No. 148, Original

In the Supreme Court of the United States

STATE OF MISSOURI, ET AL.,

Plaintiffs,

v.

STATE OF CALIFORNIA,

Defendant.

ON MOTION FOR LEAVE TO FILE A BILL OF COMPLAINT

BRIEF IN OPPOSITION

XAVIER BECERRA
Attorney General of California
EDWARD C. DUMONT
Solicitor General
THOMAS S. PATTERSON
Senior Assistant Attorney General
AIMEE FEINBERG*
Deputy Solicitor General
TAMAR PACHTER
Supervising Deputy Attorney General
PAUL STEIN
Deputy Attorney General
STATE OF CALIFORNIA
DEPARTMENT OF JUSTICE
1300 I Street
Sacramento, CA 95814
(916) 210-6003
Aimee.Feinberg@doj.ca.gov
**Counsel of Record*

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STATEMENT

1. Section 25996 of the California Health and Safety Code, enacted in 2010 in Assembly Bill 1437, provides that, effective 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" the state code. Those standards, adopted by California voters in 2008 in Proposition 2, forbid a person in California "from tether[ing] or confin[ing]" certain animals, 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." Cal. Health & Safety Code §§ 25990, 25991(b).

Both Proposition 2 and AB 1437 address activities occurring within California. Proposition 2 regulates hen-confinement practices on California farms, while AB 1437 applies to the sale of eggs within the State. AB 1437 applies uniformly (and only) to in-state sales, wherever the eggs may have been produced. Cal. Health & Safety Code § 25996.

In adopting AB 1437, the state Legislature sought 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(e). Citing reports by the Pew Commission on Industrial Farm Production and the World Health Organization and Food and Agriculture Organization of the United Nations, the Legislature found that "[s]almonella is

the most commonly diagnosed food-borne illness in the United States," and that "[e]gg-laying hens subjected to stress are more likely to have higher levels of pathogens in their intestines." *Id.* § 25995(c)-(d). The Legislature further found that "reducing flock prevalence [i.e., crowding] results in a directly proportional reduction in human health risk," and that "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." *Id.* § 25995(a)-(b). The food-safety provisions of AB 1437 are "in addition to, and not in lieu of, any other laws protecting animal welfare." *Id.* § 25996.3.

Following passage of AB 1437, the California Department of Food and Agriculture promulgated shell egg food safety regulations. *See* Cal. Code Regs. tit. 3, § 1350 (2013). These regulations require egg producers and handlers registered in California to take specified measures to combat salmonella contamination, including environmental-monitoring, vaccination, and other infection-prevention programs. *Id.* § 1350(b)-(c). They also prohibit the sale in California of shelled eggs from hens that are kept in cages or other enclosures that fail to provide a specified minimum amount of floor space per bird. *Id.* § 1350(d).

Like AB 1437, section 1350(d) was designed to address ongoing concerns about salmonella contamination. Cal. Dep't of Food & Agric., *Proposed Action on Regulations*, July 6, 2016, CA REG TEXT 297585 (NS) (Consideration of Alternatives). Among other things, the Department determined that establishing minimum enclosure-size requirements is "important to ensure the safety of shell eggs marketed to consumers." *Id.*

2. This is the third federal court challenge to California's cage-size requirements since their adoption.

a. In 2012, a California egg producer sued the Governor and Attorney General, alleging that Proposition 2 violated the dormant Commerce Clause and was unconstitutionally vague. The district court dismissed the action for failure to state a claim, and the court of appeals affirmed. *Cramer v. Brown*, No. CV 12-3130-JFW (JEMx), 2012 WL 13059699 (C.D. Cal. Sept. 12, 2012), *aff'd sub. nom. Cramer v. Harris*, 591 Fed. Appx. 634 (9th Cir. 2015).

b. In February 2014, the State of Missouri sued the California Attorney General and the Secretary of the California Department of Food and Agriculture, alleging that AB 1437 and section 1350(d) were preempted by the Egg Products Inspection Act, 21 U.S.C. § 1031 et seq., and violated the dormant Commerce Clause. Missouri later amended its complaint to add as plaintiffs the States of Nebraska, Oklahoma, and Alabama, the Commonwealth of Kentucky, and the Governor of Iowa.

The plaintiff States claimed that AB 1437 would require private egg producers within their jurisdictions to modify their operations and incur significant costs if they wished to continue selling eggs in California, thereby "eliminating the competitive advantage [their] farmers would [otherwise] enjoy once Prop. 2 bec[ame] effective" as to producers in California. *See* First Amended Compl. ¶ 97, *Missouri v. Harris,* No. 2:14-cv-00341-KJM-KJN (E.D. Cal. Dec. 15, 2014), Dkt. No. 13; *see also id.* ¶ 7 (alleging that egg farmers in the plaintiff States were the persons "most directly affected" by AB 1437). Their complaint further alleged that, due to AB 1437, "higher production costs [would] increase the price of eggs outside of California as well as in." *Id.* ¶ 85. If, however, farmers

instead "ch[ose] to forgo the California market," supply "would outpace demand by half a billion eggs, causing the price of eggs—as well as farmers' margins—to fall throughout the Midwest and potentially forcing" producers "out of business." *Id.* ¶ 88. Each of the plaintiff States alleged that it had standing to bring its claims as *parens patriae* "because it ha[d] quasi-sovereign interests in protecting its citizens' economic health and constitutional rights …." *Id.* ¶¶ 10, 17, 22, 27, 32.

The district court dismissed the complaint with prejudice, holding that it failed to allege facts sufficient to establish *parens patriae* standing. *Missouri v. Harris*, 58 F. Supp. 3d 1059 (E.D. Cal. 2014). The court found no plausible allegations of injury to the public at large, and concluded that the plaintiff States "ha[d] not brought th[e] 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 w[ould] allegedly be impacted by AB 1437." *Id.* at 1073.

