

No. \_\_\_\_, Original

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IN THE  
**Supreme Court of the United States**

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

v.

COMMONWEALTH OF MASSACHUSETTS,  
*Defendant.*

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**MOTION FOR LEAVE TO FILE BILL OF  
COMPLAINT, BILL OF COMPLAINT, AND  
BRIEF IN SUPPORT**

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The States of Indiana, Alabama, Arkansas, Louisiana, Missouri, Nebraska, North Dakota, Oklahoma, South Carolina, Texas, Utah, West Virginia, and Wisconsin, respectfully move this Court for leave to file the Bill of Complaint submitted herewith. The grounds for this Motion are set forth in an accompanying brief.

Respectfully submitted,

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**BILL OF COMPLAINT**

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The States of Indiana, State of Alabama, State of Arkansas, State of Louisiana, State of Missouri, State of Nebraska, State of North Dakota, State of Oklahoma, State of South Carolina, State of Texas, State of Utah, State of West Virginia, and State of Wisconsin (“Plaintiff States”) bring this action against the Defendant the Commonwealth of Massachusetts, and for their cause of action assert as follows:

## INTRODUCTION

1. This case challenges the Commonwealth of Massachusetts’s attempt to impose regulatory standards on farmers from every other state by dictating conditions of housing for poultry, hogs, and calves when their products will be offered for sale in Massachusetts. The Prevention of Farm Animal Cruelty Act (“the Animal Law”), Mass. Gen. Laws ch. 129 Appendix will, in effect, bar the sale in Massachusetts of products from regulated animals that were not housed according to Massachusetts specifications, no matter where that housing occurred or where the products were produced. *See* Plaintiffs’ Appendix (“App.”) 1–7, attached as Exhibit A, An Act to Prevent Cruelty to Farm Animals and incorporated as if set forth fully herein.

2. Massachusetts’s efforts to regulate farming in other states constitute extraterritorial commercial regulation in violation of the Commerce Clause. This extraterritorial regulation will increase the costs of producing and marketing farm commodities

nationwide, including for farmers and consumers in Plaintiff States.

3. Indiana and the other Plaintiff States have direct standing to challenge the Animal Law because their agencies and instrumentalities own and operate farms and sell regulated commodities on the national market as part of a supply chain that reaches Massachusetts.

4. The States also have *parens patriae* standing on behalf of their farmers and consumers, all of whom will suffer significant effects from the Massachusetts law.

5. Thirteen States have joined together in this action to challenge the Animal Law. Only this Court may effectively resolve this dispute, as it has original and exclusive jurisdiction over suits between two states, so it is the only available forum to adjudicate Plaintiff States' claims. The Plaintiff States seek declaratory and injunctive relief against Massachusetts's attempt to impose regulatory standards on farmers from every other state and the entire interstate market for eggs, pork, and veal.

### **JURISDICTION AND VENUE**

6. This Court has original jurisdiction over this suit under Article III, Section 2, Clause 2 of the Constitution of the United States, and Title 28, Section 1251(a) of the United States Code. "The Supreme Court shall have original and exclusive

jurisdiction of all controversies between two or more States.” 28 U.S.C. § 1251(a).

7. This Court has authority to grant the Plaintiff States declaratory relief pursuant to 28 U.S.C. §§ 2201 and 2202.

8. This Court is the sole forum in which the Plaintiff States may enforce their rights under the Commerce Clause. There is no alternative forum capable of fully resolving this dispute between the Plaintiff States and Massachusetts. *See Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992); *Wyoming v. Oklahoma*, 502 U.S. 437, 452 (1992).

#### **DEFENDANT MASSACHUSETTS AND ITS ANIMAL LAW**

9. Defendant the Commonwealth of Massachusetts is a sovereign State. In Massachusetts, Article 48 of the Commonwealth’s Constitution “grants to the people the right, through the use of a special legislative procedure, to enact laws directly without being thwarted by an unresponsive Legislature.” *Op. of the Justices to the House of Representatives*, 664 N.E.2d 792, 796 (Mass. 1996), *adopted sub nom. Anderson v. Attorney Gen.*, 666 N.E.2d 118 (Mass. 1996) (internal citations omitted).

10. After receiving received a signed initiative petition in August of 2015 with the title “An Act to prevent cruelty to farm animals,” the Attorney General of Massachusetts certified to the Secretary of

the Commonwealth on September 2, 2015, that the proposed measure was “in proper form for submission to the people” and that it complied with certain procedural requirements of the Constitution of Massachusetts. *Dunn v. Attorney Gen.*, 54 N.E.3d 1, 3–5 (Mass. 2016).

11. On July 6, 2016, the Supreme Judicial Court of Massachusetts “conclude[d] that the subjects contained in the [Animal Law] petition are sufficiently related to meet the requirements of art. 48 [of the Massachusetts Constitution], and that the brief statement of purpose in the proposed measure does not render it unfit for submission to the voters.” *Dunn*, 54 N.E.3d at 3. As such, the Animal Law “was properly certified by the [Massachusetts] Attorney General.” *Id.*

12. On November 8, 2016, Massachusetts voters approved the Animal Law by voter referendum with a margin of 77.7% to 22.3%. An Act to Prevent Cruelty to Farm Animals (codified at Mass. Gen. Laws Ann. ch. 129 App. §§ 1-1 *et seq.*).

13. The Animal Law will prohibit farmers both inside and outside the state from selling in Massachusetts “[s]hell egg[s],” “[w]hole veal meat,” and “[w]hole pork meat” that is the “product of a covered animal that was confined in a cruel manner.” *Id.* § 1-3.

14. The Law defines “confined in a cruel manner” to mean “confined so as to prevent a covered animal from lying down, standing up, fully extending the

animal’s limbs, or turning around freely.” *Id.* § 1-5(E). It then further provides that “fully extending the animal’s limbs” means “fully extending all limbs without touching the side of an enclosure.” *Id.*

15. The Law goes into effect on January 1, 2022, but requires the Massachusetts Attorney General to promulgate rules and regulations for implementing the Law by January 1, 2020. *Id.* §§ 1-10, 1-11.

16. The Animal Law and its implementing regulations will require that farmers start preparing immediately for compliance by decreasing flock and herd size, investing in new infrastructure, and undertaking contentious zoning approval processes. App. 11 ¶¶ 9–11, attached as Exhibit B, Declaration of Alan G. Mathew, Ph.D. and incorporated as if set forth fully herein.

17. Compliance with the Animal Law and its implementing regulations will either decrease farmers’ production or require farmers to commit additional financial resources to their operations. Like other industries, farming operations require careful long-term advance planning and well-designed business strategies including financial management. These requirements are particularly important in the farming industry due to unpredictable production cycles and natural risks that can affect revenue on an annual basis.

18. Farm operators—including the State of Indiana through Purdue University—will need to start planning immediately for the financial burden

imposed by compliance with the Animal Law and any forthcoming regulations promulgated to implement the law.

19. As a result of increased production costs and decreased production output, the Animal Law will increase prices of eggs, pork, and veal for consumers across the Nation.

### **PLAINTIFF STATES AND THEIR INJURIES THAT CONFER STANDING**

20. The State of Indiana, State of Alabama, State of Arkansas, State of Louisiana, State of Missouri, State of Nebraska, State of North Dakota, State of Oklahoma, State of South Carolina, State of Texas, State of Utah, State of West Virginia, and State of Wisconsin are sovereign States whose citizens enjoy all the rights, privileges, and immunities of our federal system of government as guaranteed under the United States Constitution and federal law.

21. Production of agricultural commodities adds billions of dollars to Indiana's economy from farm, food and forestry products. Indiana ranks third among states in egg production and, with more than 3,000 pork farmers across the State, Indiana ranks fifth among states in pork farming production.

22. Similarly, cash receipts from Nebraska's farms contributed over \$23 billion to Nebraska's economy in 2015 and 6.1 percent of the United States total. Every dollar in agricultural exports generates

\$1.22 in economic activities such as transportation, financing, warehousing and production. Nebraska's \$6.4 billion in agricultural exports in 2015 translated into \$7.8 billion in additional economic activity. In 2016, Nebraska ranked first in the nation in beef and veal exports that totaled \$1,126,575,000.

