No. 148, Original

In the Supreme Court of the United States

STATE OF MISSOURI, ET AL., PLAINTIFFS

v.

STATE OF CALIFORNIA

ON MOTION FOR LEAVE TO FILE A BILL OF COMPLAINT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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This brief is filed in response to the order of this Court inviting the Solicitor General to express the views of the United States.

STATEMENT

1. The Egg Products Inspection Act (EPIA), 21 U.S.C. 1031 *et seq.*, "provide[s] for the inspection of certain egg products, restrictions upon the disposition of certain qualities of eggs, and uniformity of standards for eggs"—as well as other "regulat[ion of] the processing and distribution of eggs and egg products"—in order "to prevent the movement or sale for human food[ ] of eggs and egg products which are adulterated or misbranded or otherwise in violation of" federal law. 21 U.S.C. 1032. The U.S. Department of Agriculture (USDA), which has primary responsibility for implementing the EPIA, 69 Fed. Reg. 56,824, 56,827 (Sept. 22, 2004), divides responsibility between its Agricultural Marketing Service, which regulates shell eggs, 7 C.F.R. 57.28, and its Food Safety and Inspection Service, which regulates other egg products (liquid eggs,

for example), 9 C.F.R. 590.20. USDA inspects production facilities to "assure that only eggs fit for human food are used for such purpose" and that most poor-quality eggs (known as "restricted eggs") do not reach consumers. 21 U.S.C. 1034(d), 1035(a); see 21 U.S.C. 1033(g)(8), 1037; see also 7 C.F.R. 57.720.

USDA administers the EPIA in cooperation with the Food and Drug Administration (FDA), 21 U.S.C. 1031, which has general jurisdiction over food safety, including shell eggs, under the Federal Food, Drug, and Cosmetic Act (FDCA), 21 U.S.C. 301 *et seq.*, and the Public Health Service Act, 42 U.S.C. 201 *et seq.* See 21 U.S.C. 1052(c) (the EPIA does "not affect the applicability" of "other Federal laws" relating to "eggs, egg products, or other food products," except that USDA "ha[s] exclusive jurisdiction to regulate official plants processing egg products"); 69 Fed. Reg. at 56,827 (describing sources of authority and allocation of responsibility between USDA and FDA). FDA has authority to promulgate regulations that "are necessary to prevent the introduction, transmission, or spread of communicable diseases," including Salmonellosis from Salmonella-containing eggs. 42 U.S.C. 264(a). Pursuant to that authority and authority in the FDCA, FDA has adopted regulations to promote egg safety, including regulations applicable to farms where eggs are laid. 21 C.F.R. Pt. 118. USDA is also charged with administering the EPIA in consultation with States and localities. See 21 U.S.C. 1038; 7 C.F.R. 57.13.

For shell eggs to be sold to consumers, USDA's Agricultural Marketing Service has promulgated standards, grades, and weight classes pursuant to the Agricultural Marketing Act of 1946, 7 U.S.C. 1621 *et seq.* See 7 U.S.C. 1622(c) (directing Secretary of Agriculture

"[to] develop and improve standards of quality, condition, quantity, grade, and packaging, * * * in order to encourage uniformity and consistency in commercial practices"). See also USDA Agric. Mktg. Serv., *United States Standards, Grades, and Weight Classes for Shell Eggs*, *AMS 56* (July 20, 2000) (AMS).[1] The grading standards enable egg producers to separate eggs by quality and size, thereby "enabl[ling] more orderly marketing." *Id.* at 1; see also USDA Agric. Mktg. Serv., *Egg-Grading Manual* (rev. July 2000).[2] The standards also provide a basis for USDA to implement the EPIA's mandate to prevent restricted eggs from reaching consumers. See 21 U.S.C. 1034(d); 7 C.F.R. 57.720.

For example, under the current Agricultural Marketing Service standards, for an egg to qualify as "AA Quality":

> The 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. The white must be clear and firm so that the yolk is only slightly defined when the egg is twirled before the candling light. The yolk must be practically free from apparent defects.

AMS § 56.201. Grade B eggs, by contrast, may have "moderately stained areas," with an air cell "over 3/16 inch in depth," and a white that is "weak and watery so the yolk outline is plainly visible when the egg is twirled before the candling light." *Id.* § 56.203. Eggs below Grade B are restricted and generally may not be sold to

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[1] https://www.ams.usda.gov/sites/default/files/media/Shell_Egg_Standard%5B1%5D.pdf.