The court of appeals affirmed, but remanded with instructions to dismiss the case without prejudice. *Missouri ex rel. Koster v. Harris*, 847 F.3d 646 (9th Cir. 2017). The court of appeals agreed with the district court that the plaintiff States had failed to articulate an interest "apart from the interests of particular private parties" and thus had not adequately pleaded facts necessary to proceed as *parens patriae*. *Id.* at 651 (quoting *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607 (1982) (internal quotation marks omitted)). Their allegations that increases in the price of eggs would broadly harm consumers were inconsistent with their allegations that prices would fall, and in any event were too speculative to support standing. *Id.* at 653-655. Because their complaint

was filed before AB 1437 took effect, the "unavoidable uncertainty of the alleged future changes in price ma[de] the alleged injury insufficient for Article III standing." *Id.* at 653. Among other things, any possible effect on egg prices in the plaintiff States was "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." *Id.* at 654.

The court of appeals recognized, however, that because the plaintiff States had filed suit before AB 1437 took effect, "[i]n theory, [they] could allege post-effective-date facts that might support standing." *Missouri*, 847 F.3d at 656. Accordingly, the court held that the plaintiff States were entitled to attempt to replead their claims in a new case if they chose to do so, and remanded with instructions to dismiss the action without prejudice. *Id.* This Court declined to review that decision. *Missouri ex rel. Hawley v. Becerra*, 137 S. Ct. 2188 (2017).

3. Instead of initiating a new suit in district court seeking relief against state officials based on any new post-effective-date evidence, Missouri and a larger group of States sought leave to file an original action in this Court. All of the plaintiff States in the prior *Missouri* litigation except the Commonwealth of Kentucky are plaintiffs in the present action, together with newly added plaintiffs Arkansas, Indiana, Louisiana, Nevada, North Dakota, Oklahoma, Texas, Utah, and Wisconsin.

The plaintiff States' proposed bill of complaint alleges the same two claims for relief as their prior district court action. First, it alleges that AB 1437 and section 1350(d) are preempted because the federal Egg Products Inspection Act establishes "federal stand-

ards for egg production," those standards are exclusive, and AB 1437 impermissibly supplements them. Compl. ¶¶ 55, 70, 89-93. Second, it alleges that AB 1437 and section 1350(d) violate the dormant Commerce Clause by regulating extraterritorially, discriminating against out-of-state egg producers, and imposing substantial burdens on interstate commerce without countervailing local benefits. *Id.* ¶¶ 95, 97, 98. As in the first *Missouri* action, plaintiffs seek a declaration that the challenged provisions are invalid, as well as preliminary and permanent injunctive relief barring their enforcement. *Id.* ¶¶ 93, 101, Prayer for Relief.

Plaintiffs allege that, "[b]ased on reasonable assumptions," California has "single-handedly" increased the price of eggs nationwide by 2.8 to 11.3 cents per dozen. Compl. ¶¶ 1, 9. Plaintiffs further claim that they purchase eggs to feed state prison inmates and that California law is causing "injury to their public fiscs through the increased prices they must pay …." *Id.* ¶¶ 12, 22, 26; *see also id.* ¶ 2. For example, the Missouri Department of Corrections allegedly "has incurred and will incur an estimated $18,000 to $76,000 in increased costs annually as a direct result of" California's law, again "based on reasonable assumptions." *Id.* ¶ 12.

Plaintiffs draw their allegations about price effects from a report by an economist. Compl., Exh. A. The report concludes that California law will lead to price increases throughout the country based on a methodology that estimates how much more it will cost out-of-state egg producers to continue meeting California's demands for imports, and then distributes those estimated additional costs across all eggs sold in the United States (both AB 1437-compliant eggs and conventionally produced eggs).

Specifically, the report first estimates that producers in other States would need to "increase expenditures roughly between $225 million and $925 million" in order to continue serving the California market. Compl. A24; *but see id.* (citing range of $228.05 million to $912.2 million). Next, it "assume[s] that the market price [for eggs] increases by the amount of the increase in [cost]." *Id.* at A22; *see also id.* at A39 ("I assume that in a competitive market, the price of eggs increased by the increase in the average costs of producing eggs."). And finally, it divides the total "increase[d] expenditures" by "the total number of eggs produced in the United States," and concludes that AB 1437 will cause the price of a dozen eggs to go up by 2.8 to 11.3 cents nationwide. *Id.* at A24-A25.

Based on these asserted price increases, the bill of complaint alleges that plaintiffs have standing to pursue their claims to "ensure the health and well-being of their citizens, both physical and economic," and "to prevent injury to their public fiscs." Compl. ¶¶ 24, 26, 27. The complaint further alleges that plaintiffs have standing to "assert their sovereign interest in exercising sovereign authority over individuals and entities within their borders, and in excluding from their borders California officials traveling to their States to directly inspect and regulate their domestic agricultural sectors," and to "vindicate the freedom of interstate commerce." *Id.* ¶¶ 28, 30.

ARGUMENT

Plaintiffs ask this Court to consider, in the first instance, a challenge to a California statute that regulates the sale of eggs in California. Plaintiffs contend that California's regulation of its own market causes the price of eggs to rise in other jurisdictions; but the claimed price effect is speculative, and contingent on countless independent decisions by private producers,

wholesalers, retailers, and consumers. Moreover, even if plaintiffs were able to make more direct or plausible allegations of harm, they have ample means of doing so without invoking this Court's original jurisdiction. Plaintiffs' request that this Court exercise its original jurisdiction to adjudicate a challenge to a State's regulation of its own market based on claimed ripple effects in the national economy would extend that jurisdiction beyond the limited boundaries that the Court has traditionally and sensibly marked out. Plaintiffs' motion should be denied.

