

No. 149, Original

IN THE
Supreme Court of the United States

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

v.

COMMONWEALTH OF MASSACHUSETTS,
Defendant.

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

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INTRODUCTION

States often disagree over how to regulate livestock and poultry farming, which constitute a significant portion of the United States economy. *See Animal Policy & Regulatory Issues*, United States Department of Agriculture, <https://www.ers.usda.gov/topics/animal-products/animal-policy-regulatory-issues/> (last updated Dec. 6, 2018) (“[These industries’ revenues] account for over half of U.S. agricultural cash receipts.”). Some States, for example, set minimum pen sizes for certain farm animals raised in-state. *See, e.g.*, Ariz. Rev. Stat. § 13-2910.07; Colo. Rev. Stat. § 35-50.5-102; Me. Rev. Stat. tit. 17, § 1039; Mich. Comp. Laws § 287.746. Other States, meanwhile, constitutionally guarantee farmers’ rights “to engage in modern farming and ranching practices” N.D. Const. art. XI, § 29; *see also* Mo. Const. art. I, § 35, or statutorily *prohibit* localities from regulating animal husbandry at all, *see* Ala. Code § 2-15-5; Ga. Code § 2-1-6; La. Stat. § 3:2095.1; Okla. Stat. tit. 2, § 2-4c; S.C. Code § 47-4-160.

Massachusetts threatens to shut down this policy pluralism and impose its preferred animal-confinement rules on the rest of the United States. If the Court does not intervene, Massachusetts’s Animal Law will require compliance by livestock farmers across the country on pain of losing access to the Massachusetts market for shell eggs, pork, and veal. What is more, on November 6, 2018, California voters adopted a law imposing similar barriers to California’s pork, veal, and liquid-egg markets (having already adopted such barriers to the State’s shell-egg

market). *See State Ballot Measures - Statewide Results*, California Secretary of State, <https://vote.sos.ca.gov/returns/ballot-measures> (last updated Dec. 7, 2018); *Text of Proposed Laws*, California Secretary of State, <https://vig.cdn.sos.ca.gov/2018/general/pdf/topl.pdf#prop12>.

Such attempts to set nationwide animal-confinement standards demand the Court's intervention. *See South Carolina v. Regan*, 465 U.S. 367, 401 (1984) (O'Connor, J., concurring in the judgment) (concluding that depriving a State "of a meaningful political choice" causes an "injury of 'serious magnitude' that justifies exercise of the Court's original jurisdiction). And the United States' tepid opposition brief offers no persuasive reason for the Court to refuse to consider Plaintiff States' claims.

Indeed, the United States does *not* suggest that the Court has no jurisdiction over this case. Just so, for Plaintiff States have alleged facts and supplied evidence plainly establishing Article III standing. In addition to limiting Plaintiffs States' policymaking discretion, the Animal Law injures Plaintiff States' quasi-sovereign interests as *parens patriae* in protecting consumers from the higher prices produced by Massachusetts's unlawful extraterritorial regulation. It also directly injures Indiana by forcing Purdue University, an arm of the State, to comply with Massachusetts's standards or lose access to Massachusetts's market.

The Court therefore may exercise original jurisdiction over the case, and, because Plaintiff States have

raised a serious claim that no alternative forum can vindicate, it *ought* to do so. See *Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992). The Animal Law regulates livestock and poultry farming across the country by threatening an embargo against any farmer who fails to comply. Its “practical effect,” in other words, “is to control [conduct] beyond the boundaries of the state,” and it therefore violates the Commerce Clause. *Edgar v. MITE Corp.*, 457 U.S. 624, 643 (1982) (plurality opinion) (brackets in original). The Court should step in, not only to prevent Massachusetts from imposing this specific policy on other States, but also to resolve the broader question whether the Commerce Clause permits States to close their markets to products created under disfavored conditions having no relation to the quality of the product itself—a question on which the circuit courts are divided.

The “complex factual disputes” the United States claims this case would raise are no reason to refuse to exercise the Court’s original jurisdiction. The Court’s original-jurisdiction cases routinely require resolution of complicated factual issues, and, because it misunderstands Plaintiff States’ Commerce Clause theory, the United States overstates the extent of the factual disputes actually involved. Plaintiff States’ Commerce Clause claim, as well as the similar claim brought against California, see *Missouri et al. v. California*, No. 220148, presents a clean legal question appropriate for the Court’s resolution, the answer to which affects every participant in America’s livestock and poultry industries. The Court should address it.