23. This Court has “established that the ‘irreducible constitutional minimum’ of [Article III] standing consists of three elements . . . [t]he plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.” *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016), *as revised* (May 24, 2016) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992); *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 180–81 (2000)).

24. At least some Plaintiff States have “suffered an injury in fact” and have direct standing to challenge the law because they control a state agency or instrumentality engaged in the sale of livestock or egg products in interstate commerce on the open market, with some of that product reaching customers throughout the United States.

25. To comply with the Animal Law, Plaintiff States' agencies and farmers in Plaintiff States will have to increase their production costs by decreasing flock or herd size, investing in new infrastructure, and undertaking contentious zoning approval processes. If they do not, they must forgo completely

any sales in Massachusetts or to national distributors that may resell products in Massachusetts.

26. For example, the State of Indiana, through Purdue University, is a market participant and is harmed directly by the Animal Law because its meat products are sold on the open market and distributed throughout the United States.

27. Purdue is a body corporate created by the Indiana legislature and is an instrumentality of the State of Indiana. Ind. Code §§ 21-23-2-1, 21-23-2-2, 21-23-2-3. Indiana's Budget Agency Act includes Purdue University in its definition of a state agency, Ind. Code § 4-12-1-2, and the State of Indiana maintains substantial control over Purdue University by directly providing a significant portion of its funding, requiring it to file a budget statement, and permitting the Governor to appoint a majority of the members of the Board of Trustees. *See Kashani v. Purdue Univ.*, 813 F.2d 843, 845 (7th Cir. 1987) (concluding that "Purdue is an instrumentality of the State of Indiana"); *Russell v. Trustees of Purdue Univ.*, 168 N.E. 529, 535 (Ind. 1929) (stating that "Purdue University is an educational institution belonging to the state of Indiana").

28. Purdue University owns and operates farms through the Animal Sciences Research and Education Center (ASREC) that confine animals, including swine and poultry, in conditions that do not currently comply with the Animal Law. *See App. 10 ¶ 5.*



29. Purdue University sells livestock in Indiana and to nationwide meat distributors who then resell the products to retailers, some of whom are presumably located in Massachusetts. *See* App. 10 ¶ 6.

30. For example, Purdue's ASREC primarily sells market hogs to Tyson Foods and Indiana Packers Corporation. Purdue's ASREC also sells cull sows and boars to Wiechman Pig Company. These distributors sell their products throughout the United States and outside of Indiana. *See* App. 10 ¶ 7.

31. Purdue's sales of meat are transactions that occur wholly outside the Commonwealth of Massachusetts.

32. For these reasons, Purdue University and the State of Indiana would either need to increase their production costs to comply with the Animal Law or forgo sales to national distributors that may resell products for retail in Massachusetts. *See* App. 11 ¶ 9.

33. In order to comply with the Animal Law, Purdue University will have to decrease flock and herd size, invest in new infrastructure, and undertake contentious zoning approval processes. If it chooses not to comply, it must forgo completely any sales in Massachusetts or to national distributors that may resell products in Massachusetts. *See* App. 11 ¶ 9.

34. Plaintiff States are also significant consumers of covered products such as eggs. Because several agencies and instrumentalities of Plaintiff States

purchase eggs for human consumption, any increase in prices will directly affect the State's budget. For example, the Indiana Department of Correction, which purchases eggs for inmate consumption, will incur increased costs annually as a direct result of the Animal Law. Also, the State of Wisconsin purchases eggs and meat through the University of Wisconsin to feed its students.

35. From October 1, 2016 through Sept. 30, 2017, the Indiana Department of Correction purchased 631,080 shell eggs from three food vendors including Sysco, Piazza Produce and Stanz Foodservice in order to feed inmates. App. 14–15 ¶ 4, attached as Exhibit C, Declaration of John Schilling and incorporated as if set forth fully herein.

36. Plaintiff States also have *parens patriae* standing—suing, in effect, on behalf of their citizens. See *Maryland v. Louisiana*, 451 U.S. 725, 737 (1981) (observing that a state “may act as the representative of its citizens” through *parens patriae* standing “in original actions where the injury alleged affects the general population of a State in a substantial way”).

37. Plaintiff States have *parens patriae* standing because each asserts “an injury to what has been characterized as a ‘quasi-sovereign’ interest[.]” *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982).

38. Plaintiff States have *parens patriae* standing because the Animal Law will financially and

physically affect a significant portion of their residents.

39. The Animal Law will increase the retail price of agricultural products such as eggs and pork. App. 25 ¶ 26, attached as Exhibit D, Declaration of Jayson L. Lusk, Ph.D. and incorporated as if set forth fully herein.

40. First, as a result of complying with the Animal Law, Indiana farmers will experience an increase in their production costs due to decreased flock and herd size or new infrastructure investments. Those higher production costs will increase the price of eggs and pork in Massachusetts as well as Plaintiff States. *See* App. 24 ¶¶ 23–25.

41. Second, these increased production costs will decrease the supply of eggs and pork relative to what it would have been in the absence of the Animal Law. This decreased supply will cause the price of such products to increase and result in consumer losses. *See* App. 24 ¶¶ 23–25.

42. Hence, the Animal Law will financially affect a significant portion of the Plaintiff States' residents, including farmers, farm employees, and consumers.

43. The increases in retail egg and pork prices will cause the greatest hardship for low-income individuals and families.

44. Plaintiff States have standing to bring this action to prevent injury to their residents through the

increased prices they will have to pay as direct purchasers of eggs, pork, and veal because of the Animal Law.

45. Plaintiff States have standing to bring this action to prevent injury to their residents through the decreased tax revenues they will suffer as a direct result of the Animal Law.

46. Plaintiff States also have standing to bring this action to prevent injury to their farmers through the increase in their production costs as a direct result of the Animal Law.

### **COUNT I VIOLATION OF COMMERCE CLAUSE**

47. Plaintiff States incorporate all allegations in Paragraphs 1 through 46 into Count I of this Complaint.

48. The Massachusetts Animal Law is an unconstitutional state regulation of interstate commerce.

49. The Commerce Clause grants Congress the power to “regulate Commerce . . . among the several States[.]” U.S. Const. art. I, § 8.

50. This Court has interpreted the Commerce Clause as “limit[ing] the power of the States to erect barriers against interstate trade.” *Maine v. Taylor*, 477 U.S. 131, 137 (1986) (quoting *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 35 (1980)).

This “dormant” Commerce Clause protects against “economic protectionism” by a state, *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).

51. The Commerce Clause also precludes States from engaging in extraterritorial regulation. *See, e.g., Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 521–23 (1935); *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336–37 (1989); *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986).

52. The Animal Law constitutes economic protectionism and extraterritorial regulation that violates the Commerce Clause. Under the Animal Law, farmers in Plaintiff States must now submit to Massachusetts’s laws, as well as those of any state that adopts similar regulations, in order to have access to those states’ markets.

53. The farming regulations set forth in the Animal Law and to be promulgated by Massachusetts’ Attorney General will force Purdue University and other similar out-of-state farming operations to (1) alter their production methods with respect to commercial activities occurring wholly outside the Commonwealth of Massachusetts, and (2) subject themselves to regulation by Massachusetts with respect to such out-of-state commercial activities as a condition of selling their products to retailers and consumers in Massachusetts.

54. The Animal Law is not directed at the quality of covered products but rather at the means or characteristics of production of such covered products.

55. As such, the Animal Law constitutes the imposition of an extraterritorial regulatory authority and burden by Massachusetts upon commerce occurring solely outside of the Commonwealth of Massachusetts by Purdue University, Plaintiff States, and other similarly-situated manufacturers in violation of the Commerce Clause to the United States Constitution.

56. Plaintiff States have accordingly suffered, or will suffer, substantial and tangible harm from the impermissible and unconstitutional actions described above, and are entitled to a Judgment that both invalidates the Animal Law and permanently enjoins Massachusetts from enforcing it.