1. This Court has long recognized that its authority to adjudicate original disputes between States is of a "delicate and grave [] character." *Louisiana v. Texas*, 176 U.S. 1, 15 (1900). Such suits ask the Court to exercise the "extraordinary" power "to control the conduct of one state at the suit of another." *New York v. New Jersey*, 256 U.S. 296, 309 (1921). They also tax the Court's resources, require it to assume the role of fact-finder, and constrain its ability to exercise its appellate jurisdiction to address questions of national importance arising in cases that have proceeded through the lower courts in the ordinary course. *See Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 498-499 (1971).

In light of these considerations, the Court has "said more than once that [its] original jurisdiction should be exercised only 'sparingly.'" *Mississippi v. Louisiana*, 506 U.S. 73, 76 (1992). The Court will entertain such suits "'only in appropriate cases,'" *id.*, such as where "the threatened injury is clearly shown to be of serious magnitude and imminent," *Alabama v. Arizona*, 291 U.S. 286, 292 (1934); *id.* at 291 (jurisdiction "will not be exerted in the absence of absolute necessity"). The "model case" for the use of this Court's original jurisdiction is an inter-State dispute "of such

seriousness that it would amount to *casus belli* if the States were fully sovereign." *Mississippi*, 506 U.S. at 77 (internal quotation marks omitted).

The Court looks to two factors in determining whether an original suit is appropriate for its resolution. First, the Court examines "the nature of the interest of the complaining State, focusing on the 'seriousness and dignity of the claim.'" *Mississippi*, 506 U.S. at 77 (citation omitted). Second, the Court considers "the availability of an alternative forum in which the issue tendered can be resolved." *Id.* In applying these factors, the Court has "'substantial discretion to make case-by-case judgments'" about the "'practical necessity'" of its review. *Id.* at 76 (quoting *Texas v. New Mexico*, 462 U.S. 554, 570 (1983)).[1]

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[1] Plaintiffs and their amici invite the Court to reconsider its discretionary approach to exercising jurisdiction over disputes between States. Pltfs. Br. 13 n.1; Landmark Legal Found. Br. 3-6; Center for Consumer Freedom Br. 2-13. None of their arguments, however, suggests the kind of special justification that would be required to disturb settled law. *See, e.g.*, *Dickerson v. United States*, 530 U.S. 428, 443 (2000) (even in constitutional cases, "special justification" required to depart from precedent) (internal quotation marks omitted). Plaintiffs' suggestion that the discretionary approach is of recent vintage (Br. 13) ignores earlier authority denying leave to file an inter-State suit, *see Alabama*, 291 U.S. at 291-292, as well as longstanding decisions indicating that the Court will hear such suits only when necessary to serve the purposes underlying the Constitution's grant of original jurisdiction, *see Louisiana*, 176 U.S. at 15 ("not contemplated that [jurisdiction] would be exercised save when the necessity was absolute and the matter in itself properly justiciable"); *North Dakota v. Minnesota*, 263 U.S. 365, 373 (1923) (jurisdiction "limited generally to disputes which, between states entirely independent, might be properly the subject of diplomatic adjustment"). Any suggestion that the Court is duty-bound to hear any case in which two States appear in the caption (*see* Cen-

2. a. Plaintiffs' proposed bill of complaint fails to meet these standards. The Court most commonly exercises its original jurisdiction to hear actions that involve core sovereign interests, such as disputes over boundaries and the use of interstate lakes and rivers. *See* Stephen Shapiro et al., *Supreme Court Practice* 622 (10th ed. 2013) (citing cases). This case does not fit that pattern. It does not involve two sovereigns' competing claims to land or resources, but rather the manner in which one State regulates private actors choosing to participate in that State's market—based on a claim that that market regulation indirectly affects other jurisdictions as a result of private actors' independent decisions. Although this Court has entertained claims alleging severe economic or environmental harm to another State or its citizens, plaintiffs here have not credibly alleged an injury that is sufficiently clear, direct, and "serious." *New York*, 256 U.S. at 309.[2]

Plaintiffs' theory of a nationwide price increase caused by AB 1437 is based on speculation, not any persuasive evidence of "post-effective-date facts." *Missouri ex. rel Koster v. Harris*, 847 F.3d 646, 656 (9th Cir. 2017). Plaintiffs do not cite any observed price increase outside of California since the law took effect

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ter for Consumer Freedom Br. 12) cannot be squared with the established principle that the Court will look behind the pleadings to determine the true nature of the interests asserted. *See New Hampshire v. Louisiana*, 108 U.S. 76, 88-89, 91 (1883); *see also Oklahoma v. Atchison, T.& S.F.R. Co.*, 220 U.S. 277, 289 (1911); *Oklahoma ex rel. Johnson v. Cook*, 304 U.S. 387, 392-395 (1938).

[2] Plaintiffs' suit is also quite different from original cases addressing conflicting escheat claims, including *Arkansas v. Delaware*, No. 146, Orig., in which California and most of the plaintiff States here are parties. Such cases involve States' competing claims of ownership of property—not in-state market regulation of third parties' commercial sales activities.

three years ago. Rather, they "assume" that the market price of eggs already has increased, or will increase, because it allegedly now costs more to produce eggs for export to California, and, "in a competitive market," those costs will be passed through to consumers nationwide. Compl. A22-A24. In fact, the only empirical data on actual egg prices cited by plaintiffs indicates that between November 2008 and July 2017—more than two years after AB 1437 took effect—egg prices *decreased* by nearly $0.50 per dozen on average nationwide. *Id.* at A8. Although plaintiffs apparently contend that prices outside of California would have decreased even further if not for AB 1437, they cite no evidence to support such a claim.[3]