ARGUMENT

I. The Court's Jurisdiction Is Secure

The Brief for the United States should give the Court comfort that it has jurisdiction over this case. As the Plaintiff States have demonstrated, the Court has jurisdiction over their challenge to Massachusetts's Animal Law because the case is a “controvers[y] between two or more States,” 28 U.S.C. § 1251(a), and because the Plaintiff States have standing sufficient to create a “case” or “controversy” under Article III. The United States disputes *neither* of these jurisdictional prerequisites, so the Court can be assured that it has jurisdiction to hear this case. Indeed, the United States' suggestion that other agricultural producers could challenge the Animal Law in federal court confirms that it has not identified any Article III jurisdictional obstacle. And for good reason: Plaintiff States have direct-injury standing because Purdue University—an arm of the State of Indiana—is a commercial producer of hogs that will be affected by the Animal Law, and they have *parens patriae* standing on behalf of their citizens as consumers, all of whom will suffer significant effects from the Massachusetts law.

1. At most the United States suggests that the Court could exercise its discretion to decline to hear the case because Plaintiff States' injuries are somehow less “direct” than injuries the Court “has typically considered when exercising its original jurisdiction.” U.S. Br. 9. Yet neither the supposedly atypical

injury, nor any asserted distinction between “direct” and “indirect” injuries, has any legal significance.

The United States cites *Pennsylvania v. New Jersey*, 426 U.S. 660 (1976) (per curiam), to assert that Plaintiff States’ injury must be “*directly* caused by the actions of another State.” U.S. Br. 6 (citing *id.* at 663). But that case does not recognize a supposed distinction between direct and indirect injuries; it merely says that one State’s discriminatory taxation of individual incomes does not amount to regulation of a sister State where affected individuals reside—all the more because the plaintiff State remained free to alter its tax laws to offset any consequential losses. *Pennsylvania*, 426 U.S. at 664 (explaining that the defendant State had not “inflicted any injury upon the plaintiff States” because “[t]he injuries to the plaintiffs’ fiscs were self-inflicted, resulting from decisions by their respective state legislatures”). Here, Massachusetts’s Animal Law directly affects Indiana in particular, via Purdue University’s commercial hog farm, because it seeks to regulate animal confinement practices in other States—including when those practices are undertaken by other States themselves. Unlike the Plaintiff States in *Pennsylvania v. New Jersey*, Indiana cannot alter its laws to avoid the consequences of the Massachusetts law.

In addition, though the United States does not stress the point, it bears mentioning that Plaintiff States’ *parens patriae* standing in this case also does not suffer the defects noted in *Pennsylvania v. New Jersey*. There, Pennsylvania essentially sought to raise equal protection claims on behalf of individual

taxpayers. Here, as in *Maryland v. Louisiana*, 451 U.S. 725 (1981), Plaintiff States assert Commerce Clause claims on behalf of all consumers who will face higher prices because of another State’s unconstitutional law. *See id.* at 739 (noting the Plaintiff States’ interest as *parens patriae* in protecting “citizens from substantial economic injury” even though the increased costs “paid by each consumer are likely to be relatively small”).

Moreover, the United States’ reliance on *Louisiana v. Texas*, 176 U.S. 1 (1900), is misplaced because there Louisiana was not challenging the facial validity of Texas’s quarantine law, but only a particular enforcement of that law which, in the Court’s view, could not properly be attributed to the State of Texas itself. Here, Plaintiff States challenge the facial validity of the Massachusetts Animal Law, which its Attorney General has “exclusive authority to enforce.” App. 6. Unsurprisingly, the United States avoids claiming that this is not a state-versus-state case.

2. The United States also points to potential factual disputes—in particular, whether Plaintiff States’ harm is “sufficiently certain or sufficiently direct”—to oppose exercise of original jurisdiction. U.S. Br. 11. Again, however, the United States does not actually argue that Plaintiff States have failed to assert sufficient facts to establish standing, but only that standing remains “unclear.” U.S. Br. 9, 11. It speculates that national wholesalers may decide for producers (such as Purdue University) whether to “bifurcate[]

their supply chains” or “serve only the market for conventionally farmed” products rather than Massachusetts. U.S. Br. 11.

