. Put another way, California granted its own farmers an extra 609 days—one *and two-thirds years—to* bring their egg-production facilities into compliance with California law. Compare Ex. A, § 1 with Ex. D, § 5.

The purported public health purpose of AB1437 is pretextual.

68. The stated purpose of AB 1437 is "to protect California consumers from the deleterious, health, safety, and welfare effects of the sale and consumption of eggs derived from egg-laying hens that are exposed to significant stress that may result in increased exposure to disease pathogens including salmonella." Ex. D, §25995(e).

69. However, no scientific study conducted to date has found any correlation between cage size or stocking density and the incidence of Salmonella in egg-laying hens. VAN IMMERSEEL ET AL, IMPROVING THE SAFETY AND QUALITY OF EGGS AND EGG PRODUCTS, at 112 (2011), excerpt attached as Ex. I. Additionally, the most recent studies establish that there is no correlation between cage size or stocking density and stress levels in egg-laying hens. J.A. DOWNING AND W.L. BRYDEN, THE EFFECTS OF HOUSING LAYING HENS AS GROUPS IN CONVENTIONAL CAGES ON PLASMA AND EGG ALBUMEN CORTICOSTERONE CONCENTRATIONS, AUST. POULT. SCI. SYMP., at 158-60 (2009), excerpt attached as Ex. J.

70. The legislative history of AB 1437 suggests that bill's true purpose was not to protect public health but rather to protect California farmers from the market effects of Prop 2 by "leveling the playing field" for out-of-state egg producers. An analysis by the California Assembly Committee on Appropriations following its May 13, 2009 committee hearings on AB 1437 stated as follows:

> "Rationale. With the passage of Proposition 2 in November 2008, 63% of California's voters determined that it was a priority for the state to ensure the humane treatment of farm animals. However, the proposition only applies to in-state producers. *The intent of this legislation is to level the playing field so that in-state producers are not disadvantaged.* This bill would require that all eggs sold in California must be produced in a way that is compliant with the requirements of Proposition 2."

Bill Analysis of the California Assembly Committee on Appropriations, May 13, 2009 at 1 (emphasis added), attached as Ex. M.

71. After AB 1437 passed both the California Assembly and the California Senate, the California Health & Human Services Agency (CHHS), prepared an Enrolled Bill Report for the Governor. That report stated in pertinent part, "Supporters of Proposition 2 claimed that giving egg-laying hens more space may reduce this type of salmonellosis by reducing the intestinal infection with *Salmonella Enteritidis* via reducing the stress of intensive confinement. *Scientific evidence does not definitively support this conclusion."* CHHS Enrolled Bill Report at 2 (emphasis added), attached as Ex. K. Summarizing the arguments pro and con concerning AB 1437 later in its report, CHHS further stated that one of the arguments against enactment of the legislation is that there is "[n]o scientific evidence to support assertion of salmonella prevention." *Id.* at 5.

72. Indeed, the California Department of Food and Agriculture ("CDFA") concedes in the Legal Impact

section of its own Enrolled Bill Report for AB 1437 that the bill's purported public health rationale is likely untenable. If AB 1437 were to be challenged on Commerce Clause grounds, the CDFA warned, California

> will have to establish that there is a public heath justification for limiting the confinement of egg-laying hens as set forth in section 25990. This will prove difficult because, given the lack of specificity as to the confinement limitations, it will invariably be hard to ascribe any particular public health risk for failure to comply .... [W]e doubt that the federal judiciary will allow the state to rely exclusively upon the findings of the Legislature, such as they are, to establish a public health justification for section 25990.

CDFA Enrolled Bill Report at 5, attached as Ex. L.

73. Despite the absence of any scientific evidence to support the bill's purported public health rationale, CDFA urged the governor to sign AB1437 into law for purely economic reasons:

> RECOMMENDATION AND SUPPORTING ARGUMENTS:
> SIGN. In November 2008, voters passed Proposition 2, requiring California farm animals, including egg-laying hens, have room to move freely. Approximately 35% of shell eggs consumed in California are imported from out of state. California is the fifth largest producer behind Iowa, Ohio, Indiana and Pennsylvania, in that order. *This will ensure a level playing field*

> *for California's shell egg producers by requiring out of state producers to comply with the state's animal care standards.*

Ex. L at 1 (emphasis added).