Plaintiffs' "assume[d]" price increase also makes little economic sense. It is based on the notion that additional costs incurred to serve *California's* market will be passed through in higher prices for conventionally produced, battery-cage eggs sold to consumers *outside* of California. *See supra* at 7 (summarizing economist's methodology). Plaintiffs do not explain why, in a competitive market, the price of all eggs nationwide would rise, notwithstanding the assumed production cost differential between conventionally produced and AB 1437-compliant eggs. A glance at the supermarket shelves confirms that special varieties such as free-range, organic, and cage-free eggs are priced differently from others, yet plaintiffs fail to take this market segmentation into account. Plaintiffs' claimed, across-the-board price increase also cannot be squared with empirical data showing that after AB 1437 took effect egg prices in California went up

[3] Indeed, plaintiffs' claimed price increase is premised on cost assumptions that were drawn from a study published in 2010—five years before AB 1437 took effect. *See* Compl. A23.

relative to prices elsewhere in the country, reflecting the production cost difference for AB 1437-compliant eggs.[4] For these reasons, plaintiffs have not alleged any injury of sufficient plausibility, seriousness, and immediacy to justify invoking this Court's original jurisdiction.

b. Similarly, plaintiffs fail to demonstrate a sufficient connection between California's law and the claimed harm they seek to redress. "It has long been the rule that in order to engage this Court's original jurisdiction, a plaintiff State must first demonstrate that the injury for which it seeks redress was directly caused by the actions of another State." *Pennsylvania v. New Jersey*, 426 U.S. 660, 663 (1976) (per curiam) (citing *Massachusetts v. Missouri*, 308 U.S. 1, 15 (1939)). Here, to the contrary, plaintiffs' alleged injury is indirect and highly attenuated. It depends on a string of assumptions: that out-of-state egg producers will wish to continue selling into California, and will both need and be willing to incur significant additional costs to do so; that out-of-state producers, wholesalers, retailers, and others in the supply chain will pass those costs on to consumers; that this will affect not just the price of eggs sold in California, but all eggs sold throughout the country; and that all this will be caused by AB 1437, rather than independent market

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[4] Colin Carter and Tina Saitone, *California's Egg Regulations: Implications for Producers and Consumers*, University of California Agriculture and Resource Economics Update, March/April 2015, at 3; *see also* Geoffrey Mohan, *Cage-Free, the Egg of the Future*, Los Angeles Times, Oct. 4, 2015 (growing shift to cage-free production has "widened the difference between wholesale prices in California and other markets, according to U.S. Department of Agriculture economists") (republished at www.vnews.com/Archives/2015/10/C3MCDONALDS-EGGS-pog-vn-100415).

forces. These speculative allegations are not enough to warrant an exercise of original jurisdiction.[5]

Plaintiffs' assumption that producers will incur increased costs as a direct result of AB 1437, rather than independent market forces, is particularly noteworthy because it fails to acknowledge the significant increase over the last several years in consumer demand for eggs that are cage-free, free-range, organic, or otherwise different from conventionally produced, battery-cage eggs.[6] In order to meet that rising demand, producers and large buyers of eggs around the country,

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[5] California does not purport to require any out-of-state producer to sell eggs in California. As some of plaintiffs previously acknowledged, any decisions by private producers to sell eggs in California are "voluntary." Appellants' Reply Brief 7, *Missouri ex rel. Koster v. Harris*, No. 14-17111 (9th Cir. July 30, 2015), Dkt. No. 55. There is also a wide variety of available caging systems and production methods, and out-of-state producers who wish to sell into California may choose what capital investments and expenditures they wish to make, if any, in order to ensure their eggs sold in California are AB 1437-compliant. Plaintiffs do not contend otherwise.

[6] *E.g.*, *McDonald's to Fully Transition to Cage-Free Eggs For All Restaurants in the U.S. and Canada*, McDonald's—Official Global Corporate Website (Sept. 9, 2015), http://news.mcdonalds.com/node/7816 ("[t]o meet consumers' changing expectations and preferences, McDonald's today announced that it will fully transition to cage-free eggs for its nearly 16,000 restaurants in the U.S. and Canada over the next 10 years"); *id.* ("'Our customers are increasingly interested in knowing more about their food and where it comes from'"); Terrence O'Keefe, *Cage-Free Housing Continues to Gain Momentum in 2016*, WATTAgNet.com, Dec. 14, 2015 ("the cage-free egg purchase pledges made by major foodservice and food processing companies in the U.S. will be the development that has the longest-lasting impact on U.S. egg producers"); *id.* (California's Proposition 2 has become "a mere footnote to the big story"); *Hickman's Family Farms Announces Cage-Free Egg Expansion*, Poultry Times, Sept. 15, 2015 (in announcing a two-million hen cage-free expansion, CEO of Hickman's

such as McDonald's, Walmart, Safeway, Costco, Kellogg Co., and many others, have made independent decisions to supply and source cage-free eggs exclusively, or transition to a cage-free supply chain over the course of the next several years.[7] Given these marketplace developments and the other circumstances here, plaintiffs fail to allege injuries that "direct[ly] result" from California's actions. *See Maryland v. Louisiana*, 451 U.S. 725, 739 (1981); *see also Wyoming v. Oklahoma*, 502 U.S. 437, 451 (1992) (jurisdiction where state action "directly affects" another State's sovereign interests); *Missouri v. Illinois*, 180 U.S. 208, 242 (1901) (jurisdiction properly invoked where alleged injury was "wholly within the control" of a defendant State).

On occasion this Court has exercised its original jurisdiction to consider claims of injury to a State

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Family Farms says, "Our customers are moving to cage-free faster than the regulatory environment is requiring it, so we want to ensure abundant supplies. It's the future of our industry and our business").