Either way, however, Purdue University would suffer cognizable Article III injury, for it must either adapt to the Massachusetts standards or lose access to the Massachusetts market. *See Blue Shield of Virginia v. McCready*, 457 U.S. 465, 483–84 (1982) (holding that an insurance beneficiary had standing because she was forced to a “Hobson’s choice” between two decisions that each would leave her injured). That the Animal Law “limits . . . the . . . market” Purdue “may serve[]” and “reduces the demand” for its products is “more than enough to satisfy Article III’s ‘injury-in-fact’ requirement”—no additional information is necessary. *Energy & Env’t Legal Inst. v. Epel*, 793 F.3d 1169, 1175 n.1 (10th Cir. 2015) (Gorsuch, J.).

Furthermore, while Massachusetts alone may seem like a small market, California’s recent adoption of even more stringent rules raises the stakes considerably: It is now even less likely that wholesalers will simply refuse to serve States that demand compliance with strict animal-confinement rules. And the longer the Massachusetts law goes unaddressed by this Court, the more likely it is that other States will adopt similar animal-confinement laws and thereby escalate the economic consequences of refusal to adapt.

II. This Case Presents a Crisp Legal Question of National Importance that Divides Lower Courts

The Plaintiff States challenge the Massachusetts law under the *Baldwin-Healy-Brown-Forman* line of cases forbidding extraterritorial state laws. Bill of Compl. ¶ 2; Br. in Support 9–15. As the States’ previous briefs have made clear, there is growing conflict and confusion among lower courts regarding how to apply these decisions, particularly in response to laws (such as the one at issue here) that erect market barriers based on conditions of production that do not affect product quality. The Seventh and Eighth Circuits flatly preclude States from erecting trade barriers based on the circumstances of production in other States. See *Nat’l Solid Waste Mgmt. Ass’n v. Meyer*, 63 F.3d 652, 657–58 (7th Cir. 1995); *North Dakota v. Heydinger*, 825 F.3d 912, 922 (8th Cir. 2016). The Ninth and Tenth Circuits, in contrast, permit States to dictate production conditions of commodities in other States by controlling access to markets. See *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1103 (9th Cir. 2013); *Energy and Env’tl. Legal Inst. v. Epel*, 793 F.3d 1169, 1173 (10th Cir. 2015).

The United States does not dispute the existence of this circuit split, but instead addresses—inexplicably—whether this case is a suitable vehicle for applying the balancing test articulated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). U.S. Br. 14. Plaintiff States have *never* asserted a *Pike* balancing claim. See States’ Reply Br. 4–5. Their only claim is that the Massachusetts law is invalid because it regulates

“commerce that takes place wholly outside of the State’s borders.” *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989) (quoting *Edgar v. MITE Corp.*, 457 U.S. 624, 642 (1982) (plurality opinion)).

Moreover, there is a pressing need for the Court to decide conclusively whether the Constitution permits States to regulate the agricultural practices of farmers in other States. This question affects the livelihood of millions of American farmers, and its resolution is only becoming more urgent. In the November 2018 election, California voters expanded the State’s out-of-state regulation to include not just hens but breeding pigs and veal calves as well. The California Secretary of State certified the results on December 14, 2018, and the law will take effect five days later. See Cal. Const. art. II, § 10; *Certificate of the Secretary of State*, California Secretary of State, <https://elections.cdn.sos.ca.gov/sov/2018-general/sov/sov-certificate.pdf>. This recent development only underscores “the seriousness and dignity of the case” and the need for the Court to resolve the existing circuit split and decide definitively whether States can erect barriers to their markets based on the circumstances of out-of-state production.

III. Supposed Factual Disputes Are No Reason To Decline To Exercise the Court’s Original Jurisdiction

Other than its mistaken assertion that Plaintiff States’ injuries are insufficiently “direct” to merit redress from the Court, U.S. Br. 9, 11, the only reason the United States offers for declining jurisdiction here

is its claim that factual complexities are better left for other parties to litigate in district court, *id.* at 11–15. But the minimal factual issues raised by this case do not justify waiting several years for private plaintiffs to litigate a new challenge through the lower courts.