74. Later in the same report, CDFA warned the governor that the danger in not signing the bill was competition, not contamination:

> When Proposition 2 requirements are implemented in 2015, these producers will no longer be economically competitive with out-of-state producers. *Without a level playing field with out-of-state producers, companies in California will no longer be able to operate in this state and will either go out of business or be forced to relocate to another state.* This will result in a significant loss of jobs and reduction of tax revenue in California.

Id. at 3 (emphasis added).

75. In his signing statement, Governor Schwarzenegger makes no mention of AB1437's purported public health rationale at all. The only purposes he cites for enacting the law is protecting California farmers from the market effects of Prop 2: "The voters' overwhelming approval of Proposition 2 demonstrated their strong support for the humane treatment of egg producing hens in California. By ensuring that all eggs sold in California meet the requirements of Proposition 2, this bill is good for both California egg producers and animal welfare." *Schwarzenegger signs bill requiring 'humane' out-of-*

state eggs, SACRAMENTO BEE CAPITOL ALERT (July 7, 2010) attached as Ex. N.

The purported public health purpose of AB1437 is preempted by federal law in any event.

76. Even assuming that AB1437 served a legitimate public health purpose *within* California by limiting the methods of egg production *outside* California, the statute would be expressly and implicitly preempted by the Federal Egg Products Inspection Act ("EPIA"), 21 U.S.C. § 1031 et seq.

77. Section 1031 of the EPIA, which is entitled "Congressional Statement of Findings," makes clear that one of the express purposes of the EPIA is to protect human health in connection with the consumption of shell eggs:

> It is essential, in the public interest, that the health and welfare of consumers be protected by the adoption of measures prescribed herein for assuring that eggs and egg products distributed to them and used in products consumed by them are wholesome, otherwise not adulterated, and properly labeled and packaged. . . .It is hereby found that ... regulation by the Secretary of Agriculture and the Secretary of Health and Human Services, ... as contemplated by this chapter, are appropriate ... to protect the health and welfare of consumers.

78. Section 1032 of EPIA, which is entitled "Congressional Declaration of Policy," contains a Congressional mandate for national uniformity of standards for eggs:

> It is hereby declared to be the policy of the Congress to provide for the inspection of certain egg products, restrictions upon the disposition of certain qualities of eggs, and uniformity of standards for eggs, and otherwise regulate the processing and distribution of eggs and egg products as hereinafter prescribed *to prevent the movement or sale for human food, of eggs and egg products which are adulterated* or misbranded or otherwise in violation of this chapter.

(Emphasis added).

79. Under EPIA, Congress expressly preempted state laws intended to regulate the quality and condition of eggs: "For eggs which have moved or are moving in interstate or foreign commerce, no State or local jurisdiction may require the use of standards of quality, condition, weight, quantity, or grade which are in addition to or different from the official Federal standards...." 21 U.S.C. § 1052(b).

80. The terms "condition" and "quality" are not defined within the EPIA itself. Rather in Section 1043 of the EPIA, Congress delegated to the Secretary of Agriculture broad authority to promulgate "such rules and regulations as he deems necessary to carry out the purposes or provisions of this chapter." USDA carried out those obligations in part by enacting a series of definitions for the purpose of the EPIA which are set forth in 7 CFR § 57.1. Those definitions provide in pertinent part that:

> *Condition means any characteristic affecting a product's merchantability including*; but not

> being limited to, . . . *cleanliness*, soundness, *wholesomeness*, *or fitness for human food* of any product; or the processing, handling, or packaging which affects such product.
>
> . . .
>
> *Quality means the inherent properties of any product which determine its relative degree of excellence.*

(Emphasis added.)

81. If AB1437's behavior-based standards for determining appropriate cage size were actually intended to reduce the risk of contamination from salmonella or other food-borne pathogens, such standards would be "in addition to or different from the official Federal standards" enumerated in EPIA, and would therefore be preempted by federal law.

AB1437 regulates conduct wholly and exclusively outside California and substantially burdens interstate commerce.

82. The inescapable conclusion to be drawn from AB1437's legislative history is that California's *legislature* enacted AB1437 as a protectionist response to the competitive advantage California *voters* gave out-of-state egg producers when they passed Prop 2.

