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UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

THE STATE OF MISSOURI, ex rel., Chris Koster, Attorney General; THE STATE OF NEBRASKA, ex rel. Jon Bruning, Attorney General; THE STATE OF OKLAHOMA, ex rel. E. Scott Pruitt, Attorney General; THE STATE OF ALABAMA, ex rel. Luther Strange, Attorney General; THE COMMONWEALTH OF KENTUCKY, ex rel. Jack Conway, Attorney General; and TERRY E. BRANSTAD, Governor of the State of Iowa,

Plaintiffs,

v.

Case No. 2:14-cv-00341-KJM-KJN

[PROPOSED] NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFFS' COMPLAINT FOR LACK OF SUBJECT MATTER JURISDICTION AND FAILURE TO STATE A CLAIM; MEMORANDUM OF POINTS AND AUTHORITIES

Date: April 25, 2014
Time: 10:00 a.m.
Judge: Kimberly J. Mueller

1 KAMALA D. HARRIS, in her official capacity as Attorney General of California;
2 KAREN ROSS, in her official capacity as Secretary of the California Department of
3 Food and Agriculture,

4 Defendants,

5 and

6 THE HUMANE SOCIETY OF THE UNITED STATES,
7
8 Defendant-Intervenor.

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European Union, Council Directive 1999/74/EC of 19 July 1999: Laying Down Minimum Standards for the Protection of Laying Hens, 203 Official Journal of the European Communities 53, 53 (1999), http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1999:203:0053:0057:EN:PDF.......... 3

European Food Safety Authority, Report of the Task Force on Zoonoses Data Collection on the Analysis of the Baseline Study on the Prevalence of *Salmonella* in Holdings of Laying Hen Flocks of Gallus gallus (2007), http://www.efsa.europa.eu/en/efsajournal/pub/97r.htm 3

An HSUS Report: Food Safety and Cage Egg Production, p. 2: http://www.humanesociety.org/assets/pdfs/farm/report_food_safety_eggs.pdf 3

R.M. De Mol, et al., A Computer Model for Welfare Assessment of Poultry Production Systems for Laying Hens, 54 Netherlands J. of Ag. Sci. 157 (2006)..........

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NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on April 25, 2014, at 10 a.m., or as soon thereafter as the matter may be heard before the Honorable Kimberly J. Mueller in Courtroom 3 of the United States District Court for the Eastern District of California, located at 501 I Street, Sacramento, California, Proposed Defendant-Intervenor the Humane Society of the United States will move this Court, pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, for an order dismissing Plaintiffs' complaint with prejudice. The grounds for this motion are: (1) Plaintiffs lack standing, (2) Plaintiffs fail to state a dormant Commerce Clause claim, and (3) Plaintiffs fail to state a preemption claim.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

In 2010, California's Legislature overwhelmingly passed a law, AB 1437, to prohibit the sale of shell eggs from hens confined to cruel battery cages. The law, effective January 1, 2015, will regulate only those who sell, or contract to sell, shell eggs in California. Plaintiffs do neither. They are political entities that purport to sue, as *parens patriae*, on behalf of all the citizens of their states while alleging only speculative harm to, at most, a handful of egg producers who could challenge AB 1437 on their own. Because Plaintiffs' allegations do not meet the requirements of *parens patriae* standing, the Court should dismiss Plaintiffs' complaint.

Plaintiffs also fail to state any viable claims. Plaintiffs allege that AB 1437 violates the dormant Commerce Clause and is preempted by the Egg Products Inspection Act (EPIA). But Plaintiffs' dormant Commerce Clause claim is foreclosed by the Ninth Circuit's recent decision in *Association des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 952 (9th Cir. 2013), which rejected a dormant Commerce Clause challenge to California's similar ban on the sale of *foie gras* produced from force-fed birds. And Plaintiffs' EPIA preemption claim is refuted by Plaintiffs' own allegations and the statutory text. The EPIA preempts state laws that interfere with the "premises, facilities, and operations" of egg product processing plants or laws that require the use of grading standards for size and quality of eggs that differ from the official "*United States Standards, Grades, and Weight Classes for Shell Eggs*." AB 1437 plainly does neither. Moreover, the EPIA *expressly authorizes* parallel safety regulation by FDA and the states—an authority exercised by all 50 states, at FDA's invitation and with its blessing.