[2] https://www.ams.usda.gov/sites/default/files/media/Egg%20Grading%20Manual.pdf.

consumers. 7 C.F.R. 57.720.[3] To facilitate interstate commerce in eggs, Congress has required that the Agricultural Marketing Service grading standards be "uniform[ ]" throughout the Nation. 7 U.S.C. 1622(c).

2. In 2008, California voters adopted Proposition 2, the Prevention of Farm Animal Cruelty Act, Cal. Health & Safety Code §§ 25990 *et seq.* (West 2010), in order to "prohibit the cruel confinement of farm animals." The statute bars California farmers from "tether[ing] or confin[ing] 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." *Id.* § 25990. The Act specifically requires that egg-laying hens be able to "fully spread[ ] both wings without touching the side of an enclosure or other egg-laying hens," as well as "turn[ ] in a complete circle without any impediment, including a tether, and without touching the side of an enclosure." *Id.* § 25991(f) and (i).[4]

In 2010, the California Legislature enacted Assembly Bill 1437 (AB 1437), which prohibits the sale of eggs in California from hens that were "confined on a farm or place"—either inside or outside California —"that is

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[3] In addition to the EPIA's mandatory requirements, the Agricultural Marketing Service offers a voluntary egg-grading program that, when utilized by an egg producer, allows the producer to label its eggs as inspected by USDA. See 7 C.F.R. Pt. 56.

[4] Massachusetts has enacted a similar requirement governing confinement standards for egg-laying hens and some other farm animals, which is the subject of another pending motion for leave to file a bill of complaint in this Court. *Indiana* v. *Massachusetts*, No. 22O149 (filed Dec. 11, 2017).

not in compliance" with the standards enacted by Proposition 2. Cal. Health & Safety Code § 25996 (West Supp. 2018). The statute's stated purpose 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 and may result in increased exposure to disease pathogens including salmonella." *Id.* § 25995(e). The legislative history of AB 1437 suggests that the Legislature also sought to "level the playing field" between California egg producers who faced increased costs to comply with Proposition 2 and out-of-state producers. Compl. ¶ 66 (quoting Cal. Assembly Comm. on Agriculture AB 1437, at 1 (2009)).[5]

In 2013, California's Department of Food and Agriculture, promulgated a regulation with the stated objective to reduce the risk that shell eggs sold in California would be contaminated with Salmonella. Cal. Code Regs. tit. 3, § 1350 (2018). Among other measures, that regulation prohibits the sale in California of shell eggs that are the product of a hen confined in an enclosure that fails to meet certain standards, including by providing a minimum number of square inches per bird, as specified by a formula. See *id.* § 1350(d).

These three enactments (together the "California Egg Laws") took effect simultaneously on January 1, 2015. See Cal. Health & Safety Code § 25996 (West Supp. 2018); Cal. Code Regs. tit. 3, § 1350(d) (2018).[6]

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[5] http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=200920100AB1437#.

[6] In 2018, California voters adopted a new proposition that phases in additional standards for confinement of egg-laying hens and prohibits the sale in California of any shell or liquid eggs that are the

3. Before California's Egg Laws took effect, the State of Missouri and others sued various California officials in federal district court, alleging that the California Egg Laws are preempted by the EPIA and violate the negative prohibition of the Commerce Clause of the Constitution, Art. I, § 8, Cl. 3. See *Missouri* v. *Harris*, 58 F. Supp. 3d 1059, 1062-1063, 1065-1066 (E.D. Cal. 2014). The court dismissed the case with prejudice for lack of standing. *Id.* at 1079.

The court of appeals agreed with the district court that the plaintiffs had failed sufficiently to allege standing. *Missouri ex rel. Koster* v. *Harris*, 847 F.3d 646, 651-655 (9th Cir. 2017). The court of appeals concluded that the plaintiffs' allegations of harm to egg farmers could not support *parens patriae* standing because those farmers could pursue their own interests, *id.* at 652-653, and that the plaintiffs' allegations of harm to consumers through raised egg prices were "remote, speculative, and contingent upon the decisions of many independent actors in the causal chain in response to California['s] laws," *id.* at 654. The court suggested, however, that "post-effective-date facts * * * might support standing," so the court remanded with instructions to the district court to dismiss the action without prejudice. *Id.* at 656. This court denied the plaintiffs' petition for a writ of certiorari. 137 S. Ct. 2188 (2017).

