No. 148, Original

In the Supreme Court of the United States

STATE OF MISSOURI, STATE OF ALABAMA,
STATE OF ARKANSAS, STATE OF INDIANA,
STATE OF IOWA, STATE OF LOUISIANA,
STATE OF NEBRASKA, STATE OF NEVADA,
STATE OF NORTH DAKOTA,
STATE OF OKLAHOMA, STATE OF TEXAS,
STATE OF UTAH, AND STATE OF WISCONSIN,
Plaintiffs,

v.

STATE OF CALIFORNIA,
Defendant.

SUPPLEMENTAL BRIEF OF PLAINTIFF STATES

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I. This case presents an appropriate vehicle for this Court to exercise its original and exclusive jurisdiction over disputes among States.

A. This case presents questions of seriousness and dignity warranting the exercise of jurisdiction.

The United States argues that this case does not present questions of sufficient "seriousness" to warrant exercising this Court's jurisdiction, because the disputes would not "amount to a *casus belli* if the States were fully sovereign." U.S. Br. 10 (quoting *Mississippi* v. *Louisiana*, 506 U.S. 73, 77 (1992)). But barriers on interstate trade and free commerce among States have caused just the sort of interstate friction that this Court's original jurisdiction was designed to alleviate. Reply Br. 6-7. And the economic burdens on Plaintiff States and their citizens alleged in the Bill of Complaint constitute, if anything, more significant causes of interstate friction than occurred in the cases that the United States concedes were appropriate for this Court's original jurisdiction. *See* U.S. Br. at 10.

In addition, the United States ignores the aggregate effect of cases in which States like California have attempted to dictate the manner of agricultural production in other States. Two other cases currently pending on this Court's docket present similar questions. *Assoc. des Eleveurs des Canards et d'Oies du Quebec* v. *Becerra*, No. 17-1285; *Indiana* v. *Massachusetts*, No. 22O149. California has faced at least three legal challenges to its

extraterritorial regulation of agricultural production in this Court in the past several years. *See Assoc. des Eleveurs*, No. 17-1285; *Nat'l Meat Ass'n* v. *Harris*, 565 U.S. 452 (2012). Last November, California enacted yet another measure imposing even more burdens on agricultural production. U.S. Br. 5 n.6.

Other States are following California's lead in imposing regulations on the agricultural sector that principally impact producers in other States. *See* Br. Amicus Curiae of State of Missouri, *et al.*, No. 17-1285. Massachusetts, for example, has purported to impose a host of standards on agricultural products produced in other states. *Indiana* v. *Massachusetts*, No. 22O149. Likewise, in 2014, Vermont passed a law requiring labeling of certain GMO products, to take effect in 2016. Compl., *Grocery Mfrs. Ass'n* v. *Sorrell*, 2014 WL 2965321, No. 5:14-CV-117 (D. Vt. 2014). In 2016, GMO-labeling bills were proposed in 25 states and enacted in three. *State Legislation Addressing Genetically-Modified Organisms*, NAT'L CONF. OF STATE LEGIS. (June 22, 2016).[1] Vermont's "national impact" caused a crisis because of the "logistical hassle of having separate labels for different states." *G.M.O.s in Food? Vermonters Will Know*, N.Y. TIMES (June 30, 2016).[2] Congress hurriedly passed a bill preempting such GMO legislation, enacting it the same month Vermont's

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1 http://www.ncsl.org/research/agriculture-and-rural-development/state-legislation-addressing-genetically-modified-organisms-report.aspx.

2 https://www.nytimes.com/2016/07/01/business/gmo-labels-vermont-law.html.

law went into effect. Pub. L. 114-216, 130 Stat. 834 (2016).

Thus, the issues presented here are important and recurring. The collective impact of such regulations on agricultural production and on costs of basic food staples for consumers is enormous. For the reasons stated below, California's interstate regulations have evaded judicial review, and will continue to do so absent a forum for Plaintiff States. *See infra* Part I.B. This case thus presents an ideal vehicle for this Court to address a nationwide problem afflicting the country's agricultural sector. Intervention is appropriate to prevent the interstate trade barriers and economic Balkanization that will occur when "not one, but many or every, State adopt[s] similar legislation." *Wyoming* v. *Oklahoma*, 502 U.S. 437, 453-54 (1992).

