No. 149, Original

IN THE
# Supreme Court of the United States

STATE OF INDIANA, STATE OF ALABAMA,
STATE OF ARKANSAS, STATE OF LOUISIANA,
STATE OF MISSOURI, STATE OF NEBRASKA,
STATE OF NORTH DAKOTA, STATE OF OKLAHOMA,
STATE OF SOUTH CAROLINA, STATE OF TEXAS,
STATE OF UTAH, STATE OF WEST VIRGINIA, AND
STATE OF WISCONSIN,
*Plaintiffs*,

v.

COMMONWEALTH OF MASSACHUSETTS,
*Defendant*.

## REPLY IN SUPPORT OF MOTION FOR LEAVE TO FILE BILL OF COMPLAINT


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## REPLY IN SUPPORT OF THE MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

Massachusetts neither undermines the importance and seriousness of the issue presented, nor provides any other convincing reason for the Court to deny the Motion for Leave.

### I. This Dispute Between States Raises an Important and Serious Issue for Adjudication

One critical consideration for the Court is whether this case raises an important and serious issue. *Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992). Massachusetts says this case merely "amounts to a policy disagreement[,]" Brief in Opposition ("Opp. Br.") at 9, but through its Animal Law that disagreement poses a "threatened invasion of rights" that "implicates serious and important concerns of federalism." *Maryland v. Louisiana*, 451 U.S. 725, 744 & n.11 (1981) (quoting *New York v. New Jersey*, 256 U.S. 296, 309 (1921)). Whether one State may, in effect, regulate production in other States is surely an issue of sufficient importance and seriousness to justify original jurisdiction.

#### A. The Animal Law regulates nationally

Massachusetts asserts that its Animal Law "simply does not apply to Indiana" because "[t]he Act applies only to 'sale[s] within the Commonwealth of Massachusetts'" and "does not directly or in practical effect regulate sales in other States[.]" Opp. Br. 21, 29. That assertion is utterly implausible and ignores

the supply chain the Animal Law necessarily regulates. For example, the Animal Law prescribes (among other things) the pen size of hens that produce shell eggs; yet reportedly *ninety-nine percent* of such eggs sold at retail in Massachusetts come from other states. Plaintiff States' Br. 13. The Animal Law therefore seems *designed* to regulate farming operations in other states—including Purdue University hog production.

Whether a state law constitutes forbidden extraterritorial legislation is a function not merely of facial application, but of "practical effect[,]" including "the consequences of the statute itself . . . ." *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989). In *Healy*, the Court invalidated state laws that targeted local retail sales, but which effectively regulated "commerce that takes place wholly outside of the State's borders[.]" *Id.*; *see also Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 580–82 (1986) (invalidating statute capping producers' in-state price of liquor to lowest price offered out of state); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935) (invalidating law precluding local resale of milk purchased at prices different than allowed by New York Law).

The Animal Law nominally targets in-state retail sales, but *in effect* regulates animal housing in *other* States, not how animal products are sold in Massachusetts. The agricultural supply chain requires multiple out-of-state transactions—farm procurement and production, sale to distributors, slaughter, packing, and transport—before sale to Massachusetts retailers and consumers. Plaintiff States' Appendix

("App.") 10 ¶ 7. One does not simply forbid sales of agricultural commodities in Massachusetts based on the circumstances of production without also, in effect, regulating the production.

Massachusetts both recognizes the extraterritorial impact of its law and misses the point of prohibiting such laws when it questions whether farmers "will actually choose to make any necessary investments to comply with Massachusetts law—as opposed to just continuing with their current practices and selling . . . elsewhere." Opp. Br. 25–26. The whole question is whether the Commerce Clause protects farmers from having to choose between ignoring another state's production regulations and selling products in that state. Massachusetts confirms that its Animal Law does, in fact, put farmers in other states to that choice.

### B. Circuit disparity over when states may close markets confirms the important and serious nature of the issue presented

The importance and seriousness of the issue presented is even more pronounced given the circuit conflict outlined by Plaintiff States. Massachusetts fails to confront, let alone refute, that disagreement, saying only that the relevant cases are vaguely distinguishable based on different factual contexts. Opp. Br. 33 n.11. But while the regulations at stake targeted different products, *all* closed state markets to products created under disfavored conditions having no relation to the quality of the product itself.