At its core, this lawsuit is an attempt to unravel the humane protections that almost two thirds of Californian voters approved as Proposition 2 ("Prop 2") and the Legislature extended in AB 1437. The egg industry has had four years to prepare to comply with these laws. But instead of doing so, the industry has brought a series of unsuccessful legal challenges to Prop 2.[1]

[1] *See Cramer v. Brown*, et al., No. 12-3130-JFW-JEM (C.D. Cal. Sept. 12, 2012) (dismissing constitutional challenge to Prop 2); *Ass'n of Cal. Egg Farms v. State of California, et al.*, No. 12-CECG-03695 (Cal. Super. Ct. Aug. 22, 2013) (same); *J.S. West Milling Co., Inc. v. State of*

1 Plaintiffs now ask this Court to circumvent those decisions, by invalidating the law that makes
2 Prop 2 effective. This Court should reject that attempt.

3 **II. STATEMENT OF FACTS**

4 **A. Battery Cages.**

5 Almost 95 percent of America's 292 million egg-laying hens are confined in battery
6 cages—wire contraptions so small that the hens cannot flap their wings, lie down, or even turn
7 around. Hens in battery cages stand night and day on painful, sloping wire mesh. In 1999, the
8 European Union started phasing out the cages after "conclud[ing] that the welfare conditions of
9 hens kept in current battery cages … are inadequate."[2] India, Israel, New Zealand, Bhutan, and
10 Taiwan have all since promised to ban battery cages. A report in the *Netherlands Journal of*
11 *Agricultural Science*, which ranked 22 different hen housing systems, found that, on a zero-to-ten
12 scale of animal welfare, battery cages rate as 0.0.[3]

13 Battery cages also breed dangerous pathogens. Eggs from battery hens are the leading
14 cause of human *Salmonella* infection, which kills more Americans than any other foodborne
15 illness.[4] A European Food Safety Authority analysis found significantly higher *Salmonella* rates
16 in operations that confine hens in cages.[5] Since then, more than a dozen other scientific studies
17 have confirmed that traditional battery cage operations have the highest rate of *Salmonella* of any
18 egg production system.[6]

19

20 *California, et al.*, No. 10-CECG-04225 (Cal. Super. Ct. Oct. 14, 2011) (same).

21 [2] European Union, Council Directive 1999/74/EC of 19 July 1999: Laying Down Minimum Standards for the Protection of Laying Hens, 203 Official Journal of the European Communities 53, 53 (1999), http://eur-
22 lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1999:203:0053:0057:EN:PDF.

23 [3] R.M. De Mol, et al., A Computer Model for Welfare Assessment of Poultry Production Systems for Laying Hens, 54 Netherlands J. of Ag. Sci. 157 (2006).

24 [4] An HSUS Report: Food Safety and Cage Egg Production, p. 2:
25 http://www.humanesociety.org/assets/pdfs/farm/report_food_safety_eggs.pdf (last visited Mar. 25, 2014) (collecting studies).

26 [5] European Food Safety Authority, Report of the Task Force on Zoonoses Data Collection on the Analysis of the Baseline Study on the Prevalence of *Salmonella* in Holdings of Laying Hen
27 Flocks of Gallus gallus (2007), http://www.efsa.europa.eu/en/efsajournal/pub/97r.htm.

[6] *See* An HSUS Report: Food Safety and Cage Egg Production, *supra* note 4 (collecting studies).

28

B. Prop 2 and AB 1437.

In 2008, Californians took action to address these concerns. Despite vigorous opposition from the egg industry, almost two-thirds of California voters approved Prop 2, a ballot initiative "to prohibit the cruel confinement of farm animals." First Amended Complaint ("FAC"), Exh. A, § 2. Prop 2 requires that egg-laying hens be able to "fully spread[ ] both wings without touching the side of an enclosure or other egg-laying hens," and "turn[ ] in a complete circle without any impediment, including a tether, and without touching the side of an enclosure." Cal. Health & Safety Code § 25991(b), (f), (i).