The United States argues that the issues presented here lack seriousness and dignity because the asserted harms to the States and their citizens are supposedly not as "direct" as the harms asserted in other cases. U.S. Br. at 10-13. The United States does not cite any case adopting a standard of "directness" of injury as a criterion for exercising this Court's jurisdiction. *See id.*

In any event, the economic injuries inflicted on Plaintiff States and their citizens are quite direct. No one disputes that California's regulations inflated egg prices in California. Reply Br. 8; BIO 11. And California's assertion that its economy is "segmented" from the rest of the country—even though California imports 4 billion eggs each year, nearly half its total consumption—contradicts basic

principles of economics. Compl. ¶ 58. By increasing production costs, California drove many producers out of business, decreasing the supply of eggs, increasing demand for out-of-state eggs and non-shelled eggs, and diverting out-of-state production resources to address California's needs. Reply Br. 8-11. Basic principles of economics dictate that these shifts in supply and demand increased prices for consumers outside California as well.

In similar circumstances, this Court has held that an economic injury was direct enough to support jurisdiction when an action by one State shifted supply or demand, harming another State through the reactions of marketplace actors. When Oklahoma required utility companies to purchase more coal from Oklahoma companies, it injured Wyoming by reducing demand for Wyoming coal. *Wyoming*, 502 U.S. at 442-45, 451. When West Virginia restricted sales of its natural gas, it harmed Pennsylvania by lowering supply and "threaten[ing] withdrawal of the gas from the interstate stream." *Pennsylvania* v. *West Virginia*, 262 U.S. 553, 592 (1923). As in these cases, the economic harm here "fairly can be traced" to the California regulations, because their natural and inevitable consequence is to reduce egg supply and increase demand for non-California eggs and derivative products, driving up prices for consumers outside California. *Maryland* v. *Louisiana*, 451 U.S. 725, 736 (1981) (citation omitted)

Moreover, Article III does not require the Court to discern the precise economic effect of the California regulations, so long as *some* impact exists.

See Harper v. *Virginia State Bd. of Elections*, 383 U.S. 663, 665 (1966). And this Court has "decline[d] any invitation to key the exercise of this Court's original jurisdiction on the amount in controversy." *Wyoming*, 502 U.S. at 453.

In addition, the United States' argument that the injuries here are insufficiently "direct" fails to address the non-economic, sovereign and quasi-sovereign interests asserted by Plaintiff States, which are also inflicted "directly." Compl. ¶¶ 25, 28-31.

Noting that Plaintiff States rely on an expert economic analysis, the United States argues that "questions of market forces and indirect effects would be best resolved by a district court that can conduct discovery and weigh expert testimony." U.S. Br. 13. As discussed below, no such district court forum is available. In any event, the factual complexity of the economic issues presented here is no greater than the factual complexity regularly presented in cases involving border disputes and "the manner of use of waters of interstate lakes and rivers," which the United States concedes are appropriate for this Court's jurisdiction. U.S. Br. 10.

The United States argues that the Court should decline to exercise jurisdiction because "plaintiffs' Article III standing is unclear." U.S. Br. 13. In questioning Plaintiff States' standing, however, the United States again addresses only the asserted economic injuries, ignoring the sovereign and quasi-sovereign injuries alleged in the Complaint, which independently establish standing. *See* Compl. ¶¶ 25, 28-31; Reply Br. 5-8. And the United States cites no

case holding that economic injuries that arise from the operation of well-established market forces are too causally attenuated to support standing. *See* U.S. Br. 13 (citing only *Allen* v. *Wright*, 468 U.S. 737, 757 (1984)). As noted, this Court's cases hold that such injuries are sufficiently direct to support Article III standing as well as the exercise of this Court's original jurisdiction. *See Wyoming*, 502 U.S. at 442-51; *Pennsylvania*, 262 U.S. at 592.

The United States argues that Plaintiff States "have not demonstrated an injury that 'affects the general population of their States in a substantial way.'" U.S. Br. 15 (quoting *Maryland*, 451 U.S. at 737) (alterations omitted). On the contrary, the proposed Bill of Complaint provides detailed allegations of economic impact on all consumers of egg products, including virtually every person in Plaintiff States, especially persons of limited means. Compl. ¶¶ 11-23, 36-37, 71-87.

The United States disputes that Plaintiff States' "sovereignty is offended if California inspectors visit private egg-production facilities in their States." U.S. Br. 16. But state officials cannot "exercise their functions in the territory of another state [without] the consent of the other state." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 432 (1987). The United States' observation that the Restatement "addresse[s] relationships among foreign states," U.S. Br. 16, proves this point. In our unique system of federalism, the States *are* separate sovereigns. Unless federal law provides otherwise, the rule against extraterritorial regulation is the cornerstone of their relations. *E.g.*, *Rose* v. *Himely*, 8 U.S. 241,

279 (1808); *Beers* v. *State*, 61 U.S. 527, 529 (1857). The only difference between the States and foreign sovereigns is that the States gave up traditional conflict-resolution powers in exchange for a forum to resolve disputes in this Court. *Texas* v. *New Mexico*, 138 S. Ct. 954, 958 (2018).