[7] *E.g.*, Greg Trotter, *Are Cage-Free Eggs the Future? This Farm Has Done It For 60 Years*, Chicago Tribune, Dec. 24, 2015 ("Almost every week, it seems, a major food company—Dunkin Donuts, General Mills and Taco Bell recently—announces its transition to cage-free eggs, amounting to a monumental shift in the industry"); Tim Hearden, *Egg Prices Plunge as Supplies Rebound*, Capital Press: The West's Ag Website, May 4, 2016 ("[M]ore eggs became available to California as numerous major chains—including chain stores such as Costco, Safeway and Walmart as well as food manufacturers such as General Mills and Nestle—announced plans to source exclusively cage-free eggs"); Dan Charles, *Most U.S. Egg Producers Are Now Choosing Cage-Free Houses*, National Public Radio, Jan. 15, 2016 ("[N]o law has required farmers to do this"; President of Big Dutchman USA, supplier of chicken housing systems globally, says, "It's a very interesting and very big change compared to some years ago, and it is even more interesting because here in this country, we are seeing this change based solely on the market").

caused by another State's regulation of private market actors, but those cases involved circumstances very different from the situation here. In *Maryland*, 451 U.S. at 736, for example, Louisiana's "First-Use Tax" on natural gas was imposed on gas pipeline companies, rather than the plaintiff States themselves or end-use consumers. The Court nonetheless found a sufficient causal connection between Louisiana's statute and the plaintiff States' injury because the tax was "clearly intended to be passed on to the ultimate consumer. Indeed, the statute forb[ade] the Tax from being passed on or back to any third party other than the purchaser of the gas and explicitly direct[ed] that it should be considered as a cost of preparing the gas for market." *Id.* "In fact, the pipeline companies, with the approval of [the Federal Energy Regulatory Commission], ha[d] passed on the cost of the First-Use Tax to their customers." *Id.* at 737. That is nothing like the situation here. Nothing in AB 1437 guarantees that out-of-state producers will incur any particular amount of increased cost, let alone that any percentage of such an increase will be passed through to consumers outside California.

In *Pennsylvania v. West Virginia*, 262 U.S. 553, 581 (1923), a West Virginia statute imposed restrictions on private gas pipelines, but those restrictions threatened to "largely curtail or cut off the supply of natural gas heretofore and now carried by pipe lines from West Virginia" into neighboring States. Thus, it posed a "direct issue" between States. *Id.* at 591. The alleged injuries were also potentially catastrophic, "imperil[ing] the health and comfort of thousands of [out-of-state residents] who use[d] the gas in their homes and [were] largely dependent thereon," and "halt[ing] or curtail[ing] many industries which seasonally use[d] great quantities of the

gas and wherein thousands of persons [were] employed and millions of taxable wealth [were] invested." *Id.* at 583-585; *see also id.* at 591-592 (plaintiff States were "proprietor[s] of various public institutions and schools whose supply of gas will be largely curtailed or cut off," such that a "break or cessation in the supply will embarrass [them] greatly in the discharge of those duties and expose thousands of dependents and school children to serious discomfort, if not more"). Accordingly, the Court found a "justiciable controversy between states." *Id.* at 591. In sharp contrast, AB 1437 will not cause a "break or cessation" in the supply of any commodity outside of California, let alone one as essential to health and safety (both physical and economic) as natural gas. Moreover, unlike the West Virginia statute, which imposed an "unconditional and mandatory duty" on pipeline companies to satisfy the needs of domestic users over those outside the State, *id.* at 593, AB 1437 does not discriminate between eggs produced in or out of California, and does not have any direct effect on the price of eggs outside of California.

Finally, in *Wyoming*, 502 U.S. at 442-444, the Court exercised original jurisdiction over Wyoming's action challenging an Oklahoma statute that required in-state utilities to reduce their "exclusive" reliance on coal imported from Wyoming, and to purchase at least 10 percent of their requirements from Oklahoma coal producers. "Unrebutted evidence" before the Court demonstrated that the statute "directly affect[ed] Wyoming's ability to collect [coal] severance tax revenues." *Id.* at 445, 451. Further, the statute specifically targeted coal imports from Wyoming producers and the revenue stream Wyoming derived from those sales. *Id.* at 443. Again, that is nothing like the situation here. The chain of causation alleged in this

case depends on independent decisions by many different actors at multiple levels of the supply chain in a dynamic and evolving market. And unlike Oklahoma's statute, AB 1437 does not favor in-state sellers at the expense of out-of-state sellers. It applies to all sales in the California market, regardless of where the eggs are produced. *See supra* at 1.

Fundamentally, plaintiffs' motion in this case is premised on the proposition that the exercise of this Court's original jurisdiction is appropriate whenever a State asserts an injury based on an alleged ripple effect in the national economy that can be claimed to trace back to another State's in-state market regulation. This Court, however, has resisted that suggestion, in part because disputes over such regulation are increasingly commonplace. More than forty years ago, the Court observed that "[a]s our social system has grown more complex, the States have increasingly become enmeshed in a multitude of disputes with persons living outside their borders." *See Arizona v. New Mexico*, 425 U.S. 794, 798 (1976) (per curiam) (internal quotation marks omitted). "It would, indeed, be anomalous," the Court explained, "were this Court to be held out as a potential principal forum for settling such controversies." *Id.* (internal quotation marks omitted). Such considerations counsel strongly against granting plaintiffs' motion here.

c. The lack of credible allegations of injury and the attenuated chain of causation alleged in the bill of complaint also raise a serious question whether plaintiffs would even have standing to bring their claims. To demonstrate standing for Article III purposes, a plaintiff must allege an injury-in-fact that was caused by defendant and that a favorable decision could remedy. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555,

562 (1992). The Court has made clear that it is "substantially more difficult" to establish standing when the alleged injury depends on a chain of "independent decisions" that may "collectively" have a "significant effect" on the plaintiff's injury. *Allen v. Wright*, 468 U.S. 737, 758, 759 (1984); *Lujan*, 504 U.S. at 562. Plaintiffs' likely failure to clear this threshold is further reason to decline jurisdiction.[8]