4. In December 2017, the States of Missouri, Alabama, Arkansas, Indiana, Iowa, Louisiana, Nebraska, Nevada, North Dakota, Oklahoma, Texas, Utah, and

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product of hens not confined according to those standards. Prevention of Cruelty to Farm Animals Act, Cal. Proposition 12 (2018), https://vig.cdn.sos.ca.gov/2018/general/pdf/topl.pdf#prop12. Plaintiffs' complaint is not directed at these new requirements, and we do not address them in this brief.

Wisconsin filed a motion in this Court for leave to file a bill of complaint against the State of California, claiming (Compl. ¶¶ 88-93) that the California Egg Laws are preempted by the EPIA, 21 U.S.C. 1052(b), and also (Compl. ¶¶ 94-101) violate the Commerce Clause. Plaintiffs assert *parens patriae* standing on the theory that their residents will experience increased eggs prices as a result of California's Egg Laws, and they additionally assert their own standing by alleging that state institutions such as prisons will pay higher prices for eggs. Compl. ¶¶ 24-27. Plaintiffs also assert an invasion of various sovereign interests. Compl. ¶¶ 28-31.

In opposition to the motion, California argues that this case does not warrant an exercise of this Court's original jurisdiction (Br. in Opp. 10-22); that plaintiffs lack standing (*id.* at 17-19); and that California's Egg Laws do not violate the Commerce Clause (*id.* at 22-25) and are not preempted by the EPIA (*id.* at 25-28).

DISCUSSION

The motion for leave to file a bill of complaint should be denied because this is not an appropriate case for the exercise of this Court's original jurisdiction, which the Court has repeatedly stated should be exercised only "sparingly." *Mississippi* v. *Louisiana*, 506 U.S. 73, 76 (1992) (citations omitted). Moreover, contrary to plaintiffs' assertion, California's AB 1437 and Shell Egg Food Safety regulation are not preempted by the EPIA, because USDA's egg-grading standards do not address confinement conditions for egg-laying hens. And in order to resolve plaintiffs' Commerce Clause challenge, both on standing and the merits, it would be necessary to resolve complex factual disputes that are better suited to a district court.

1. a. The Constitution includes within this Court's original jurisdiction "all Cases * * * in which a State shall be Party." U.S. Const. Art. III, § 2, Cl. 2. Since the First Judiciary Act, Congress has provided by statute that this Court has "original and exclusive jurisdiction of all controversies between two or more States." 28 U.S.C. 1251(a); see Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 80; see also Stephen M. Shapiro et al., *Supreme Court Practice* § 10.1, at 620-621 (10th ed. 2013). But although that jurisdiction is exclusive, the Court has "interpreted the Constitution and [Section] 1251(a) as making [its] original jurisdiction 'obligatory only in appropriate cases,'" *Mississippi*, 506 U.S. at 76 (quoting *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 93 (1972)), and therefore "as providing [the Court] 'with substantial discretion to make case-by-case judgments as to the practical necessity of an original forum in this Court,'" *ibid.* (quoting *Texas* v. *New Mexico*, 462 U.S. 554, 570 (1983)).

In exercising that discretion, this Court has "said more than once" that its original jurisdiction should be invoked only "'sparingly,'" observing that original jurisdiction "'is of so delicate and grave a character that it was not contemplated that it would be exercised save when the necessity was absolute.'" *Mississippi*, 506 U.S. at 76 (quoting *Wyoming* v. *Oklahoma*, 502 U.S. 437, 450 (1992), and *Louisiana* v. *Texas*, 176 U.S. 1, 15 (1900)) (citations omitted). The Court has therefore expressed "reluctance to exercise original jurisdiction in any but the most serious of circumstances." *Nebraska* v. *Wyoming*, 515 U.S. 1, 8 (1995); see *Connecticut* v. *Massachusetts*, 282 U.S. 660, 669 (1931) ("[T]his Court will not exert its extraordinary power to control the conduct of one State at the suit of another, unless the threatened

invasion of rights is of serious magnitude and established by clear and convincing evidence.").