The sovereign injury inflicted on Plaintiff States when California sends its inspectors into their territory provides an independent basis for Article III standing and highlights the "seriousness and dignity" of the claims asserted here. "The laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens." *The Apollon*, 22 U.S. 362, 370 (1824). The same is true with extraterritorial enforcement of subpoenas because "enforcement jurisdiction by and large continues to be strictly territorial." *F.T.C.* v. *Compagnie De Saint-Gobain-Pont-a-Mousson*, 636 F.2d 1300, 1316 (D.C. Cir. 1980). Just as "Massachusetts cannot invade Rhode Island to force reductions in greenhouse gas emissions," *Massachusetts* v. *E.P.A.*, 549 U.S. 497, 519 (2007), California inspectors should not be allowed to invade Missouri and other States to enforce California's unlawful egg regulations.

The United States downplays this intrusion on sovereignty by arguing that private producers "voluntarily invite[]" enforcement. U.S. Br. 16. But compliance with the California production standards is obligatory, not voluntary, for any producer shipping eggs into California. California coerces farmers to accede to inspections or lose access to markets providing large percentages of revenue.

Compl. ¶ 21. In any event, egg producers cannot "voluntarily" waive the rights of consumers or the sovereign rights of their States.

B. No alternative forum is available to resolve the issues presented here.

The United States contends that original jurisdiction is unwarranted because "plaintiffs' claims can be raised by other parties in a district-court action." U.S. Br. 16. But the United States does not dispute that Plaintiff States would face significant jurisdictional obstacles if they attempted to sue in federal district court. *See, e.g., Safe Streets All.* v. *Hickenlooper*, 859 F.3d 865, 909-13 (10th Cir. 2017); *see also Connecticut* v. *Cahill*, 217 F.3d 93, 105-12 (2d Cir. 2000) (Sotomayor, J., dissenting).

The United States suggests that "egg producers" would constitute "the most natural plaintiffs" for a district-court challenge. U.S. Br. 17. The United States also argues that egg consumers could serve as appropriate plaintiffs, *id.*—though this argument tends to contradict the earlier assertion that egg consumers may lack Article III standing because their economic injury is supposedly too indirect, *see id.* at 13. The United States does not address Plaintiff States' argument that neither egg producers nor consumers have appropriate incentives to undertake the burden and expense of litigation. Reply Br. 12. Plaintiff States' economic analysis strongly indicates that egg producers have no incentive because their market share has actually increased due to the California regulations. A-10–A-14. And the economic injury to each individual egg consumer is too diffuse to justify the burden and

expense of litigation. Reply Br. 12. Thus, this case presents the quintessential scenario for Plaintiff States to exercise their *parens patriae* authority. *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico, ex rel., Barez*, 458 U.S. 592, 608 (1982).

Indeed, as this Court has recognized, even if an action by private parties were likely to materialize, no private parties could adequately represent the States' sovereign and quasi-sovereign interests. *Wyoming*, 502 U.S. at 452 ("Even if such [private] action were proceeding, however, Wyoming's interests would not be directly represented."). Moreover, egg *producers* could not adequately represent the interests of egg *consumers*, since their economic interests lie at odds.

The California regulations have been in effect for nearly four years, and no legal challenge other than that of Plaintiff States has materialized. This fact refutes the claim that these claims "can be raised by other parties in a district-court action." U.S. Br. 16. Absent this Court's intervention, the California regulations are likely to go unchallenged, and the issues here left unaddressed.

Finally, the United States' attempt to distinguish the holding of *Wyoming,* 502 U.S. at 452, that the action in the alternative forum must be already pending, is unconvincing. U.S. Br. 17. The United States notes that the *Wyoming* Court provided an alternative basis for exercising jurisdiction, *id.*, but the United States does not dispute that the Court stated that the absence of an already-pending action justified this Court's exercise of original jurisdiction. *See Wyoming*, 502 U.S. at 452.