57. Plaintiff States therefore seek declaratory and injunctive relief under 28 U.S.C. § 2201.

58. Plaintiff States have no sufficient remedy except by invoking the Court's original jurisdiction in this proceeding.

WHEREFORE, the Plaintiff States respectfully request that the Court issue the following relief:

1. Accept jurisdiction of this case;
2. Declare the Animal Law is unconstitutional for the reasons described above;
3. Enter a Judgment declaring the Animal Law is unconstitutional in violation of the Commerce

Clause to the United States Constitution on the basis that it imposes an impermissible extraterritorial regulation of commercial activity occurring wholly in another state;

4. Preliminarily and permanently enjoin Massachusetts from enforcing the Animal Law; and

5. Award all other necessary and proper relief.

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IN THE  
**Supreme Court of the United States**

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

v.

COMMONWEALTH OF MASSACHUSETTS,  
*Defendant.*

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**APPENDIX TO BILL OF COMPLAINT**

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**Exhibit A**

**Acts (2016)**

**Chapter 333**

**AN ACT TO PREVENT CRUELTY TO FARM  
ANIMALS**

*Be it enacted by the People, and by their  
authority, as follows:*

Prevention of Farm Animal Cruelty Act

Section 1.

The purpose of this Act is to prevent animal cruelty by phasing out extreme methods of farm animal confinement, which also threaten the health and safety of Massachusetts consumers, increase the risk of foodborne illness, and have negative fiscal impacts on the Commonwealth of Massachusetts.

Section 2.

Notwithstanding any general or special law to the contrary, it shall be unlawful for a farm owner or operator within the Commonwealth of Massachusetts to knowingly cause any covered animal to be confined in a cruel manner.

Section 3.

Notwithstanding any general or special law to the contrary, it shall be unlawful for a business owner or operator to knowingly engage in the sale within the Commonwealth of Massachusetts of any:

(A) Shell egg that the business owner or operator knows or should know is the product of a covered animal that was confined in a cruel manner.

(B) Whole veal meat that the business owner or operator knows or should know is the meat of a

covered animal that was confined in a cruel manner.

(C) Whole pork meat that the business owner or operator knows or should know is the meat of a covered animal that was confined in a cruel manner, or is the meat of the immediate offspring of a covered animal that was confined in a cruel manner.

Section 4.

For the purposes of this Act, a covered animal shall not be deemed to be “confined in a cruel manner” during:

(A) Transportation.

(B) State or county fair exhibitions, 4-H programs, and similar exhibitions.

(C) Slaughter in accordance with any applicable laws, rules, and regulations.

(D) Medical research.

(E) Examination, testing, individual treatment or operation for veterinary purposes, but only if performed by or under the direct supervision of a licensed veterinarian.

(F) The five (5) day period prior to a breeding pig’s expected date of giving birth, and any day that the breeding pig is nursing piglets.

(G) Temporary periods for animal husbandry purposes for no more than six (6) hours in any twenty-four (24) hour period.

Section 5.

For purposes of this Act, the following terms shall have the following meanings:

(A) “Breeding pig” means any female pig of the porcine species kept for the purpose of commercial breeding.

(B) “Business owner or operator” means any person who owns or controls the operations of a

business.

(C) “Calf raised for veal” means any calf of the bovine species kept for the purpose of commercial production of veal meat.

(D) “Covered animal” means any breeding pig, calf raised for veal, or egg-laying hen that is kept on a farm.

(E) “Confined in a cruel manner” means confined so as to prevent a covered animal from lying down, standing up, fully extending the animal’s limbs, or turning around freely.

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

(G) “Enclosure” means any cage, crate, or other structure used to confine a covered animal or animals. “Enclosure” includes what is commonly described as a “gestation crate” or “stall” for pigs during pregnancy, a “veal crate” for calves raised for veal, and a “battery cage, enriched cage, or colony cage” for egg-laying hens.

(H) “Farm” means the land, building, support facilities, and other equipment that are wholly or partially used for the commercial production of animals or animal products used for food; and does not include live animal markets or establishments at which inspection is provided under the Federal Meat Inspection Act.

(I) “Farm owner or operator” means any person who owns or controls the operations of a farm.

(J) “Fully extending the animal’s limbs” means fully extending all limbs without touching the side of an enclosure. In the case of egg-laying hens, fully

extending the animal's limbs means fully spreading both wings without touching the side of an enclosure or other egg-laying hens and having access to at least 1.5 square feet of usable floor space per hen.

(K) "Person" means any individual, firm, partnership, joint venture, limited liability corporation, estate, trust, receiver, syndicate, association, or other legal entity.

(L) "Pork meat" means meat, as defined in 105 CMR 531.012 as of June 1, 2015, of a pig of the porcine species, intended for use as human food.

(M) "Sale" means a commercial sale by a business that sells any item covered by Section 3, but does not include any sale undertaken at an establishment at which inspection is provided under the Federal Meat Inspection Act. For purposes of this section, a sale shall be deemed to occur at the location where the buyer takes physical possession of an item covered by Section 3.

(N) "Shell egg" means a whole egg of an egg-laying hen in its shell form, intended for use as human food.

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

(P) "Uncooked" means requiring cooking prior to human consumption.

(Q) "Usable floor space" means the total square footage of floor space provided to each hen, as calculated by dividing the total square footage of floor space provided to hens in an enclosure (including both ground space and elevated flat platforms) by the number of hens in that enclosure.

(R) "Veal meat" means meat, as defined in 105



CMR 531.012 as of June 1, 2015, of a calf raised for veal, intended for use as human food.

(S) "Whole pork meat" means any uncooked cut of pork (including bacon, ham, chop, ribs, riblet, loin, shank, leg, roast, brisket, steak, sirloin or cutlet) that is comprised entirely of pork meat, except for seasoning, curing agents, coloring, flavoring, preservatives and similar meat additives. Whole pork meat does not include combination food products (including soups, sandwiches, pizzas, hot dogs, or similar processed or prepared food products) that are comprised of more than pork meat, seasoning, curing agents, coloring, flavoring, preservatives and similar meat additives.

(T) "Whole veal meat" means any uncooked cut of veal (including chop, ribs, riblet, loin, shank, leg, roast, brisket, steak, sirloin or cutlet) that is comprised entirely of veal meat, except for seasoning, curing agents, coloring, flavoring, preservatives and similar meat additives. Whole veal meat does not include combination food products (including soups, sandwiches, pizzas, hot dogs, or similar processed or prepared food products) that are comprised of more than veal meat, seasoning, curing agents, coloring, flavoring, preservatives and similar meat additives.

Section 6.

The Attorney General shall have exclusive authority to enforce the provisions of this Act. Each violation of this Act shall be punished by a civil fine not to exceed one thousand dollars (\$1,000). The Attorney General may also seek injunctive relief to prevent further violations of this Act.

Section 7.

It shall be a defense to any action to enforce this

Act that a business owner or operator relied in good faith upon a written certification or guarantee by the supplier that the shell egg, whole pork meat, or whole veal meat at issue was not derived from a covered animal that was confined in a cruel manner, or from the immediate offspring of a female pig that was confined in a cruel manner.

Section 8.

The provisions of this Act are in addition to, and not in lieu of, any other laws protecting animal welfare. This Act is not intended, and should not be construed to limit any other state law or rules protecting the welfare of animals or to prevent a local governing body from adopting and enforcing its own animal welfare laws and regulations that are more stringent than this section.

Section 9.

The provisions of this Act are severable and if any clause, sentence, paragraph or section of this Act, or an application thereof, shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder thereof but shall be confined in its operation to the clause, sentence, paragraph, section or application adjudged invalid.

Section 10.

The Attorney General shall promulgate rules and regulations for the implementation of this Act on or before January 1, 2020.

Section 11.

Sections 2-7 of this Act shall take effect on January 1, 2022.

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**Exhibit B**

A-9

No. \_\_\_\_\_, Original

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IN THE  
**Supreme Court of the United States**

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STATE OF INDIANA, *et al.*,  
*Plaintiffs,*

v.