b. Plaintiffs (Br. in Support 13 n.1) and their amici invite the Court to reconsider its well-established conclusion—reaffirmed several times over more than 40 years—that the exercise of original jurisdiction in controversies between States under 28 U.S.C. 1251(a) is discretionary. That invitation should be declined. This Court's interpretation of Article III and the statute is grounded on the historical understanding that original jurisdiction over suits between States arose from the "'extinguishment of diplomatic relations between the States,'" and was therefore intended by "the framers of the Constitution" to be available only when absolutely necessary. *Louisiana* v. *Texas*, 176 U.S. at 15 (quoting *Hans* v. *Louisiana*, 134 U.S. 1, 15 (1890)). The Court's interpretation is also supported by structural limits on the Court's ability "to assume the role of a trial judge," *South Carolina* v. *North Carolina*, 558 U.S. 256, 278 (2010) (Roberts, C.J., concurring in the judgment in part and dissenting in part); the Court's duty to attend to its appellate docket, see *City of Milwaukee*, 406 U.S. at 93-94; and the doctrine of *stare decisis*, see *Kimble* v. *Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015).

2. This is not one of the rare cases that warrants the exercise of this Court's original jurisdiction. In deciding whether to exercise jurisdiction, the Court considers "'the nature of the interest of the complaining State,' focusing on the 'seriousness and dignity of the claim,'" and whether there exists an alternative forum "in which the issue[s] tendered" to the Court "'may be litigated.'" *Mississippi*, 506 U.S. at 77 (citations omitted). Both factors weigh against the exercise of jurisdiction here.

a. This Court has explained that "[t]he model case for invocation of this Court's original jurisdiction is a dispute between States of such seriousness that it would amount to *casus belli* if the States were fully sovereign." *Mississippi*, 506 U.S. at 77 (quoting *Texas*, 462 U.S. at 571 n.18). In many of the instances in which this Court has exercised its original jurisdiction over a controversy between States, the disputed questions "sound[ed] in sovereignty and property, such as those between states in controversies concerning boundaries, and the manner of use of the waters of interstate lakes and rivers." *Supreme Court Practice* § 10.2, at 622 (collecting cases). The Court "has also exercised original jurisdiction in cases sounding in contract, such as suits by one state to enforce bonds or other financial obligations of another state," or "to construe and enforce an interstate compact." *Id.* at 624.

The plaintiff States' asserted interests in this case do not fall into any of those categories. Instead, plaintiffs allege that the California Egg Laws: (1) have resulted in higher egg prices for egg consumers in their States, including certain state institutions; (2) upset principles of federalism; and (3) offend their sovereignty by resulting in private egg producers inviting California inspectors within their borders without their consent. None of those asserted interests justifies the exercise of this Court's original jurisdiction.[7]

i. Plaintiffs' allegations (Compl. ¶¶ 71-75) regarding economic harm to state residents and institutions are insufficient because they do not persuasively show price

[7] Though plaintiffs assert that California's Egg Laws have imposed "hundreds of millions of dollars in costs on the agricultural sector of the national economy," Br. in Support 15, they do not appear to premise their suit on alleged harm to egg producers.

increases outside California that are directly attributable to California's Egg Laws.

In original-jurisdiction cases where this Court has allowed a State to proceed on a claim that another State's regulatory actions have inflicted an economic injury on the plaintiff State or its residents, this Court has required the plaintiff State to 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) (emphasis added). Thus, in *Pennsylvania* v. *West Virginia*, 262 U.S. 553, aff'd, 263 U.S. 350 (1923), the Court held that West Virginia had acted unlawfully when it "largely curtail[ed] or cut off the supply of natural gas" carried from its territory to neighboring States. *Id.* at 581; see *id.* at 591-593. In *Maryland* v. *Louisiana*, 451 U.S. 725 (1981), the Court invalidated a Louisiana natural-gas tax that was "clearly intended to be passed on to the ultimate consumer"—States and their citizens—and was structured to minimize burdens on in-state consumers "for the most part." *Id.* at 733, 736. And in *Wyoming* v. *Oklahoma*, the Court invalidated an Oklahoma law that required Oklahoma's utilities to purchase a minimum percentage of their coal from mines in Oklahoma, thereby diminishing purchases of coal mined in Wyoming and depriving Wyoming of tax revenue on Wyoming coal. 502 U.S. at 442-445, 451. By contrast, the Court declined to exercise original jurisdiction in *Louisiana* v. *Texas*, where the defendant State allegedly permitted, but did not direct or approve, the action that caused injury. 176 U.S. at 22-23. The Court held that the Constitution requires a "direct issue between" the States for this Court to exercise original jurisdiction. *Id.* at 18.