Moreover, even if plaintiffs' allegations could survive a motion to dismiss on standing grounds, the case would still present difficult, fact-intensive threshold questions about standing more suitably addressed by a lower court, subject to review in the court of appeals and ultimately to this Court's certiorari jurisdiction. In a variety of contexts, this Court has cautioned that economic behavior is inherently ambiguous, and therefore a plaintiff claiming injury in the marketplace must provide evidence or, at the pleading stage, allegations tending to rule out natural economic forces as the cause of the injury. *See, e.g.*, *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 545 (2007) ("parallel conduct or interdependence, without more, mirrors the ambiguity of the behavior: consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market");

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[8] As noted above, the court of appeals held that plaintiffs' previous allegations that egg prices would increase outside of California were "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." *Missouri*, 847 F.3d at 654. It further observed that "the complaint here cannot allege, even under the more permissive standards at the pleading stage, that the choices leading to consumer price increases [in the plaintiff States] 'have been or will be made.'" *Id.* (quoting *Lujan*, 504 U.S. at 562). Plaintiffs have yet to remedy these defects.

Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 237 (1993) ("rising prices do not themselves permit an inference of a collusive market dynamic," and a jury may not "infer competitive injury" absent evidence tending to rule out natural market conditions as the cause of the price increase); *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 343 (2005) ("[g]iven the tangle of factors affecting price, the most logic alone permits us to say is that the higher purchase price will *sometimes* play a role in bringing about a future loss"; an "inflated purchase price *might* mean a later loss," but that is "far from inevitably so" because a lower price on resale "may reflect, not the earlier misrepresentation, but changed economic circumstances, changed investor expectations, new industry-specific or firm-specific facts, conditions, or other events, which taken separately or together account for some or all of that lower price"). Here, significant discovery and expert analysis would be required to test plaintiffs' theories of causation and redressability, including their contentions that California is exercising "market power" over out-of-state egg producers, Pltfs. Br. 15, and that producers have incurred or will incur increased production costs, and have passed or will pass those costs on to consumers—all *directly in response* to AB 1437, rather than to independent forces of supply and demand in the marketplace.[9] This Court is not the appropriate forum for addressing such questions in the first instance.

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[9] Any examination of egg prices would have to account not just for increases in capital costs and their cause, but also fluctuations in variable costs, such as feed and fuel costs, as well as market disruptions like the widespread outbreak of avian flu that caused a short-term drop in the supply of eggs nationwide and a consequent price spike in early 2015. *See, e.g.*, Carter and Saitone, *supra* note 4, at 12.

3. Plaintiffs likewise have not shown the absence of an alternative forum for the claims pleaded in their bill of complaint. *See, e.g.*, *Mississippi*, 506 U.S. at 77. On the contrary, Missouri and a similar group of plaintiff States previously brought an action alleging precisely the same claims in federal district court, naming California officials as defendants. Although the court of appeals held that the complaint failed to allege facts adequate to establish *parens patriae* standing, it remanded for the district court to enter the judgment of dismissal without prejudice, so that plaintiffs could seek to re-plead their claims if they developed new evidentiary support after the law took effect. *See supra* at 5; Pltfs. Br. 21. Plaintiffs never availed themselves of that opportunity.

The legal issues plaintiffs seek to present here could also be resolved, if necessary, in suits brought by private parties. The question whether there is an adequate alternative forum turns not only on whether a State itself could bring its claims elsewhere, but also on whether there is an "alternative forum in which *the issue tendered* can be resolved." *Mississippi*, 506 U.S. at 77 (emphasis added). As some of the plaintiff States here previously acknowledged, private egg producers are the entities "most directly affected" by AB 1437 and section 1350(d). First Amended Compl. ¶ 7, *Missouri v. Harris,* No. 2:14-cv-00341-KJM-KJN (E.D. Cal. Dec. 15, 2014), Dkt. No. 13. Such a producer could, if it wished, bring a suit in federal district court and assert the claims alleged here. One California producer, for example, challenged Proposition 2—directly governing in-state production practices—on vagueness and dormant Commerce Clause grounds. *Supra* at 3. Indeed, there is no lack of suits asserting preemption and dormant Commerce Clause claims by private agricultural producers or others who object to state regulation. *See, e.g.*, Association des Éleveurs

Br. 1-2 (describing suit by foie gras producers challenging California's law regarding the in-state sale of products produced by force-feeding). Because there are ample available alternative means for seeking judicial review of the claims presented here, the exercise of this Court's original jurisdiction is not warranted. *See Alabama*, 291 U.S. at 292 (denying Alabama leave to file, where it failed to show, *inter alia*, "that the validity of the statutes in question and Alabama's assertion of right" would not be tested by affected private companies).

Plaintiffs argue that a parallel action must already have been initiated before the Court will conclude an alternative forum is available. *See* Pltfs. Br. 19-21. That is not correct. Rather, the Court looks to whether an alternative suit could be brought, and whether other options have been exhausted. *See Alabama*, 291 U.S. at 292 (denying leave where plaintiff failed to show legal question "may not, or indeed will not" be tested in another suit). Thus, in *California v. Texas*, the Court first declined to exercise jurisdiction to resolve States' competing claims to tax a decedent's estate, when, among other things, it remained unclear whether a federal district court interpleader action could resolve the matter. 437 U.S. 601, 601 (1978) (per curiam); *see also id.* at 601-602 (Brennan, J., concurring). Four years later, after it was established that an interpleader action in the lower courts did not lie, the Court granted leave to file. *California v. Texas*, 457 U.S. 164, 168-169 (1982) (per curiam).