COMMONWEALTH OF MASSACHUSETTS,  
*Defendant.*

---

**DECLARATION OF ALAN G. MATHEW, Ph.D.**

1. I am over 18 years of age and competent to make this declaration.

2. I am a Professor and Head of the Department of Animal Sciences in the College of Agriculture at Purdue University.

3. As the Head of the Department of Animal Sciences, I am responsible for administering academic programs in the Department of Animal Sciences and I am familiar with the Purdue Cooperative Extension Service. In this capacity, I oversee the Department of Animal Sciences including its Animal Sciences Research and Education Center (ASREC) which provides animals, facilities, technical assistance and labor to conduct research, provide instruction, and assist in extension educational

activities for Purdue University.

4. I am aware of the Prevention of Farm Animal Cruelty Act (“Massachusetts Animal Law”), Mass. Gen. Laws ch. 129 Appendix, that was enacted in 2016 by the Commonwealth of Massachusetts.

5. In my position, I am aware that Purdue University owns and operates farms through the Animal Sciences Research and Education Center (ASREC) that confine animals including swine and poultry in conditions that do not currently comply with the Massachusetts Animal Law because in some instances these animals are prevented “from lying down, standing up, fully extending the animal’s limbs, or turning around freely.” Massachusetts Animal Law at § 1-5(E).

6. I am also aware that Purdue University sells livestock from those swine herds and poultry flocks on the open market.

7. Purdue’s ASREC sells whole pigs in Indiana as well as to distributors who sell their pork products across the country, which could include retailers in Massachusetts. For example, Purdue’s ASREC primarily sells market hogs to Tyson Foods and Indiana Packers Corporation. Additionally, Purdue’s ASREC also sells cull sows and boars to Wiechman Pig Company.

8. Given Purdue’s sale of livestock to national meat distributors, I am of the opinion that Purdue University must comply with the requirements of the

Massachusetts Animal Law or cease selling our meat to distributors who sell the products across the country since a product may be ultimately sold in Massachusetts.

9. In order to comply with the new Massachusetts Animal Law and any regulations promulgated pursuant to it, Purdue University, an institution of the State of Indiana, will have to spend financial resources on new infrastructure or decrease its livestock inventory to satisfy the law's requirements, forgo sales altogether to distributors who sell the products across the country because a product may be sold in Massachusetts, or otherwise ensure its products are not sold or re-sold in Massachusetts.

10. I am aware that the Massachusetts Animal Law is set to take effect on January 1, 2022, and that by January 1, 2020 the attorney general of Massachusetts is supposed to promulgate rules and regulations implementing the law.

11. Unless the Massachusetts Animal Law is invalidated, I am of the opinion that the Department of Animal Sciences in College of Agriculture at Purdue University will need to begin planning its compliance with this law in advance of those effective dates. In my experience, this type of planning including the allocation of financial resources to comply will need to occur years in advance of the effective date of the law.

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12. I declare under penalty of perjury that the foregoing is true and correct.

Dated: December 8, 2017

*/s/ Alan G. Mathew*

---

Alan G. Mathew, Ph.D.  
Professor  
Department Head  
Department of Animal  
Sciences  
College of Agriculture  
Purdue University

A-13

**Exhibit C**



A-14

No. \_\_\_\_\_, Original

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IN THE  
**Supreme Court of the United States**

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STATE OF INDIANA, *et al.*,  
*Plaintiffs,*

v.

COMMONWEALTH OF MASSACHUSETTS,  
*Defendant.*

---

**DECLARATION OF JOHN SCHILLING**

1. I am over 18 years of age and competent to make this declaration.
2. I am the Director of Contract Compliance at Indiana Department of Correction (“IDOC”).
3. As the Director of Contract Compliance, I oversee all of the food service contracts and vendors for IDOC. I am familiar with the contract terms and amount of food provided by these vendors for inmates in the IDOC.
4. I am aware of the total number of shell eggs purchased by the IDOC from Oct. 1, 2016 through Sept. 30, 2017 from Sysco, Piazza Produce and Stanz Foodservice. During this time period, IDOC purchased 631,080 shell eggs from these three food

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vendors to feed inmates.

5. I declare under penalty of perjury that the foregoing is true and correct.

Dated: December 8, 2017

*/s/ John Schilling*

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John Schilling  
Director of Contract  
Compliance  
Indiana Department of  
Correction

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**Exhibit D**

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No. \_\_\_\_\_, Original

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IN THE  
**Supreme Court of the United States**

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STATE OF INDIANA, *et al.*,  
*Plaintiffs,*

v.

COMMONWEALTH OF MASSACHUSETTS,  
*Defendant.*

---

**DECLARATION OF JAYSON L. LUSK, Ph.D.**

1. I am over 18 years of age and competent to make this declaration.

2. I am the Distinguished Professor and Head of the Department of Agricultural Economics at Purdue University in West Lafayette, Indiana.

3. As a food and agricultural economist, my research has primarily centered on (1) food policy, (2) emerging food issues, (3) consumer behavior, (4) livestock and meat technology and marketing, and (5) research methods.

4. After earning a Bachelor of Science degree in Food Technology from Texas Tech University in 1997, I earned a Ph.D. in Agricultural Economics from Kansas State University in 2000. Since 2000, I have

published more than 200 articles in peer-reviewed scientific journals on a wide assortment of topics ranging from the economics of animal welfare to consumer preferences for genetically modified food to the impacts of new technologies and policies on livestock and meat markets to analyzing the merits of new survey and experimental approaches eliciting consumer preferences.

5. In addition to my published articles, I have also authored or co-authored several books. In 2007, I co-authored a book on experimental auctions (a consumer research method) with Jason Shogren published by Cambridge University Press and co-authored an undergraduate textbook on agricultural marketing and price analysis with Bailey Norwood published by Prentice-Hall. In 2011, I released a book co-authored with Norwood on the economics of farm animal welfare published by Oxford University Press and also co-edited (with Jutta Roosen and Jason Shogren) the *Oxford Handbook on the Economics of Food Consumption and Policy*. In 2013, my first trade book, *The Food Police: A Well-Fed Manifesto about the Politics of Your Plate*, was published by Crown Forum. Most recently, I authored a book titled *Unnaturally Delicious: How Science and Technology are Serving Up Super Foods to Save the World* that was published by St. Martin's Press in 2016.

## I. California Animal Welfare Laws

6. I am the co-author (along with Conner Mullally) of the report titled: *The Impact Of Farm Animal Housing Restrictions on Egg Prices, Consumer Welfare, and Production in California* (2017), which was peer-reviewed and published in the *American Journal of Agricultural Economics*. See Conner Mullally & Jayson L. Lusk, *The Impact Of Farm Animal Housing Restrictions on Egg Prices, Consumer Welfare, and Production in California*, AMER. J. AGR. ECON. (September 13, 2017), available at <https://academic.oup.com/ajae/advance-article/doi/10.1093/ajae/aax049/4157679> (last viewed on November 30, 2017). For this reason, I am familiar with the report's contents.

7. The report reviews the economic repercussions of minimum space requirements for egg-laying hens following California's enactment of animal welfare laws and accompanying regulations (collectively referred to as "California AW laws"). The information detailed in the report *The Impact Of Farm Animal Housing Restrictions on Egg Prices, Consumer Welfare, and Production in California* was accurately reported and gathered by two expert agricultural economists.

8. In 2008, California voters passed Proposition 2, banning confinement that prohibits animals from turning around freely, lying down, standing up, and fully extending their limbs. In fact, "[t]he text of Proposition 2 stated that as a result of passing the law, farm animals would have sufficient room for

‘lying down, standing up, and fully extending (their) limbs; and turning around freely.’” *Id.* at 16.

9. While this measure applied to chicken battery cages, veal crates, and sow gestation crates, our research focused on eggs given that there is very little veal, pork, or broiler production in California and the potential impacts of the laws were largest for the egg industry. *Id.* at 3.

10. In 2010, the California State Legislature passed Assembly Bill 1437, which banned the sale of eggs in California produced under conditions that do not comply with Proposition 2 after recognizing that the egg market would soon be dominated by cheaper imports from other states. *Id.* at 4.