83. As Prop 2 would already have required larger hen enclosures *within* the State of California starting on January 1, 2015, the sole effect of AB1437 will be the extraterritorial regulation of egg production *outside* the State of California in places like Missouri, Nebraska, Alabama, Oklahoma, Kentucky, and Iowa.

84. AB1437 also imposes a substantial burden on interstate commerce by forcing Plaintiffs' farmers either to forgo California's markets altogether or accept significantly increased production costs just to comply with California law.

85. Those higher production costs will increase the price of eggs outside California as well as in. Because demand for eggs varies greatly throughout the year, egg producers in other states cannot simply maintain separate facilities for their California-bound eggs. In high-demand months, Plaintiffs' farmers may not have enough eggs to meet California demand if only a fraction of their eggs are produced in compliance with AB1437. In low-demand months, there may be insufficient California demand to export all compliant eggs, forcing Plaintiffs' farmers to sell those eggs in their own states at higher prices than their competitors. Given those inefficiencies, Plaintiffs' egg farmers must choose either to bring their entire operations into compliance with AB1437 so that they always have enough supply to meet California demand, or else simply leave the California marketplace.

86. Assuming they may comply with AB1437 by building new colony housing with 116 square inches per bird—as required by 3 CA ADC § 1350(d)(1)—the necessary capital improvements will cost Plaintiffs' farmers hundreds of millions of dollars. The cost to bring all henhouses into compliance in Missouri alone is estimated at approximately $120 million.

87. Yet, because those costs would have been imposed on California producers under Prop 2 already, the sole purpose and economic effect of AB1437 is to

increase capital improvement and production costs *outside* California—i.e., to "level the playing field."

88. Even if farmers in Missouri would choose to forgo the California market instead of incurring increased production costs, AB1437 would still impose a substantial burden on interstate commerce. Without California consumers, Missouri farmers would produce a surplus of 540 million eggs per year. If one third of Missouri's eggs suddenly had no buyer, supply would outpace demand by half a billion eggs, causing the price of eggs—as well as egg farmers' margins—to fall throughout the Midwest and potentially forcing some Missouri producers out of business. The same goes for egg producers in Nebraska, Alabama, Oklahoma, Kentucky, and Iowa.

Plaintiffs bring this suit to declare AB1437 and 3 CA ADC § 1350(d)(1) unconstitutional and enjoin their enforcement presents a case or controversy ripe for review.

89. Although AB1437 and 3 CA ADC § 1350(d)(1) do not become effective until 2015, the injury to Plaintiffs' farmers is "certainly impending." *See Pennsylvania v. West Virginia,* 262 U.S. 553, 593 (1923). Absent some additional action by Congress, the California Legislature, or this Court, any of our farmers who continue to export their eggs to California will face criminal sanctions beginning January 1, 2015 unless they take action now to come into compliance by the law's effective date.

90. Constructing new, compliant housing for tens of millions of hens in Nebraska, Alabama, Oklahoma, Kentucky, and Iowa cannot be accomplished overnight.

If our farmers want to continue selling eggs in the California market on January 1, 2015, those eggs must be laid, inspected, packaged, and shipped before the end of 2014. In fact, those farmers need to begin making the necessary capital improvements to their farms *now* if they are to reach compliance with California law by January 2015. If AB1437 and 3 CA ADC § 1350(d)(1) are eventually held to be unconstitutional, those capital improvements will turn out to have been a tremendous and unnecessary expense.

91. The uncertainty surrounding the constitutionality of AB1437 and 3 CA ADC § 1350(d)(1) and their impending effective date less than one year away forces Plaintiffs' egg producers to literally bet the farm on the outcome of this law suit. They can proceed without making capital improvements in hopes that the law will be struck down, or they can begin the costly and labor-intensive process of changing their operations in case AB1437 and 3 CA ADC § 1350(d)(1) are upheld.

92. Whichever path they follow, an incorrect choice spells doom for their businesses. Coming into compliance will necessarily increase productions costs; if the law is eventually struck down, the farmer will not be able to compete with egg producers still using cage-systems. And although maintaining the status quo costs nothing now, if the law is eventually upheld, the farmer who has not preemptively complied will face an interruption of business during the months it will take her to retool after the law is already in effect.