On one side, in *National Solid Waste Management Ass'n v. Meyer*, 63 F.3d 652 (7th Cir. 1995), the court invalidated a law closing state landfills to waste produced by non-recycling communities, and in *North Dakota v. Heydinger*, 825 F.3d 912, 922 (8th Cir. 2016), the court invalidated a law closing markets to electricity generated by any new large facility. On the other side, the court in *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070 (9th Cir. 2013), upheld a law closing markets to fuel generated from sources that emit too much carbon during production, and the court in *Energy and Environment Legal Institute v. Epel*, 793 F.3d 1169 (10th Cir. 2015), upheld a law closing markets to electricity generated from an insufficient percentage of renewable sources.

These irreconcilable cases demonstrate that the Motion for Leave raises an important and serious issue: whether states may close their markets based on the circumstances of production rather than the quality of the product.

### C. The Animal Law does not protect the health and safety of consumers

Massachusetts argues that a state may regulate its food supply so long as it does not discriminate and can survive the balancing test of *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). *See* Opp. Br. 32–33. But the laws upheld in the cases Massachusetts cites

are justified by reference to the quality of the products, not the conditions of production simpliciter.[1]

Here, the self-stated primary purpose of the Animal Law is not health and safety, but "to prevent animal cruelty[.]" Mass. Gen. Laws ch. 129 App. § 1-1. And while the Animal Law "also" purports to be concerned with "the health and safety of Massachusetts consumers," *id.*, Massachusetts fails to provide even minimal explanation to support such an implausible rationale. How does pen size affect egg or pork quality? Massachusetts does not say.

More telling is the Animal Law's tertiary purpose to address "negative fiscal impacts on the Commonwealth of Massachusetts." *Id.* Here, the Animal Law

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[1] *See Sligh v. Kirkwood*, 237 U.S. 52 (1915) (regulation barring sale, shipment, etc. of immature oranges based on concerns about fitness for consumption); *New York ex rel. Silz v. Hesterberg*, 211 U.S. 31 (1908) (no possession of game birds during closed season owing to potential for adulteration); *Plumley v. Massachusetts*, 155 U.S. 461 (1894) (no sale of artificially colored oleomargarine, in order to protect against consumer fraud); *Empacadora de Carnes de Fresnillo, S.A. de C.V. v. Curry*, 476 F.3d 326 (5th Cir. 2007) (ban on possession and sale of horsemeat intended for human consumption); *Pac. Nw. Venison Producers v. Smitch*, 20 F.3d 1008 (9th Cir. 1994) (ban on possession, etc. of "deleterious exotic wildlife"). The only exceptions are New York's prohibition on sale of wild birds upheld in *Cresenzi Bird Imps., Inc. v. New York*, 658 F. Supp. 1441 (S.D.N.Y. 1987), and California's ban on force-fed foie gras upheld in *Ass'n des Eleveurs de Canards et D'Oies du Quebec v. Harris*, 729 F.3d 937 (9th Cir. 2013). But those decisions underscore the need for the Court to review whether a state may regulate transactions occurring wholly in other states when there is no implication for the quality of the products being produced or for the health, safety and welfare of the citizens of the regulating state.

itself seems to convey that extraterritorial application protects any Massachusetts farmers affected—a prototypical Commerce Clause violation. *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273 (1988) ("This 'negative' aspect of the Commerce Clause prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.").

Accordingly, while *Pike* balancing is appropriate where states regulate interstate commerce as part of a legitimate attempt to protect the health and safety of citizens, it does not apply where a state is simply trying to export its preferred public policy to other states.

## II. Plaintiff States Have Multiple Grounds for Standing

### A. Indiana itself produces hogs in facilities that will be affected by the Animal Law, so it has direct-injury standing

Massachusetts lodges no dispute with the facts Indiana alleges respecting Purdue University's production of hogs for the national market, nor with Indiana's argument that, if those facts describe Article III injury to Purdue, such injury constitutes injury to Indiana as a State. Rather, it argues only that Indiana's claim of direct injury is "of no weight at all" because the Animal Law "simply does not apply to Indiana" since Purdue's "sales of meat are transactions that occur wholly outside the Commonwealth of Massachusetts." Opp. Br. 21.