11. Beginning in 2012, the California Department of Food and Agriculture (CDFA) further promulgated regulations because California’s Proposition 2 and AB 1437 did not provide specific rules defining the confinement requirements for egg-laying hens. *Id.* “In July 2012, the California Department of Food and Agriculture (CDFA) proposed regulations stating that enclosures with nine or more birds must allow a minimum 116 square inches of floor space per bird, while enclosures with fewer birds must allow additional space as prescribed by a formula provided by CDFA.” *Id.* As noted in my article, “the CDFA standards would result in between one-third and one-half as many birds per cage using standard battery cages.” *Id.* (internal citation omitted). After being

passed in May 2013, these proposed rules were implemented in January 2015. *Id.*

12. Our research evaluated both the impact of the California AW laws on egg production and costs, as well as, the impact on consumer prices of eggs.

13. As further explained in the article, our research revealed that California's AW laws affected egg production and costs. *Id.* at 7. Most significantly, this impact "operated through reductions in flock size" by farmers to comply with the restrictions. *Id.*

14. In fact, "[i]n the thirty-four months covered by our forecasts, the number of egg-laying hens in California was reduced by an average of 4.4 million birds each month relative to what would have been observed in the absence of the [California] AW laws." *Id.* at 7. One explanation for this is that "[i]f a producer expects higher production costs in the future, and higher costs will not be completely offset by rising output prices, then he or she will reduce production by cutting flock size relative to levels that would be observed in the absence of the policy change." *Id.* at 4. As a result of this reduction in flock size, "[e]gg production was also strongly affected, falling by an average of 26% each month relative to its pre-break mean." *Id.* at 7.

15. Despite the California AW laws not going into effect until 2015, we noted that "the dynamic nature of egg production suggests that egg producers would have been affected beforehand. For example, California producers may have reduced expenditures



on major investments such as facilities and equipment shortly after passage of the laws, as expectations of higher future production costs could lower the stream of net benefits from these investments.” *Id.* at 4. Ultimately, the study revealed “that output began to shrink about a year and a half prior to implementation of the [California] AW laws. Twenty months after implementation of the [California] AW laws, the number of egg-laying hens and total egg production in California had each fallen by about 35% because of the policy.” *Id.* at 1.

16. In addition to the egg production research, we study the effects on consumer prices and “conduct[ed] our consumer analysis using five years of scanner data from three California markets and three control markets.” *Id.* at 2. In this article, we explain that “[t]he results of panel structural break tests indicate that the [California] AW laws first affected retail egg prices one month prior to implementation, closely tracking the structural break in total availability of eggs in California.” *Id.* at 2.

17. Our research on consumer prices also found that “the average price paid per dozen eggs was about 22% higher from December 2014 through September 2016 than it would have been in the absence of the hen housing restrictions.” *Id.* at 1. Additionally, “[t]he price impact fell over time, from an initial impact of about 33% per dozen to about 9% over the last six months of the observed time horizon.” *Id.*

18. The study went on to conclude that “[t]hese price increases correspond to [consumer] welfare

losses of at least \$117 million for the three California markets over the observed time horizon.” *Id.* Ultimately, “[o]ur results suggest that because of the policy change, California consumers can expect to experience annual [consumer] welfare losses of at least \$25 million in future years from higher retail egg prices alone.” *Id.* at 19.

19. Our study also considered hypothetically other implications that could have affected the estimation of consumer welfare impacts, resulting in a portion of price increases. For example, we examined whether “the perception of improved treatment of hens in California increased demand for eggs in the state, causing a portion of resulting price increases.” *Id.* at 15. Yet, we confirmed that “there is no solid evidence suggesting that demand increases caused by the [California] AW laws were anything other than negligible, a conclusion we reached based on several lines of evidence” detailed in the report. *Id.*

## **II. Massachusetts Animal Law**

20. I am also familiar with and have reviewed the referendum passed in Massachusetts called The Prevention of Farm Animal Cruelty Act (“Massachusetts Animal Law”), Mass. Gen. Laws ch. 129 Appendix.

21. I am aware that the Massachusetts Animal Law will prohibit the sale in Massachusetts of “[s]hell egg[s],” “[w]hole veal meat,” and “[w]hole pork meat” that is the “product of a covered animal that was confined in a cruel manner.” *Id.* § 1-3. I am also

aware that it defines “confined in a cruel manner” to mean “confined so as to prevent a covered animal from lying down, standing up, fully extending the animal’s limbs, or turning around freely.” *Id.* § 1-5(E).

22. Based on my experience and training, I am of the opinion that the Massachusetts Animal Law is substantially similar to Proposition 2 enacted in California. I am also of the opinion that the Massachusetts Animal Law will result in specific cage size requirements similar to those promulgated by the California Department of Food and Agriculture.

23. Based on my experience and training, I am of the opinion that the Massachusetts Animal Law and rules promulgated pursuant to it will result in increased production costs for farmers due to either decreasing flock sizes to comply with confinement requirements or changes in animal performance characteristics. Alternatively, compliance may result in investments in new infrastructure to comply with the requirements.

24. This increase in production cost will not only affect farmers who will have to comply with the Massachusetts law in order to sell their products there, but also consumers who will be charged higher prices for meat and eggs produced according to the Massachusetts standards.

25. Based on my experience and training, the compliance costs for farmers is correlated with decreased supply of the eggs and increased retail prices for eggs for consumers.

26. In sum, the Massachusetts Animal Law will result in retail price increases for eggs similar to those experienced in California.

27. I declare under penalty of perjury that the foregoing is true and correct.

Dated: December 4, 2017

*/s/ Jayson Lusk*

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Jayson L. Lusk, Ph.D.  
Distinguished Professor and  
Department Head  
Department of Agricultural Economics  
Purdue University

No. \_\_\_\_, Original

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IN THE  
**Supreme Court of the United States**

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

v.

COMMONWEALTH OF MASSACHUSETTS,  
*Defendant.*

---

**BRIEF IN SUPPORT OF MOTION FOR LEAVE  
TO FILE BILL OF COMPLAINT**

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## INTRODUCTION

This matter challenges a 2016 Massachusetts referendum, An Act to Prevent Cruelty to Farm Animals (codified at Mass. Gen. Laws ch. 129 App. §§ 1-1 *et seq.*) (“the Animal Law”), which imposes standards for housing poultry, hogs, and calves whose food products (namely, eggs, pork and veal) will be offered for sale in Massachusetts. The Animal Law will, in effect, bar the sale in Massachusetts of products from regulated animals that were not housed according to the statutory requirements—no matter where that housing occurred or where the products were produced.

The Animal Law is a substantial departure from current farming practices in most states, including Indiana and other Plaintiff States. To comply with its terms, farmers in Plaintiff States would have to either decrease flock and herd sizes or spend millions of dollars on new infrastructure and undergo contentious zoning approval processes. Such an effort by Massachusetts to regulate farming in other states violates the Commerce Clause barrier to extraterritorial commercial regulation.

Plaintiff States have multiple grounds to assert standing to bring this challenge. Indiana in particular has direct standing to challenge the Animal Law because Purdue University, a body corporate and politic and an arm of the State, raises swine and sells them into the supply chain reaching Massachusetts customers. As such, Indiana as a State will be directly affected by the Animal Law. Plaintiff States also have

*parens patriae* standing on behalf of their farmers and consumers, all of whom will suffer significant negative effects from the Animal Law.

Only this Court may effectively resolve this dispute. It has original and exclusive jurisdiction over suits between two states, so it is the only available forum to adjudicate Indiana's claims. Moreover, only the Court can resolve doctrinal tension among the circuits over whether states may close their markets to products not meeting certain production-condition specifications. Because the Bill of Complaint presents a serious claim concerning an important issue for which only this Court can provide an answer, the Court should accept original jurisdiction.

## STATEMENT

### I. The Massachusetts Animal Law

The Prevention of Farm Animal Cruelty Act (“the Animal Law”), Mass. Gen. Laws ch. 129 App., was enacted in 2016 in a voter referendum by a margin of 77.7% to 22.3%. Its stated purpose is “to prevent animal cruelty by phasing out extreme methods of farm animal confinement[.]” *Id.* § 1-1. The Animal Law will prohibit the sale in Massachusetts of “[s]hell egg[s,]” “[w]hole veal meat[,]” and “[w]hole pork meat” that is the “product of a covered animal that was confined in a cruel manner.” *Id.* § 1-3. “Confined in a cruel manner’ means confined so as to prevent a covered animal from lying down, standing up, fully extending the animal’s limbs, or turning around freely.” *Id.* § 1-5(E). The Law expressly exempts

temporary confinement, confinement during transportation, state or county fair exhibitions, slaughterhouses, medical research, veterinary examination and treatment, and the period immediately prior to a pig giving birth and when she is nursing piglets. *Id.* § 1-4.