This Court's decision in *Wyoming v. Oklahoma* did not establish a contrary rule. *Compare* Pltfs. Br. 20. There, the Court exercised original jurisdiction over Wyoming's challenge to an Oklahoma law where, among other things, private industry had not filed its own suit and where Wyoming's interest in preserving

state tax revenue would not have been adequately represented in any such private action. *See Wyoming*, 502 U.S. at 451-452. Here, a suit by private egg producers would adequately advance the plaintiff States' interests and claims, as the injuries plaintiffs assert derive substantially from the increased production costs that California law allegedly inflicts on out-of-state farmers. Such a suit against state officials, if successful, could also provide all the relief that the plaintiff States seek here. *Compare Mississippi*, 506 U.S. at 78 (suit between purely private parties could not bind State). *Wyoming*, moreover, did not purport to establish a general rule that a parallel action must be pending before the Court will conclude that the issues raised in a bill of complaint could be adjudicated elsewhere. *Compare* Pltfs. Br. 20. As noted above, in considering a State's request for leave to file, the Court has "substantial discretion to make case-by-case judgments as to the practical necessity of an original forum in this Court." *Mississippi*, 506 U.S. at 76 (internal quotation marks omitted). There is no such necessity here.

4. Finally, the Court's exercise of its original jurisdiction is not warranted because plaintiffs' proposed bill of complaint does not allege weighty federal questions necessitating this Court's review.

a. Plaintiffs seek leave to press their claim that California's law violates the dormant Commerce Clause by regulating extraterritorially, discriminating against out-of-state egg producers, and unduly burdening interstate commerce. Compl. ¶¶ 96-100. None of these assertions has merit.

This Court has explained that "the 'Commerce Clause … precludes the application of a state statute to commerce that takes place wholly outside of the State's borders.'" *Healy v. Beer Institute, Inc.*, 491 U.S. 324, 336 (1989) (ellipses in original). Only when a

state law "directly controls commerce occurring wholly outside the boundaries of [the] State," either by its terms or in "practical effect," will it exceed a State's authority. *Id.*

California's law does not control commerce occurring elsewhere. AB 1437 applies only to eggs that are sold within the State; the law says nothing about sales that take place elsewhere. In that regard, it is not at all like those rare laws this Court has determined to regulate extraterritorially by seeking to dictate the price of products sold entirely in another jurisdiction. *See Healy*, 491 U.S. at 338 (invalidating Connecticut price-affirmation statute because it controlled price of beer sold in Massachusetts); *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 575-576, 582-583 (1986) (holding unconstitutional New York price-affirmation law that had effect of requiring distillers to seek approval from New York regulators for prices charged for sales in other States); *cf. Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 519 (1935) (holding invalid New York milk-pricing statute that regulated prices paid for milk purchased in other States). Unlike those price-control laws, AB 1437 is indifferent to how eggs sold in other States are produced or priced.

That private producers in other States may have to alter their production practices with respect to eggs they wish to sell in California does not mean that California's law impermissibly controls commerce occurring elsewhere. This Court has long rejected the proposition that the dormant Commerce Clause disables States from regulating in-state commerce, even if the regulation might have effects outside the State. *See Pharmaceutical Research & Mfrs. of America v. Walsh*, 538 U.S. 644, 669 (2003) (rejecting extraterri-

toriality challenge to Maine drug-rebate program, notwithstanding possible influence on terms of wholly out-of-state sales and reduced ultimate benefit of those sales); *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 73-74, 93 (1987) (rejecting Commerce Clause challenge to Indiana anti-takeover law applicable to Indiana corporations even though it applied to tender offers made by out-of-state offerors and involving out-of-state shareholders). Because California's law applies only to in-state sales of eggs, it does not directly regulate or otherwise unconstitutionally seek to control commerce occurring entirely outside the State's borders.

Plaintiffs' allegation that California law discriminates against out-of-state egg producers is also insubstantial. Discrimination under the dormant Commerce Clause "means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Or. Waste Sys., Inc. v. Dep't of Envt'l Quality of State of Oregon*, 511 U.S. 93, 99 (1994). California law imposes no such differential treatment. It applies uniformly to all eggs sold in California, wherever they may have been produced. Cal. Health & Safety Code § 25996. Out-of-state producers are treated precisely the same as in-state ones in that regard.

Plaintiffs emphasize statements in legislative history reports indicating that AB 1437 would "level the playing field" for in-state and out-of-state producers after the earlier-enacted Proposition 2 imposed confinement standards on egg farmers operating within the State. Compl. ¶ 83 (internal quotation marks omitted). These statements do not help plaintiffs' cause, because the dormant Commerce Clause forbids States from adopting measures that *privilege* in-state companies at the expense of out-of-state ones. *E.g.*,

Or. Waste, 511 U.S. at 99. The Constitution does not require a State to confer preferential treatment on out-of-state entities that choose to sell their products within that State, or to exempt those entities from the same neutral rules that apply to in-state sellers.

Finally, there is no merit to the complaint's allegation that AB 1437 violates the dormant Commerce Clause by disproportionately burdening interstate commerce. Compl. ¶¶ 87, 98-100. Where a statute "regulates evenhandedly" and "has only indirect effects on interstate commerce," it will be sustained so long as the state interest underlying the law is legitimate and the local benefits of the law are not "clearly exceed[ed]" by any burden on interstate commerce. *Brown-Forman*, 476 U.S. at 579 (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)). For all the reasons explained above, plaintiffs have not plausibly alleged any meaningful burden on interstate commerce, much less one that could outweigh the significant public health and welfare benefits that AB 1437 seeks to achieve. *Supra* at 1-2.

b. Plaintiffs' preemption claim is no stronger. No provision of the Egg Products Inspection Act addresses the in-state sale of eggs from hens that are housed in crowded conditions. The Act therefore does not preempt California law, expressly or impliedly.