Indiana, of course, said exactly the same thing in its opening brief, Plaintiff States' Br. 13, and Massachusetts' agreement on the point ought to bring a swift end to any purported dispute over standing. The whole question this lawsuit seeks to answer is whether one state may enforce a law that ultimately impacts "transactions that occur wholly outside" that state. And one way to have standing to challenge such a law is to participate in wholly out-of-state transactions that are nonetheless regulated by the law in question. *Energy & Env't Legal Inst. v. Epel*, 793 F.3d 1169, 1175 n.1 (10th Cir. 2015) (Gorsuch, J.) (declaring out-of-state coal producer's sales to generators who sell electricity in Colorado "more than enough to satisfy Article III's 'injury-in-fact' requirement" where Colorado law "limits . . . the . . . market" the producer "may serve[]") (internal citations omitted)).

Massachusetts' argument seems to be that, because the Animal Law is only *enforceable* against Massachusetts retailers, only they can challenge it. Opp. Br. 22–23. To the contrary, precisely because such retailers are in Massachusetts, they would have no grounds for asserting that the Animal Law is unconstitutional because it regulates others' wholly out-of-state transactions.

Massachusetts also argues that the Court should not permit one state to sue another state on behalf of a select group of residents. Opp. Br. 10–12 (citing *Pennsylvania v. New Jersey*, 426 U.S. 660, 665–66 (1976) (per curiam); *Oklahoma ex rel. Johnson v. Cook*, 304 U.S. 387, 396 (1938); *Oklahoma v. Atchison,*

*Topeka, & Santa Fe Ry. Co.*, 220 U.S. 277 (1911)). But here, unlike in those cases—and more like in *Kansas v. Colorado*, 533 U.S. 1, 8–9 (2001)—Plaintiff States are suing because they themselves suffer direct injury from the challenged regulation. Massachusetts has erected trade barriers to check the refusal of other States to enact its preferred production regulations. That is a paradigmatic assault on horizontal federalism, and Plaintiff States are seeking legal redress for their own direct interests, which extend far beyond those of "certain farmers[.]" Opp. Br. 12.

### B. Plaintiff States' *parens patriae* standing is on behalf of citizen consumers who will suffer retail price increases—not just "certain farmers"

The Court has long permitted States to 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." *Maryland v. Louisiana*, 451 U.S. 725, 737 (1981) (citing *Missouri v. Illinois*, 180 U.S. 208 (1901); *Kansas v. Colorado*, 185 U.S. 125 (1902); *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907)). The Plaintiffs States assert this basis for standing as well, on the theory that the Massachusetts Animal Law will injure the general population in a substantial way by causing higher prices for shell eggs and pork.

Massachusetts dismisses that allegation as "speculative," but the Plaintiff States cite evidence of price increases caused by similar laws. Opp. Br. 24–26. Unlike in *Missouri ex rel. Koster v. Harris*, 847 F.3d 646,

652 (9th Cir. 2017), where the complaint lacked "specific allegations about the statewide magnitude of these difficulties or the extent to which they affect[ed] more than just an 'identifiable group of individual' egg farmers[,]" here Plaintiff States cite scientific analysis of the California's egg law's effect on consumer prices. *See* Declaration of Jayson L. Lusk, Ph.D. App. 17–25. Moreover, Dr. Lusk has specifically testified that that Massachusetts Animal Law "will result in increased production costs for farmers" that will, in turn, affect "consumers who will be charged higher prices for meat and eggs produced according to the Massachusetts standards." App. 24 ¶ 23–24.

Furthermore, Missouri has demonstrated the negative interstate impact of California's analogous egg law. *See* Bill of Compl., *Missouri v. California*, Orig. No. 148 (Dec. 4, 2017) (citing Ex. A, Joseph H. Haslag, Ph.D., *California Cage-System Regulations: The Economic Impacts on Prices, State Government Expenses and Welfare Losses* (2017), at A–7 ("For Missouri households, the welfare loss is between $1.75 million and $7.4 million per year.")). There is no reason to expect a different result from the Massachusetts Animal Law.

Accordingly, Plaintiff States have unquestionably demonstrated multiple grounds for standing to bring this challenge—including as a livestock producer effectively regulated by the Animal Law and as *parens patriae* on behalf of citizens who will suffer retail price increases.

## III. This Case Presents a Clean Legal Issue For Which No Other Forum Exists

Massachusetts's assertion that this case is "better suited for resolution in the lower courts[,]" Opp. Br. 17, is both inaccurate and contrary to the rationale for the Court's original jurisdiction.