The Animal Law is set to take effect on January 1, 2022, but in the meantime, the Massachusetts Attorney General must promulgate implementing regulations by January 1, 2020. *Id.* § 1-10. To date, the Massachusetts Attorney General has not promulgated any such regulations. Nonetheless, the text of the Animal Law itself clearly prohibits confinement that “prevent[s] a covered animal from lying down, standing up, fully extending the animal’s limbs, or turning around freely.” *Id.* § 1-5(E).

The text of the Animal Law is similar to California’s Proposition 2, which was enacted in 2008 and stated that farm animals must have sufficient room for “lying down, standing up, and fully extending (their) limbs; and . . . turning around freely.” Cal. Health & Safety Code § 25990. As a result of Proposition 2 and other similar legislation, the California Department of Food and Agriculture promulgated specific rules defining sufficient space for farm animals such as egg-laying hens. *See* 3 Cal. Code Regs. § 1350(d)(1) (specifically requiring “[a]n enclosure containing nine (9) or more egg-laying hens shall provide a minimum of 116 square inches of floor space per bird.”). Plaintiff States expect that the Massachusetts Attorney General will promulgate similar rules defining specific space requirements.

The Animal Law also gives the Massachusetts Attorney General sole enforcement authority against farmers and business owners via injunctive relief and civil fines not exceeding \$1,000 per violation. Mass. Gen. Laws ch. 129 App. § 1-6.

## II. Plaintiff States

Indiana, Alabama, Arkansas, Louisiana, Missouri, Nebraska, North Dakota, Oklahoma, South Carolina, Texas, Utah, West Virginia, and Wisconsin are sovereign states, whose citizens enjoy all the rights, privileges, and immunities inherent in our federal system of government as guaranteed in the United States Constitution.

Some Plaintiff States including Indiana operate farms that sell meat on the open market. For example, Purdue University—an arm of the State of Indiana—owns and operates farming operations through the Animal Sciences Research and Education Center (ASREC) that confine animals including swine and poultry in conditions that do not currently comply with the Animal Law. *See* Plaintiff’s Appendix (“App.”) 10 ¶ 5. Purdue University sells swine to distributors who sell their products across the country, including presumably to retailers in Massachusetts. In fact, Purdue’s ASREC primarily sells market hogs to Tyson Foods and Indiana Packers Corporation, both of which engage in the sale of meat outside of Indiana. App. 10 ¶ 7. It also sells cull sows and boars to Wiechman Pig Company. *Id.* These transactions—sales of livestock from Purdue

University—occur wholly outside the Commonwealth of Massachusetts.

Plaintiff States including Indiana and Wisconsin are also significant consumers of covered products such as eggs. Because several state agencies and instrumentalities in Plaintiff States purchase eggs for human consumption, any increase in prices will directly affect the States' financial resources and budgets. For example, the Indiana Department of Correction, which purchases eggs for inmate consumption, will incur increased food costs annually as a direct result of the Animal Law. From October 1, 2016 through Sept. 30, 2017 the Department purchased 631,080 shell eggs from three food vendors to feed inmates. App. 14–15 ¶ 4.

The Animal Law will financially affect a significant portion of residents in Plaintiff States by increasing the cost of eggs, pork, and veal. It will increase production costs for farmers in Plaintiff States who will either have to invest in compliant livestock housing, decrease their inventory, or forego sales to Massachusetts retailers and distributors altogether. Indeed, even ahead of specific Massachusetts regulations, poultry, swine and cattle farmers must begin planning for compliance. They will have to expend effort determining whether to decrease the number of animals they raise to allow additional space in their existing facilities or to invest in new infrastructure and seek zoning approvals to construct larger pens.



Ultimately, consumers in Plaintiff States will be charged higher prices for meat and eggs produced according to the Massachusetts standards.

### **ARGUMENT**

Although Massachusetts is not a major producer of nutritional livestock, it has a vision for how such livestock should be raised, and it intends to export that regulatory vision to leading agricultural production States. Specifically, Massachusetts intends to close its markets to eggs, pork and veal that were not produced in accordance with the conditions prescribed in the Animal Law. But while Massachusetts may legitimately protect its consumers from harmful foodstuffs produced elsewhere, it may not leverage access to its markets to regulate every station in the supply chain of agricultural commodities.

This case presents a serious and important constitutional question in an action directly between two or more states; accordingly, the Court has original and exclusive jurisdiction over it pursuant to Article III, Section 2, Clause 2 of the Constitution, and Title 28, Section 1251(a) of the United States Code.

The Court's practice in recent decades has been to exercise "substantial discretion to make case-by-case judgments as to the practical necessity of an original forum in this Court for particular disputes within [its] constitutional original jurisdiction." *Texas v. New Mexico*, 462 U.S. 554, 570 (1983). In deciding whether to exercise original jurisdiction, the Court generally

considers two factors: (1) “the nature of the interest of the complaining state,” including “the seriousness and dignity of the claim,” and (2) “the availability of an alternative forum in which the issue tendered can be resolved.” *Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992) (internal citations omitted). Because this matter raises a serious claim with potentially dramatic national repercussions, and because Plaintiff States have no alternative forum for this claim, the Court should grant the Motion for Leave to File Bill of Complaint and exercise its jurisdiction over this dispute.

### **I. Massachusetts’s Attempt to Regulate Conditions for Raising Livestock Across the Nation Presents an Important and Serious Commerce Clause Issue**

Massachusetts’s attempt to regulate the conditions of livestock farming across the country is sufficiently serious to merit Supreme Court involvement in this dispute between States. Agriculture generally constitutes 5.5% of the nation’s economy, *Ag and Food Sectors and the Economy*, United States Department of Agriculture, <https://www.ers.usda.gov/data-products/ag-and-food-statistics-charting-the-essentials/ag-and-food-sect-ors-and-the-economy/> (last updated Oct. 18, 2017), and commercial farms produced \$6.48 billion in shell eggs in 2016, *Eggs Profile*, Agricultural Marketing Resource Center, <https://www.agmrc.org/commodities-products/live-stock/poultry/eggs-profile/> (last visited Dec. 8, 2017), \$9.52 billion in pork in 2014, National Agricultural Statistics Service, Agricultural

Statistics Board, United States Department of Agriculture, Overview of the United States Hog Industry (2015), *available at* [http:// usda.mannlib.cornell.edu/usda/current/hogview/hogview-10-29-2015.pdf](http://usda.mannlib.cornell.edu/usda/current/hogview/hogview-10-29-2015.pdf), and 88 million pounds of veal for human consumption in 2015, *Total U.S. Veal Production from 2000 to 2015 (in million pounds)*, Statista, <https://www.statista.com/statistics/194688/us-total-veal-production-since-2000/> (last visited Dec. 8, 2017).

Production of these staples of the American diet centers in California, Iowa, Nebraska, Texas, Minnesota, Illinois, Kansas, Wisconsin, North Carolina, and Indiana, *FAQs*, United States Department of Agriculture, <https://www.ers.usda.gov/faqs/#Q1> (last updated Aug. 30, 2017), but all fifty states have farms engaged in at least some egg, pork and veal production, *Table 1. State Summary Highlights: 2012*, USDA Census of Agriculture, [https://www.agcensus.usda.gov/Publications/2012/Full\\_Report/Volume\\_1,\\_Chapter\\_2\\_US\\_State\\_Level/](https://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_2_US_State_Level/) (last visited Dec. 8, 2017).