93. A genuine case or controversy has arisen between the parties as to the constitutionality of

AB1437 and 3 CA ADC § 1350(d)(1). Until that controversy is resolved, Plaintiffs' farmers do not know whether they need to renovate their henhouses in order to remain competitive after January 1, 2015. If they choose to comply, and AB1437 and 3 CA ADC § 1350(d)(1) are struck down, our farmers will have priced themselves out of business. But if they wait and see, and the law is upheld, they will lose months of business trying to catch up after the law comes into effect.

94. Article III of the U.S. Constitution does not require Plaintiffs to wait until AB1437 and 3 CA ADC § 1350(d)(1) become effective to seek a declaratory judgment as to their constitutionality because the damage to our economies will be irreparable at that point. This is precisely the kind of case for which declaratory relief is appropriate under 28 U.S.C. §2201.

COUNT I

VIOLATION OF THE COMMERCE CLAUSE

95. Plaintiffs incorporate all allegations in Paragraphs 1 through 93 into Count I of this Complaint.

96. The Commerce Clause of the United States Constitution prohibits states from enacting legislation that protects its own citizens from competition from citizens of other states, that regulates conduct wholly outside of the state's borders, or that places an undue burden on interstate commerce.

97. AB1437 and 3 CA ADC § 1350(d)(1) violate the Commerce Clause because they are protectionist measures intended to benefit California egg producers

at the expense of Plaintiffs' egg producers by eliminating the competitive advantage our farmers would enjoy once Prop 2 becomes effective.

98. AB1437 and 3 CA ADC § 1350(d)(1) also violate the Commerce Clause because they have the purpose and effect of regulating conduct in our states and wholly outside the State of California.

99. AB1437 and 3 CA ADC § 1350(d)(1) further violate the Commerce Clause because they impose a substantial burden on interstate commerce by forcing Plaintiffs' egg producers either to increase their production costs—raising the price of eggs not just in California but in our own states as well—or forgo the largest market in the United States and see the prices and profits plunge.

100. AB1437 and 3 CA ADC § 1350(d)(1) serve no legitimate state purpose because they do not protect the welfare of any animals within the State of California, and their stated purpose—to prevent salmonella contamination—is pretextual.

101. Plainitffs therefore seek declaratory and injunctive relief under 28 U.S.C. § 2201.

COUNT II

(IN THE ALTERNATIVE)

FEDERAL PREEMPTION

102. Plaintiffs incorporate all allegations in Paragraphs 1 through 100 into Count II of this Complaint.

103. If this Court were to rule that AB1437 and 3 CA ADC § 1350(d)(1) served a legitimate, non-discriminatory purpose to lower the risk of salmonella contamination by imposing new cage-size and flock-density standards for housing egg-laying hens, the statute and regulations would be in conflict with the express terms of 21 U.S.C. § 1052(b).

104. Moreover, because Congress evidenced its intention to occupy the entire field of regulations governing the quality and condition of eggs by imposing uniform national standards, the Federal Egg Products Inspection Act, 21 U.S.C. § 1032, implicitly preempts AB1437 and 3 CA ADC § 1350(d)(1) as well.

105. Plaintiffs therefore seek declaratory and injunctive relief under 28 U.S.C. § 2201 that AB1437 and 3 CA ADC § 1350(d)(1) are null and void under the Supremacy Clause of the United States Constitution.

WHEREFORE, the States of Missouri, Nebraska, Alabama, and Oklahoma; the Commonewealth of Kentucky, and the Governor of Iowa respectfully request that this Court issue the following relief:

A. declare that AB1437 is invalid because it violates the Commerce Clause of the United States Constitution or, in the alternative, because it is expressly and implicitly preempted by the Federal Egg Products Inspection Act;

B. declare that 3 CA ADC § 1350(d)(1) is invalid because it violates the Commerce Clause of the United States Constitution or, in the alternative, because it is expressly and implicitly preempted by the Federal Egg Products Inspection Act;

C. permanently enjoin Defendant from enforcing the provisions of both AB1437 and 3 CA ADC § 1350(d)(1);

D. award costs and fees; and

E. grant such other relief as the Court deems just and proper.

March 5, 2014 Respectfully submitted,

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