II. The California regulations violate federal law.

The United States fails to address the fundamental dilemma confronting the California regulations: If they constitute valid health-and-safety provisions designed to prevent salmonella contamination, they constitute regulations of "quality" and "condition" that are preempted by the plain language of the Egg Products Inspection Act. But if the California regulations do *not* purport to address the "quality" and "condition" of eggs shipped into California, then they serve only to regulate the welfare of animals outside California, or to deliberately impose economic burdens on egg producers outside California—both of which purposes are *per se* invalid under the Commerce Clause.

A. The Egg Products Inspection Act preempts the California regulations.

The United States concedes that the EPIA is designed "to encourage uniformity and consistency in commercial practices." U.S. Br. 2-4, 18. But the California regulations directly undermine this goal by prohibiting what federal law permits: selling eggs produced in industry-standard cages. As in *National Meat Association*, the Act prohibits imposing "standards of quality" or "condition" on eggs that are "in addition to or different from" federal standards. 21 U.S.C. § 1052(b).

The United States asserts that the Act does not preempt California's regulations because federal "standards do not address confinement conditions for egg-laying hens," but only address classifications and

labeling. U.S. Br. 7, 19. On the contrary, the absence of a direct conflict "is irrelevant, because the [Act]'s preemption clause covers not just conflicting, but also different or additional state requirements." *Nat'l Meat Ass'n*, 565 U.S. at 461.

In response, the United States argues that "standard" refers only to classifying and labeling regulations. U.S. Br. 19. But the United States admits that "standard" also includes regulations prohibiting selling kinds of eggs. U.S. Br. 3-4, 19. And it admits that AB 1437 makes selling eggs illegal when production of those eggs "fails to meet certain *standards*." U.S. Br. 5 (emphasis added). Those "standards" are preempted by the EPIA because they compel farmers to grow eggs in a manner that federal standards do not address.

The United States seeks to distinguish *National Meat Association* by asserting that the statute at issue there preempted regulations about facilities, whereas the preemption clause here concerns eggs. U.S. Br. 20. But both statutes prohibit any standards "in addition to" or "different" from federal standards. As this Court acknowledged in *National Meat Association*, a standard regulating a product is also a standard regulating facilities when it is "calculated" to affect facilities. *Nat'l Meat Ass'n*, 565 U.S. at 463-64. Precisely the same is true for a regulation of production facilities that is "calculated" to affect the "quality" or "condition" of products. The California regulations impose cage-size requirements on egg-producing facilities for the stated purpose of improving the quality and condition of eggs produced there. They thus impose "standards" of "quality" and

"condition" within the plain meaning of the EPIA's preemption clause.

The United States also argues that the EPIA's preemption provision cannot preempt shelled-egg production standards because the Act elsewhere preempts regulations of factories that process derivative egg products, such as liquid eggs. U.S. Br. 20; 21 U.S.C. §§ 1033(f), (q), 1052(a). But these two preemption clauses reflect only that the Act regulates non-shelled eggs, which are processed in factories, differently than it regulates shelled eggs, which are not processed in factories. U.S. Br. 1.

B. The Commerce Clause prohibits California's egg-production regulations.

California's regulations unlawfully discriminate against out-of-state commerce and reach into other states to regulate their egg production. They are subject to strict scrutiny and "virtually *per se* invalid." *Oregon Waste Sys., Inc.* v. *Dep't of Envtl. Quality of State of Or.*, 511 U.S. 93, 99 (1994).

The United States argues that California's laws "do not discriminate," because "California treats alike all eggs sold in that State, without any preference for local producers or local products." U.S. Br. 21. To the contrary, when assessing whether state regulations discriminate against interstate commerce, this Court looks to the law's practical impact, not merely to "the name, description or characterization given it by the legislature or the courts of the State." *Hughes* v. *Oklahoma*, 441 U.S. 322, 336 (1979) (citation omitted); *cf. Church of the Lukumi Babalu Aye, Inc.*

v. *City of Hialeah*, 508 U.S. 520, 536 (1993) (declaring unlawful a facially valid but gerrymandered statute).

Here, California's purpose and effect is to reach outside its borders and impose extraterritorial regulation on producers in other States. California had already imposed these confinement standards on California producers. As the California Assembly's Appropriations Committee openly admitted, the law's true intent "is to level the playing field so that in-state producers are not disadvantaged" by the regulations California had already imposed. Compl. ¶ 83. It is hard to imagine a clearer statement of discriminatory intent. The desire to inflict economic burdens on out-of-state producers for the stated purpose of protecting California producers from competition constitutes *per se* invalid discrimination under the Commerce Clause.

CONCLUSION

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

Respectfully submitted,

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