Until recent years, regulation of livestock health has been a matter each state has addressed for its own farms, with some national regulation by Congress. The Animal Law (like a similar California law being challenged in a separate action) portends a new age where States erect trade barriers as a means to give nationwide effect to their own views of what constitutes virtuous farming practices. If this method of interstate regulation succeeds, similar regulatory endeavors affecting other sectors of the economy will

surely follow. Particularly given the scale of economic impact here, the Court's intervention is necessary to decide whether the Animal Law is consonant with fundamental notions of horizontal federalism.

**A. The Animal Law would regulate transactions occurring wholly in other States, including other States' own commercial transactions**

At the most basic level, the Court should review this case because the Animal Law represents an effort by one state to occupy the field of agricultural regulation across the Nation, and to do so by superseding sound, reasonable, and longstanding animal husbandry standards. Indeed, even if the Animal Law does not directly conflict with other states' existing laws, it nonetheless would "arbitrarily . . . exalt the public policy of one state over that of another" in violation of the Commerce Clause. *Midwest Title Loans, Inc. v. Mills*, 593 F.3d 660, 667–68 (7th Cir. 2010).

1. Under the Articles of Confederation, "each state would legislate according to its estimate of its own interests, the importance of its own products, and the local advantages or disadvantages of its position in a political or commercial view." *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 533 (1949) (internal quotation omitted). The Commerce Clause was adopted in reaction to the framers' "conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later

among the States under the Articles of Confederation.” *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979). “The entire Constitution was ‘framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.’” *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 n.12 (1989) (quoting *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935)).

Consequently, the Commerce Clause has been understood not only to give Congress power to regulate interstate commerce, but also to preclude states from unilaterally exercising that same power. *See id.* at 336. The framers believed that violation of this principle would “threaten at once the peace and safety of the Union.” *H.P. Hood & Sons, Inc.*, 336 U.S. at 533 (internal quotation omitted). “The limits on a State’s power to enact substantive legislation are similar to the limits on the jurisdiction of state courts. In either case, ‘any attempt ‘directly’ to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State’s power.” *Edgar v. MITE Corp.*, 457 U.S. 624, 643 (1982) (quoting *Shaffer v. Heitner*, 433 U.S. 186, 197 (1977)).

Accordingly, the Court has invalidated efforts by one state to project its policies into others. In *Baldwin*, 294 U.S. at 519, the Court invalidated a New York law precluding resale of milk purchased from dairies (no matter where located) at prices higher than those dictated by New York Law. The effect was to neutralize price advantages of nearby

Vermont dairies, which had no state minimum price of their own. *See id.* at 520. Such barriers against competition with the labor of another state’s residents, the Court said, improperly neutralize competitive advantages and “are an unreasonable clog upon the mobility of commerce.” *Id.* at 527. Indeed, the New York Law would “set a barrier to traffic between one state and another as effective as if customs duties, equal to the price differential, had been laid upon the thing transported.” *Id.* at 521. Critically, while New York could restrict sale of Vermont milk if it were contaminated, it could no more set a minimum price for Vermont milk than “condition importation upon proof of a satisfactory wage scale . . .” *Id.* at 524.

Similarly, in *Healy* and *Brown-Forman*, the Court specifically interpreted the Commerce Clause to prohibit a state from enforcing extraterritorial regulations, *i.e.* regulations of “commerce that takes place wholly outside of the State’s borders, whether or not the commerce has effects within the State[.]” *Healy*, 491 U.S. at 336; *see also Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 582–83 (1986) (holding that a state “may not project its legislation into [other States]” (internal quotation omitted)). The Court assessed the legality of such extraterritorial legislation by assessing its “practical effect[.]” including “considering the consequences of the statute itself . . . [and] how the challenged statute may interact with the legitimate regulatory regimes of other States[.]” *Healy*, 491 U.S. at 336.

And in *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 394 (1994), the Court invalidated a solid-waste ordinance granting exclusive sorting rights to a local franchisee. Among other objections, the Court observed that “Clarkstown [may not] justify the flow control ordinance as a way to steer solid waste away from out-of-town disposal sites that it might deem harmful to the environment. To do so would extend the town’s police power beyond its jurisdictional bounds.” *Id.* at 393. Critically, “States and localities may not attach restrictions to exports or imports in order to control commerce in other States.” *Id.*

2. The Animal Law mule kicks this state regulatory pen. With hardly the faintest pretense of concern for the quality of the commodities themselves, Massachusetts is poised to regulate the supply chain of eggs, pork and veal, and with it the circumstances of agricultural production occurring wholly in other states.

Massachusetts’s attempt to project its own policy into other States will inevitably regulate commercial transactions occurring entirely in other States. The agricultural supply chain leading to Massachusetts typically requires multiple out-of-state transactions such as farm procurement and production, sale to distributors, and slaughter and packing (followed by sale to Massachusetts retailers, transportation, and ultimate sale to consumers). App. 10 ¶ 7.

What is more, sometimes these transactions are undertaken by States themselves. For example,

Purdue University—an instrumentality of the State of Indiana—owns and operates farms through the Animal Sciences Research and Education Center (ASREC) that confine animals including swine and poultry in conditions that do not comply with the Animal Law. *See* App. 10 ¶ 5. Purdue University then sells livestock to distributors (including Tyson Foods) with retail customers nationwide, including in Massachusetts. *Id.* Purdue’s commercial transactions with those wholesalers occur wholly outside of Massachusetts, but will nonetheless be regulated by the Animal Law unless the wholesalers choose to forego the Massachusetts market altogether. That same model of interstate regulation will be replicated over and over as to private and public farms in Indiana and other States.

Not only that, but in terms of discriminatory impact, perhaps as many as *ninety-nine percent* of the eggs sold in Massachusetts come from out of state. *See* Zack Colman, *The Fight for Cage-Free Eggs*, *The Atlantic*, Apr. 16, 2016, *available at* <https://www.theatlantic.com/politics/archive/2016/04/a-referendum-on-animalrights/478482/> (last visited Dec. 8, 2017). In other words, with respect to eggs, at least, nearly the entire impact of the Animal Law will be visited on out-of-state farms that, though they have no vote in Massachusetts, will have to remodel their farms or reduce their production to comply with the Animal Law. Thus, one state will dictate farming conditions in other states simply by closing its markets to products from non-compliant farms.



3. Among many other horizontal federalism problems, in this situation the “risk of inconsistent regulation by different States[,]” *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 89 (1987), is substantial. Massachusetts may have its own view of what constitutes proper treatment of livestock sold as food to its consumers, but other states may have other ideas, and differing standards will ultimately conflict with one another. Massachusetts is not the first state to project its animal husbandry laws across the Nation (see *Missouri et al. v. California*, No. 220148), and it is unlikely to be the last.

Indeed, State efforts to exert unilateral control over large sectors of national economic activity are increasingly common. In the field of energy regulation, for example, California and Oregon regulate greenhouse gases generated along the electricity supply chain leading to those states. Cal. Code Regs. tit. 17, § 95481; Or. Admin. R. 340-253-0040. See generally James W. Coleman, *Importing Energy, Exporting Regulation*, 83 Fordham L. Rev. 1357 (2014). Colorado, meanwhile, regulates the renewable energy portfolios of power companies selling electricity for use in the state. Colo. Rev. Stat. § 40-2-124.

Eventually, this trend is likely to prompt exactly the sorts of trade wars the Commerce Clause was designed to prevent. It is not hard to imagine, for example, a large state obstructing access to its markets for goods produced by labor paid less than \$15 per hour—the hypothetical “satisfactory wage scale” dismissed as absurd in *Baldwin*—only to face

retaliation from other states via exclusion of goods produced by labor lacking right-to-work protections. Lest such a troubling model of state policy experimentation become the new normal, the Court should take this case to prevent Massachusetts from regulating farm production in other states.

**B. The circuits disagree over whether States may restrict market access in order to control production conditions elsewhere**

The trend toward regulating the conditions of production in other states has generated a circuit conflict over whether the rule against extraterritorial regulation precludes such laws. The split is perhaps unsurprising, for “*Baldwin’s* extraterritoriality principle may be the least understood of the Court’s three strands of dormant commerce clause jurisprudence.” *Energy and Env’t Legal Inst. v. Epel*, 793 F.3d 1169, 1172 (10th Cir. 2015) (Gorsuch, J.). This case presents an excellent vehicle for clarifying the extraterritoriality principle.