Here, plaintiffs acknowledge (Reply Br. 9) that egg prices outside California depend on the cumulative effect of decisions by a series of marketplace actors, including major egg purchasers outside California such as food processing plants, which may elect whether to buy California-compliant eggs, conventionally farmed eggs, or both, and egg producers outside California, which may or may not increase their capital investment to produce California-compliant eggs and may or may not be able to pass those costs along to consumers. Plaintiffs' expert agrees that observing egg prices is not a reliable indicator of the impact of California's Egg Laws, because "[t]here are simply too many demand and supply forces operating over time." Compl. Ex. A8. Instead, plaintiffs' expert attempts to measure economic impact by estimating the total cost of compliance with California's Egg Laws and then dividing by the total number of eggs produced in the United States. *Id.* at A24. But as California observes (Br. in Opp. 13), that analysis does not disaggregate trends attributable to California's Egg Laws from those attributable to increased consumer demand for "cage-free" or similarly farmed eggs. See, *e.g.*, Dan Charles, *Most U.S. Egg Producers Are Now Choosing Cage-Free Houses*, Nat'l Pub. Radio (Jan. 15, 2016)[8]; Br. in Opp. 13-14 & nn.6-7 (describing rising consumer preference for cage-free eggs).

Plaintiffs' allegations of increased prices also do not account for the data identified by amicus curiae Association of California Egg Farmers (Br. 11-13), which shows a segmented market for California-compliant versus conventionally farmed eggs, with the result that

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[8] https://www.npr.org/sections/thesalt/2016/01/15/463190984/most-new-hen-houses-are-now-cage-free.

the price of conventionally farmed eggs is relatively unaffected by California's regulatory developments. Plaintiffs respond (Reply Br. 9) that out-of-state egg producers that ship to California will "inevitabl[y]" "pass along [compliance] costs to consumers, both inside and outside California," but that does not account for competitive constraints on the ability of out-of-state producers to pass on to non-California consumers any increased costs they incur in complying with California's laws for the portion of their production to be shipped to California. See Ass'n of Cal. Egg Farmers Amicus Br. 4, 11-14. Those questions of market forces and indirect effects would be best resolved by a district court that can conduct discovery and weigh expert testimony.

In the face of such uncertainty about whether plaintiffs and their residents have suffered economic injury at all, and if so, whether the harm is attributable to California's Egg Laws or to decisions by other market actors, plaintiffs' Article III standing is unclear. See *Allen* v. *Wright*, 468 U.S. 737, 757 (1984) (an injury is not "fairly traceable" to a defendant's conduct, as required for standing, when it "'results from the independent action of some third party not before the court'") (citation omitted). And even assuming that plaintiffs could ultimately demonstrate standing, their claim of injury—which depends on speculation about numerous decisions of third-parties in the marketplace—is not the type of direct harm imposed by another State that this Court has typically considered when exercising its original jurisdiction in cases like *Pennsylvania* v. *West Virginia*, *Maryland* v. *Louisiana*, and *Wyoming* v. *Oklahoma*.

ii. Plaintiffs also contend (Compl. ¶¶ 29-30) that this Court should exercise its original jurisdiction because California's Egg Laws violate principles of federalism. Plaintiffs assert an interest, "independent of the benefits that might accrue to any particular individual," in affording "the benefits of the federal system" to their citizens. Br. in Support 16 (quoting *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico ex rel. Barez*, 458 U.S. 592, 608 (1982)) (internal quotation marks omitted). They further allege a "core sovereign interest" in opposing interstate trade barriers. *Id.* at 18.