1. The United States exaggerates the extent of the factual disputes at issue. It notes that “Massachusetts argues that, for purposes of *Pike*, its laws are aimed at ‘health and safety concerns,’” and argues that *Pike* balancing will therefore require complex factual determinations, such as whether Massachusetts’s assertion is true and the extent to which the Animal Law will raise prices nationwide. U.S. Br. 14 (citing Br. in Opp. 31–32 & n.10).

Once again, however, Plaintiff States’ claim is *not* that the Animal Law fails *Pike* balancing; rather, it is that Massachusetts unconstitutionally regulates extraterritorial conduct in violation of the Commerce Clause as interpreted in the *Baldwin-Healy-Brown-Forman* line of cases. This theory presents a pure question of law: whether the Commerce Clause permits a State to prohibit the sale of out-of-state goods simply because those goods were produced in violation of state production regulations. It is a matter of *per se* invalidity, not a matter of balancing various fact-laden considerations. And in any case, there is no genuine factual dispute over the rationale for the Animal Law: Massachusetts has failed to provide any evidence the law is concerned with promoting health and safety rather than its obvious purpose, preventing “animal cruelty.”

2. The only relevant factual issue raised by this case regards Plaintiff States' standing, which is a factual question that the Court has previously answered in original-jurisdiction cases without any difficulty. *See Wyoming v. Oklahoma*, 502 U.S. 437, 447 (1992) (“We agree with the Master’s conclusion, arrived at after consideration of all the facts submitted to him, that Wyoming clearly had standing to bring this action.”); *Maryland v. Louisiana*, 451 U.S. 725, 737 (1981) (“[T]he Special Master properly determined that ‘although the tax is collected from the pipelines, it is really a burden on consumers.’”).

Indeed, whether Plaintiff States have sustained an Article III injury is less factually complicated than factual issues the Court regularly confronts in its original-jurisdiction cases. Because Plaintiff States are not seeking damages, they need not establish the *degree* of injury the Animal Law is likely to impose; they need only establish that they have the “‘irreducible constitutional minimum’ of standing” required by Article III. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016), as revised (May 24, 2016) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). And the factual findings necessary to demonstrate *some* “concrete and particularized” injury, *id.* at 1548, are far less “extensive and *specific*,” *Florida v. Georgia*, 138 S. Ct. 2502, 2515 (2018) (internal quotation marks and citation omitted), than the factual findings required in, for example, the Court’s “many water-division cases,” which present “complex[]” issues that require “detailed factual findings” on a wide variety of different issues, *id.*; *see id.* at 2517 (remarking on the case’s “long” record that “addresses a number of

highly technical matters on a range of subjects—from biology to hydrology to the workings of the Corps’ newly revised Master Manual governing the organization’s complex operations in the [interstate river] Basin”).

3. Finally, the Court has said that the “availability of an alternative forum” is a “factor[]” to consider in determining whether to exercise its original jurisdiction. *Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992). The mere possibility that private parties might someday challenge the Animal Law in federal district court, however, does not justify declining to hear this case. Regardless whether “plaintiffs’ claims can be raised by other parties in a district-court action,” U.S. Br. 11, no other court is available to vindicate *Plaintiff States’* claims against Massachusetts. See 28 U.S.C. § 1251(a) (“[t]he Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States”). The United States makes no argument to the contrary.

Actions by private companies do not properly represent the interests of a State, which “brings suit as a sovereign.” *Wyoming*, 502 U.S. at 452. That is especially true where, as here, the Plaintiff States sue not only as producers in the market but also as consumers of affected products and as *parens patriae* on behalf of citizens. The unique confluence of these affected interests within the sovereignty of the plaintiff States makes this case particularly appropriate for the Court’s consideration.

Perhaps the most critical takeaway from the Brief for the United States is that this case harbors no hidden jurisdictional defects. The Court may proceed with a high level of comfort that its jurisdiction is secure, and it should not be deterred by the irrelevant and overstated factual “complexities” identified by the United States. This case affects every producer, distributor, and consumer of eggs, pork, and veal in the country, and it implicates fundamental constitutional principles of horizontal federalism and interstate comity. The Court should hear it.

CONCLUSION

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

Respectfully submitted,

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