1. On one side of the divide are the Seventh and Eighth Circuits, which flatly preclude States from erecting trade barriers based on the circumstances of production in other states.

In *National Solid Waste Management Ass’n v. Meyer*, the court invalidated a Wisconsin statute prohibiting solid waste generators—including those located in other states—from dumping waste in Wisconsin landfills unless “they reside[d] in a community that has adopted an ‘effective recycling

program,” which naturally impacted “commerce occurring wholly outside of the State of Wisconsin.” 63 F.3d 652, 657–58 (7th Cir. 1995). Critically, the Wisconsin regulation was not concerned with the quality of the solid waste itself, but with the circumstances in which it was produced.<sup>1</sup>

Similarly, in *North Dakota v. Heydinger*, the court invalidated state regulations prohibiting the supply of electricity that had been generated by a “new large energy facility.” 825 F.3d 912, 922 (8th Cir. 2016). Not only was the practical effect “to control activities taking place *wholly* outside Minnesota,” *id.*, but those activities had no impact on the quality of electricity being supplied. In light of Minnesota’s desire to phase out coal-fired power plants everywhere, what triggered the trade barrier were production conditions bearing on the world at large—*i.e.*, production in a *new* coal-fired power plant—not conditions bearing only on the safety of Minnesota citizens.

The laws invalidated in *Meyer* and *Heydinger* contain critical parallels to the Animal Law. Each seeks to give effect to the enacting state’s *intrastate* priorities (recycling, coal-power phaseout, conditions

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<sup>1</sup> Which is not to say the Seventh Circuit affords more leeway to regulate production in other states so long as there is an arguable connection to product safety. In *Legato Vapors, LLC v. Cook*, 847 F.3d 825, 833–34 (7th Cir. 2017), the court invalidated regulations specifying the design and operation of facilities for manufacturing vaping liquid to be sold in Indiana (no matter where the plant was located), which the state justified on grounds of consumer safety.

of animal confinement) by regulating circumstances of commercial production wherever it may occur. In each situation, the regulating state seeks not to protect its consumers who come into contact with harmful products created in another state, but to regulate the conditions in which a commodity was produced, which is an “archetypal trade restriction.” James W. Coleman, *Importing Energy, Exporting Regulation*, 83 *Fordham Law Rev.* 1357, 1384 n. 169 (2014). Such laws not only exalt one state’s public policy over others, but also neutralize the competitive advantage producers in non-regulating states would otherwise enjoy. This is exactly the sort of regulatory model the Court declared invalid in *Baldwin*. 294 U.S. at 522 (“If New York, in order to promote the economic welfare of her farmers, may guard them against competition with the cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation.”).

2. In marked contrast with the Seventh and Eighth Circuits, however, the Ninth and Tenth Circuits *permit* States to dictate production conditions of commodities in other States by controlling access to markets.

In *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070 (9th Cir. 2013), the court upheld California’s Low Carbon Fuel Standard, which barred sale of fuel based *not* on the carbon in the fuel itself, but based instead on the aggregate amount of greenhouse gases emitted in the *supply chain* through

which the fuel reached California. Despite obvious regulation of wholly interstate transactions (including everything from extraction of raw materials, to transportation to refineries, to the refining process itself), the Ninth Circuit upheld the law because it *facially* regulated only the sale of fuel in California, such that the regulatory impact on out-of-state commerce was merely “incidental.” *Id.* at 1078, 1106.

In the Ninth Circuit’s view, moreover, the *Baldwin-Healy-Brown-Forman* per se invalidity standard is limited to price regulation laws. *Id.* at 1102–03. And, while “[s]tates may not mandate compliance with their preferred policies in wholly out-of-state transactions . . . they are free to regulate commerce and contracts within their boundaries *with the goal of influencing the out-of-state choices of market participants.*” *Id.* at 1103 (emphasis added).

Similarly, in *Energy and Environment Legal Institute v. Epel*, 793 F.3d 1169 (10th Cir. 2015), the court said Colorado could prohibit importation of electricity lacking a minimum percentage generated using renewable sources. Like the Ninth, but in contrast with the Seventh and Eighth, the Tenth Circuit views the extraterritoriality doctrine to be limited to price-control statutes. *Id.* at 1173. So while the Seventh and Eighth Circuits distinguish between consumer-safety regulations (where *Pike* balancing applies) and production-condition regulations (where *Baldwin* per se invalidity applies), the Tenth lumps all “non-price standards” into the category of regulations subject only to *Pike* balancing.

Consequently, California and Colorado may dictate the how commodities are produced in other states while Indiana and North Dakota may not.

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This case is fundamentally about the use of trade barriers to “influenc[e]”—actually, dictate—the “out-of-state choices of market participants.” *Rocky Mountain Farmers Union*, 730 F.3d at 1103. Already, the Ninth and Tenth Circuit holdings permitting that regulatory model cannot be squared with decisions of the Seventh and Eighth Circuits, which say that any time a state statute affects merely the conditions of commercial production in another state, it must be struck down. It is all the more important for the Court to exercise its exclusive jurisdiction in this case so that it can resolve the extant conflict.

## II. There Is No Other Forum for This Case

Congress has provided that “[t]he Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States.” 28 U.S.C. § 1251(a). Accordingly, no alternative forum capable of fully resolving this dispute exists. *See Mississippi v. Louisiana*, 506 U.S. 73, 77–78 (1992) (“[T]he description of our jurisdiction as ‘exclusive’ necessarily denies jurisdiction of such cases to any other federal court.”); *Wyoming v. Oklahoma*, 502 U.S. 437, 452 (1992) (holding that because the Constitution provides the Supreme Court with original and exclusive jurisdiction over suits between two states, “[i]t was proper to entertain this case

without assurances . . . that a State's interests under the Constitution will find [another] forum for appropriate hearing and full relief").

First, at least some Plaintiff States are directly affected by the Animal Law, whether as livestock farmers or as purchasers of affected farm commodities. Yet, as States, they are not permitted to sue Massachusetts in federal district court to redress the injuries they suffer from barriers to the Massachusetts market. 28 U.S.C. § 1251(a). They literally have no other forum where they can seek redress.

Second, Plaintiff States have no other forum to vindicate *parens patriae* standing to sue on behalf of its citizens who will suffer from the higher commodities prices resulting from the Animal Law. App. 24 ¶ 25. Although a State is not permitted to enter a controversy as a nominal party to forward the claims of individual citizens, *Oklahoma ex rel. Johnson v. Cook*, 304 U.S. 387, 394 (1938), it may act as the representative of its citizens in an original action "where the injury alleged affects the general population of a State in a substantial way[.]" *Maryland v. Louisiana*, 451 U.S. 725, 737 (1981) (citing *Missouri v. Illinois*, 180 U.S. 208 (1901); *Kansas v. Colorado*, 185 U.S. 125 (1902); *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907)). That description fits this situation precisely, as the consumer prices paid by nearly every citizen of the Plaintiff States are likely to be negatively affected by the Animal Law.

Moreover, as a practical matter, injuries to individual consumers are too diffuse to expect consumers to challenge the Animal Law on their own in federal district court. This practical consideration is far from an avant-garde idea. The Court observed in *Maryland v. Louisiana*, while determining the constitutional validity of a tax imposed on certain uses of natural gas in an original action, that “individual consumers cannot be expected to litigate the validity of the [tax] given that the amounts paid by each consumer are likely to be relatively small.” *Id.* at 739. Still here, as in that case, “a great many citizens in each of the plaintiff States are themselves consumers” and “are faced with increased costs aggregating millions of dollars per year.” *Id.* Because of this practical obstacle to complaints of individual consumers suffering price increases, only the Plaintiff States can effectively bring this challenge, so only this Court is available as a forum for this dispute.

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The attempt by one State to leverage regulatory trade barriers as a means to overcome the refusal of other states to enact preferred supply chain regulations is a paradigmatic assault on horizontal federalism. Without this Court’s exercise of original jurisdiction, such assaults may proliferate unchecked, rendering extraterritoriality doctrine a virtual nullity.



**CONCLUSION**

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

Respectfully submitted,

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