1. Massachusetts speculates that the case "implicates myriad factual issues," Opp. Br. 19, including the "evolving state of animal husbandry practices and consumer demand . . . the numerous variables affecting the prices for these products in the various markets; the interstate price effects . . . and the extent of the Plaintiff States' own purchasing and farming activities." Opp. Br. 19. The relevance of many of these inquiries is unclear, and the basis for insisting on others is nonexistent.

First, as to Plaintiffs' own "purchasing and farming activities," Indiana has already provided evidence to establish standing based on both. Indiana produces pork for the interstate market, and, should the Massachusetts law go into effect, either its operations will be affected or it will forego the Massachusetts market. App. 11 ¶ 9. And Indiana buys shell eggs to feed its prisoners, the price of which will be affected by the Massachusetts law. App. 14–15 ¶ 4; *see also* App. 24 ¶¶ 24–26. Massachusetts cannot evade original jurisdiction merely by professing to contest such straightforward—and easily tested—factual assertions.

Second, when suggesting a need to investigate the "evolving state of animal husbandry practices" and

"consumer demand," Massachusetts implies that other forces will cause farmers in all States to farm the Massachusetts way, such that litigating the Animal Law would be moot. To be sure, if Massachusetts has evidence to suggest this lawsuit will be overtaken by events, it may surely bring it forward. But that remote possibility does not imply complex discovery and fact-finding issues that should deter the Court.

Third, the most plausible area of factual disagreement that Massachusetts raises is the degree to which its Animal Law will cause an increase in commodity prices. Again, the Lusk study evidences that likelihood, but Massachusetts purports to dispute those findings. The potential for such a price increase, however, goes only to the Plaintiff States' *parens patriae* standing, and Indiana's direct standing means there is no compelling need to resolve any dispute over whether Lusk is correct.

Regardless, gathering and presenting fact and expert witness testimony is hardly a novel or arduous exercise for the parties or the Court. The Court is well versed in appointing Special Masters to referee evidence production and submission, and the Court itself frequently must assess the views of competing experts when it exercises original jurisdiction. *See, e.g.*, *Kansas v. Nebraska*, 135 S.Ct. 1042, 1051 (2015) ("Special Master issued his report and recommendations" after "conducting hearings, receiving evidence, and entertaining legal arguments[.]").

On the merits, the case presents a clean legal issue unburdened by serious questions of fact. Either Massachusetts may close its markets to commodities not produced in conformance with its policy preferences, or it may not. Resolution of that unanswered Commerce Clause issue turns on traditional legal tools, including the text, history and structure of Article 1, section 8 of the Constitution. It does not depend on the precise degree of regulatory or economic intrusion the Animal Law portends for other States.

2. Finally, Massachusetts says the Court should decline original jurisdiction and leave Plaintiff States to bring their claims in lower federal courts. Opp. Br. 17–19. It fails, however, to identify how 28 U.S.C. § 1251(a)—"[t]he Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States"—permits Plaintiff States to sue Massachusetts in federal district court. *Cf. Hood ex rel. Mississippi v. City of Memphis, Tenn.*, 570 F.3d 625, 632 (5th Cir. 2009) ("Tennessee cannot be joined to this suit without depriving the district court of subject-matter jurisdiction because a suit between Mississippi and Tennessee for equitable apportionment of the Aquifer implicates the exclusive jurisdiction of the Supreme Court under 28 U.S.C. § 1251(a).").

Furthermore, Plaintiff States need to achieve a final result more expeditiously than would be possible in district court. If the Animal Law is valid, livestock farmers will need to make plans and expend resources on infrastructure well in advance of the effective date. *See* App. 11 ¶ 11 ("Purdue University will need to

begin planning its compliance with this law in advance of those effective dates."). The process of obtaining a district court final judgment, followed by appeal, followed by cert- and merits-stage proceedings before this Court may not permit such timely resolution. Particularly in view of the existing circuit conflict over extraterritorial regulation, the Court would in all likelihood need to address the issue in any event. Doing it now, through the original action procedure, ensures efficient, final resolution and vindicates the Court's structural role—envisioned by both the Framers and Congress—as the arbiter of disputes between States.

## CONCLUSION

For the foregoing reasons, Plaintiff States' Motion for Leave to File Bill of Complaint should be granted.

Respectfully submitted,

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