The government is aware of no case in which this Court has held that a State may invoke this Court's original jurisdiction simply by raising such federalism concerns, including through a preemption or Commerce Clause claim. On the contrary, this Court has repeatedly denied motions to file bills of complaint that presented issues of preemption, federalism, and interstate commerce. See, *e.g.*, *Nebraska* v. *Colorado*, 136 S. Ct. 1034 (2016) (denying motion to file bill of complaint alleging Colorado's marijuana laws were preempted by the federal Controlled Substances Act); *Arizona* v. *New Mexico*, 425 U.S. 794, 795 (1976) (per curiam) (denying motion to file bill of complaint alleging New Mexico energy tax violated the Commerce Clause); *Alabama* v. *Arizona*, 291 U.S. 286, 288 (1934) (denying motion to file bill of complaint alleging five States' bans on the sale of articles produced by convict labor violated the Commerce Clause).

The cases that plaintiffs cite do not hold that asserted federalism concerns, including those arising from preemption arguments, are sufficient standing alone to justify the exercise of original jurisdiction. In

Wyoming v. *Oklahoma*, the Court concluded that Wyoming's claim had sufficient "seriousness and dignity" to warrant the exercise of original jurisdiction not merely because Wyoming asserted a Commerce Clause claim, but because the Oklahoma statue would "directly affect[ ] Wyoming's ability to collect severance tax revenues" on Wyoming-mined coal, "an action undertaken in [Wyoming's] sovereign capacity." 502 U.S. at 451. Plaintiffs do not assert a similar injury to a sovereign function; their allegations of direct injury are based on their status as purchasers of eggs in the market on par with other consumers. And although plaintiffs also assert standing as *parens patriae*, they have not demonstrated an injury that "affects the general population of [their] State[s] in a substantial way" akin to past cases in which this Court has accepted original jurisdiction. *Maryland* v. *Louisiana*, 451 U.S. at 737; cf. *Pennsylvania* v. *West Virginia*, 262 U.S. at 581 (alleging that challenged provision would "largely curtail or cut off the supply of natural gas" to the plaintiff States to be "used for fuel and lighting purposes").

Litigants frequently allege that a wide range of state enactments are preempted by federal law, violate the Commerce Clause, or both. If merely pleading a preemption or Commerce Clause claim could justify exercise of this Court's original jurisdiction, the Court would likely soon face the "quandary" of "opt[ing] either to pick and choose arbitrarily among similarly situated litigants" to preserve the Court's ability to attend its appellate docket, "or to devote truly enormous portions" of the Court's "energies to such matters." *Ohio* v. *Wyandotte Chems. Corp.*, 401 U.S. 493, 504 (1971).

iii. Plaintiffs argue, primarily in their reply brief, that their sovereignty is offended if California inspectors visit private egg-production facilities in their States to certify compliance with California's Egg Laws. Reply Br. 5-8; Compl. ¶ 13; Br. in Support 9.

No authority supports plaintiffs' position that state sovereignty is implicated when a private producer or manufacturer in one State voluntarily invites regulators from another State to inspect and certify its goods as meeting the standards to be sold in the second State. Plaintiffs cite (Reply Br. 7) Section 432 of the Restatement (Third) of Foreign Relations Law (1987) for the proposition that a "state's law enforcement officers may exercise their functions in the territory of another state only with the consent of the other state." But that statement addressed relationships among foreign states, and it concerns only "Measures in Aid of Enforcement of Criminal Law." *Ibid.* (emphasis omitted). Plaintiffs do not contend that California's inspectors are violating plaintiffs' own laws—for example, a law purporting to prohibit out-of-state inspectors from conducting inspections within the state—or that the inspectors lack the private egg producers' consent. Plaintiffs cite no case where this Court has exercised original jurisdiction based on this type of asserted injury—or even recognized such a theory of injury at all.

b. Original jurisdiction is unwarranted in this case for the additional reason that plaintiffs' claims can be raised by other parties in a district-court action. See *Arizona* v. *New Mexico*, 425 U.S. at 796-787 (availability of actions by other parties raising same legal claims can militate against exercise of original jurisdiction); *Mississippi*, 506 U.S. at 76 (same). Here, egg produc-

ers who wish to sell eggs into California and are unwilling to comply with California's Egg Laws with respect to those eggs are free to sue the appropriate California officials for injunctive relief, asserting the same preemption and Commerce Clause claims raised in plaintiffs' complaint. Indeed, they would be the most natural plaintiffs, because they would be directly affected by those laws. Alternatively, out-of-state entities that purchase significant quantities of eggs, such as school systems, universities, bakeries, or institutional food-service companies, could seek to raise those claims, attempting to demonstrate standing and an equitable cause of action through allegations and proof of increased prices.