The EPIA provides in part that "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). Focusing on this phrase in isolation, plaintiffs allege that: (1) the EPIA establishes "federal standards for egg production," Compl. ¶¶ 55, 70; and (2) AB 1437 and section 1350(d) establish additional and different egg production standards in violation of the EPIA. *Id.* ¶¶ 42-48; *see*

also Pltfs. Br. 1-5. Plaintiffs' allegations and arguments distort the text and meaning of the EPIA's preemption provision.

The EPIA expressly defines the "official [Federal] standards" as "the standards of quality, grades, and weight classes for eggs, in effect upon the effective date of this chapter, or as thereafter amended, under the Agricultural Marketing Act of 1946." 21 U.S.C. § 1033(r); *see also* 7 C.F.R. §§ 57.1, 57.35(a)(1)(i); *id.* § 56.1 ("Official standards means the official U.S. standards of quality, grades, and weight classes for shell eggs maintained by and available from" the Poultry Programs branch of the federal Agricultural Marketing Service). The "official Federal standards" do not, contrary to plaintiffs' contentions, establish uniform "production" standards for shell eggs. Pltfs. Br. 3. Rather, they create a uniform system for classifying egg weights, shells, yolks, and whites, so consumers know what they are getting and can make accurate comparisons. *See* Agricultural Marketing Service, *United States Standards, Grades, and Weight Classes for Shell Eggs* (eff. July 20, 2000); *see also id.* (stating in Foreword that "[c]onsumers can purchase officially graded product with the confidence of receiving quality in accordance with the official identification").[10] Thus, for example, for eggs to meet "AA Quality" standards, "[t]he shell must be clean, unbroken, and practically normal. The air cell must not exceed 1/8 inch in depth, may show unlimited movement, and may be free or bubbly." *Id.* at 2 (§ 56.201). Similarly, for eggs to meet "U.S. Grade AA" standards, they must "consist of eggs which are at

[10] The "official Federal standards" can be found at https://www.ams.usda.gov/sites/default/files/media/Shell_Egg_Standard%5B1%5D.pdf (last accessed on March 1, 2018).

least 87 percent AA Quality"; "[n]ot more than 5 percent (7 percent for Jumbo size) Checks are permitted and not more than .50 percent Leakers, Dirties, or Loss (due to meat or blood spots) …." *Id.* at 6 (§ 56.216). Nothing in the "official Federal standards" purports to regulate the way egg-laying hens are housed, or the in-state sale of eggs from hens that are housed in a particular way.[11]

Plaintiffs' reliance on *National Meat Association v. Harris*, 565 U.S. 452 (2012), to support their preemption claim is unavailing. *See* Pltfs. Br. 4. That case, unlike this one, involved a state law that the Court concluded regulated activities at the core of the preemptive federal statute. *See National Meat*, 565 U.S. at 460-467 (state law regulating treatment of non-ambulatory pigs in slaughterhouses was

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[11] Plaintiffs' related contentions, based on snippets of legislative history, that Congress sought to "promote free and unhindered commerce in the interstate market for eggs and egg products," and to "eliminat[e] artificial barriers in the interstate egg market," are similarly divorced from the EPIA's particular text and meaning. *See* Pltfs. Br. 2. According to the House Report cited by plaintiffs, the "barriers" to be eliminated were additional or different egg-grading standards from State to State. H.R. Rep. No. 91-1670 (1970), 1970 WL 5922, at *5246-5247. Nothing in AB 1437 or section 1350(d) implicates those concerns. Further, plaintiffs' suggestion that Congress sought to eliminate any role for state regulation ignores the statute's express recognition of state authority. *See* 21 U.S.C. § 1052(b) (authorizing States to "exercise jurisdiction with respect to eggs … for the purpose of preventing the distribution for human food purposes of any [eggs or egg products] which are outside of [an official egg processing plant] and are in violation of [the EPIA, the federal Food, Drug, and Cosmetic Act, or the federal Fair Packaging and Labeling Act] or any State or local law consistent therewith. Otherwise the provisions of this chapter shall not invalidate any law or other provisions of any State or other jurisdiction in the absence of a conflict with this chapter").

preempted by the Federal Meat Inspection Act, which expressly preempts state laws governing the "premises, facilities, and operations" of slaughterhouses); *id.* at 467, 460 (state law "reaches into the slaughterhouse's facilities and affects its daily activities," and imposes conflicting requirements governing treatment of non-ambulatory pigs in slaughterhouses); *id.* at 464 (law "functions as a command to slaughterhouses [on how] to structure their operations," and "runs smack into the FMIA's regulations"). In contrast, AB 1437 and section 1350(d) regulate a subject—in-state sales of eggs from hens that are housed in crowded conditions—that the EPIA does not address.[12]

[12] Plaintiffs' other preemption cases are also off-point. *See* Pltfs. Br. 4. The state law at issue in *Campbell v. Hus*sey, 368 U.S. 297 (1961), sought to supplement federal standards for grading "tobacco by which its type, grade, size, condition, or other characteristics may be determined, which standards shall be the official standards of the United States." *Id.* at 299. Similarly, in *United Egg Producers v. Davila*, 871 F. Supp. 106, 108-109 (D.P.R. 1994), *aff'd on other grounds*, *United Egg Producers v. Dep't of Agric. of Com. of Puerto Rico*, 77 F.3d 567 (1st Cir. 1996), a local egg-grading system governing the "weight" and "freshness" of shell eggs was held to fall within the scope of the EPIA's preemption clause. As discussed above, AB 1437 and section 1350(d) do not supplement or conflict with the official egg grading standards promulgated by the federal government.

CONCLUSION

The motion for leave to file a bill of complaint should be denied.

Respectfully submitted,

XAVIER BECERRA
Attorney General of California
EDWARD C. DUMONT
Solicitor General
THOMAS S. PATTERSON
Senior Assistant Attorney General
AIMEE FEINBERG
Deputy Solicitor General
TAMAR PACHTER
Supervising Deputy Attorney General
PAUL STEIN
Deputy Attorney General

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