Plaintiffs argue (Br. in Support 18-21) that there must be another action already pending for this Court to decline to exercise original jurisdiction. But while the Court has sometimes referenced "pending" actions, it has not stated that it will defer only to already-filed cases. See *Arizona* v. *New Mexico*, 425 U.S. at 797 (holding that pending state-court action provided appropriate alternative forum "[i]n the circumstances of this case"). Instead, the Court has stated that it will decline to exercise jurisdiction where the plaintiff State "fails to show that * * * [its] assertion of right may not, or indeed will not, speedily and conveniently be tested by [private parties]." *Alabama*, 291 U.S. at 292. In *Wyoming* v. *Oklahoma*, on which plaintiffs rely, the Court affirmed its jurisdiction after concluding that no other action was currently pending *and* that "[e]ven if such action were proceeding * * * Wyoming's interests [in protecting state tax revenue] would not be directly represented." 502 U.S. at 452.

Plaintiffs further contend (Reply Br. 12) that, even if other egg purchasers were permitted to assert preemption and Commerce Clause claims, a private-party suit would not fully represent their interests. But the plaintiff States' primary asserted interest is as *parens patriae* for egg consumers, Compl. ¶¶ 23-25, meaning that a private suit for injunctive relief would pursue the same goal. And to the extent plaintiffs rely on their own asserted economic injury as purchasers of eggs, Compl. ¶¶ 22-26, they give no reason why their interests differ from those of comparable egg purchasers.

3. Plaintiffs' preemption claim (Compl. ¶¶ 88-93) does not warrant an exercise of this Court's original jurisdiction for the additional reason that the California Egg Laws are not preempted by the federal statute that plaintiffs invoke, 21 U.S.C. 1052(b).[9]

In accordance with Congress's mandate that the Agricultural Marketing Service's grading standards be "uniform[ ]" nationwide, 7 U.S.C. 1622(c), the EPIA's preemption clause provides (as relevant here) that, for eggs moving in interstate 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). The statute defines "official standards" to mean "the standards of quality, grades, and weight classes for eggs * * * under the Agricultural

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[9] There is also a question whether purchasers of shell eggs would have an equitable cause of action to challenge California's Egg Laws as preempted. See *Armstrong* v. *Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378 (2015). Such consumers are only derivatively or indirectly affected by California's Egg Laws, as compared to producers who sell eggs into California and are directly regulated or affected by those laws.

Marketing Act of 1946," 21 U.S.C. 1033(r)—that is, the Agricultural Marketing Service's grading standards. See 7 C.F.R. 57.1.

The Agricultural Marketing Service's standards are used to assess individual shell eggs and packages of eggs, so that most below-grade eggs are not sold to consumers and so that eggs can be sorted into batches of similar quality and size for commercial purposes. See AMS § 56.216(a)(2); *Egg-Grading Manual* 32. The standards ensure, for example, that all eggs sold across the Nation as "Jumbo" are of comparable size, that only the highest quality eggs are sold as "Grade AA," and that most eggs below Grade B are not sold as food. *Ibid.* But the California Egg Laws do not impose any additional or different assessment standards of that kind. Cf. *Campbell* v. *Hussey*, 368 U.S. 297, 302 (1961) (holding that a Georgia law requiring *labeling* of type 14 tobacco sold in Georgia was preempted by federal law standardizing the "type, grade, size, condition, or other characteristics" of tobacco).

The Agricultural Marketing Service's standards do not regulate the size of cages for egg-laying hens on farms. Instead, FDA has historically undertaken primary responsibility for regulating farms to prevent Salmonella and address other potential food-safety concerns. See 21 C.F.R. Pt. 118. Plaintiffs have not identified any conflict between the California Egg Laws and FDA's farm regulations. On the contrary, FDA has stated that States may impose Salmonella-prevention requirements more stringent than federal standards. See 74 Fed. Reg. 33,030, 33,091 (July 9, 2009).

Plaintiffs' reliance on *National Meat Ass'n* v. *Harris*, 565 U.S. 452 (2012), is misplaced. That case involved the Federal Meat Inspection Act's, 21 U.S.C.

601 *et seq.*, preemption provision, which generally prohibits States and localities from adopting "[r]equirements within the scope of [that Act] with respect to premises, facilities and operations of any establishment" inspected under that Act that are "in addition to, or different than those made under" the Act. 21 U.S.C. 678. The Court held that the federal statute preempted a California law preventing slaughterhouses from processing or selling nonambulatory animals because the California law "impose[d] additional or different requirements on swine slaughterhouses" by "compel[ling] them to deal with nonambulatory pigs on their premises in ways that the [Meat Inspection Act] d[id] not." *National Meat*, 565 U.S. at 460.

The EPIA preemption provision at issue here is materially different. It is not so broad as to cover any state regulation of the "premises, facilities, and operations" of any egg farm, but instead prohibits States and localities from adopting additional or different "standards of quality, condition, weight, quantity, or grade," for eggs. 21 U.S.C. 1052(a)-(b). The EPIA has a separate preemption provision very similar to the one at issue in *National Meat*, which prohibits state regulation of "premises, facilities, and operations." 21 U.S.C. 1052(a). But that provision applies only at "official plant[s]," *ibid.*, which are facilities where "egg products"—not shell eggs—are processed. 21 U.S.C. 1033(f) and (q).

4. Plaintiffs' Commerce Clause claim (Compl. ¶¶ 94-101) also does not warrant an exercise of the Court's original jurisdiction.

The Constitution forbids States from "discriminat[ing] against interstate commerce" or "impos[ing] undue burdens on interstate commerce." *South Dakota*

v. *Wayfair, Inc.*, 138 S. Ct. 2080, 2091 (2018). But the California Egg Laws do not discriminate; California treats alike all eggs sold in that State, without any preference for local producers or local products. Cf. *Wyoming* v. *Oklahoma*, 502 U.S. at 455 (Oklahoma statute impermissibly reserved segment of Oklahoma's coal market for Oklahoma-mined coal).

States are permitted to "make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it." *Southern Pac. Co.* v. *Arizona ex rel. Sullivan*, 325 U.S. 761, 767 (1945). Under *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970), when a state statute "regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Id.* at 142.

Assessing California's Egg Laws under *Pike* would require resolution of complex factual issues. California argues (Br. in Opp. 1-2, 25) that, for purposes of *Pike*, its laws are aimed at reducing the risk of Salmonella contamination, which is a type of safety rationale that "has long been recognized" as a legitimate state interest. 397 U.S. at 143 (citation omitted); see *Raymond Motor Transp., Inc.* v. *Rice*, 434 U.S. 429, 443-444 (1978) (stating that promoting safety is a legitimate local concern). Whether California's rules governing cage size advance that objective, however, is disputed. See, *e.g.*, Reply Br. 5; Compl. ¶¶ 76-81. In *Compassion Over Killing* v. *U.S. Food & Drug Administration*, 849 F.3d 849 (9th Cir. 2017), the court of appeals affirmed FDA's denial of a petition for rulemaking because the plaintiffs "had not provided persuasive evidence that eggs from

caged hens are either less nutritious or more likely to be contaminated with Salmonella than eggs from uncaged hens." *Id.* at 853. Also potentially relevant for application of *Pike* is the parties' dispute, as discussed above, pp. 10-13, *supra*, over whether nationwide egg prices have increased and, if so, whether that increase is attributable to California's Egg Laws as opposed to the choices of other actors in the marketplace. Each of those questions could bear on whether California's Egg Laws have so affected commerce in other States as to impose an undue burden.

This Court has held that the Constitution also forbids States from attempting to regulate the price of products sold in another State. See *Healy* v. *The Beer Inst.*, 491 U.S. 324, 335-337 (1989); *Brown-Forman Distillers Corp.* v. *New York State Liquor Auth.*, 476 U.S. 573, 579-582 (1986); *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U.S. 511, 527-528 (1935). To the extent plaintiffs argue that California's Egg Laws are invalid under *Baldwin* and its progeny, those precedents too would require an assessment of facts regarding "whether the practical effect of the regulation is to control conduct beyond the boundaries of the State." *Healy*, 491 U.S. at 336.

Applying either *Pike* or *Baldwin* in this case would therefore require analyzing the economic impact of decisions by a host of different actors. Those questions would be best decided after development of a factual record in an adversary case brought in district court by a party directly regulated by the California laws.

CONCLUSION

For the foregoing reasons, the motion for leave to file a bill of complaint should be denied.

Respectfully submitted.

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