In 2010, the California Legislature passed AB 1437, ensuring the effectiveness of Prop 2 by requiring all eggs sold in the state come from Prop 2-compliant conditions. The bill passed the Assembly by a vote of 65 to 9, and passed the Senate by a vote of 23 to 7. The law provides:

> Commencing January 1, 2015, a shelled egg shall not be sold or contracted for sale for human consumption in California if the seller knows or should have known that the egg is the product of an egg-laying hen that was confined on a farm or place that is not in compliance with animal care standards set forth in Chapter 13.8 (commencing with Section 25990) [codifying Prop 2].

Cal. Health & Safety Code § 25996. California's Legislature passed AB 1437 "to protect California consumers from the deleterious, health, safety, and welfare effects of the sale and consumption of eggs derived from egg-laying hens that are exposed to significant stress and may result in increased exposure to disease pathogens including salmonella." *Id.* § 25995(e).[7] Prop 2 and AB 1437 will take effect on January 1, 2015. On March 2, 2014, Plaintiffs brought this action, challenging AB 1437 and California Department of Food and Agriculture's (CDFA) regulations 3 CA ADC § 1350(d).[8] Plaintiffs seek declaratory and injunctive relief.

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[7] Plaintiffs' complaint quotes AB 1437's original language, but section 25996 has since been amended twice. *See* Cal. Stats 2011, c. 296 (A.B.1023), § 159 (nonsubstantive change); Cal. Stats 2013, c. 625 (S.B.667), § 1 (adding knowledge requirement).

[8] In 2012, the CDFA issued regulations stating that "[c]ommencing January 1, 2015, no egg handler or producer may sell or contract to sell a shelled egg for human consumption in California if it is the product of an egg-laying hen that was confined in an enclosure" in which each hen has at least 116 square inches of space. 3 CA ADC §1350(d). The CDFA issued these regulations as anti-*Salmonella* measures, not to implement AB 1437 or protect animals from

III. LEGAL STANDARD

When considering a Rule 12(b)(6) motion the court accepts the non-conclusory allegations of the complaint as true and considers legal issues *de novo*. Challenges to subject-matter jurisdiction under Rule 12(b)(1) may be either facial or factual. *See White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). When considering a facial challenge, the court determines whether the allegations are insufficient on their face to invoke federal jurisdiction. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). When the movant disputes the truth of the factual allegations that purport to establish jurisdiction, the court need not presume the truthfulness of the plaintiff's allegations and "may review evidence beyond the complaint." *Id.* The plaintiff has "the burden of proof that jurisdiction does in fact exist." *Thornhill Pub. Co., Inc. v. Gen. Tel. & Electronics Corp.*, 594 F.2d 730, 733 (9th Cir. 1979) (internal citations omitted).

IV. ARGUMENT

A. Plaintiffs Lack Standing.

Plaintiffs lack standing to bring this case on behalf of an unspecified number of unnamed egg producers from their states. "[S]tanding is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Plaintiffs' allegations are insufficient on their face to establish *parens patriae* standing, and they could not supplement or amend their allegations to establish standing on that or any other basis.[9]

Plaintiffs cannot meet the requirements for *parens patriae* standing because they allege only speculative harm to a handful of private egg producers who could sue on their own. While *parens patriae* standing allows a state in certain circumstances "to bring suit on behalf of its citizens," *Table Bluff Reservation (Wiyot Tribe) v. Philip Morris, Inc.*, 256 F.3d 879, 885 (9th

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cruelty. HSUS thus does not seek to defend these regulations in this action.

[9] Plaintiffs do not allege direct injury standing, and could not amend their complaint to state a direct injury. As Plaintiffs do not themselves produce eggs, the only direct injury they could claim would be lost state tax revenues. But "impairment of state tax revenues should not, in general, be recognized as sufficient injury-in-fact to support state standing." *Commonwealth of Pennsylvania v. Kleppe*, 533 F.2d 668, 672 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 977 (1976).

Cir. 2001), the state must "allege[] injury to a sufficiently substantial segment of its population, articulate[] an interest apart from the interests of particular private parties, and express[] a quasi-sovereign interest." *Id.* at 885 (quoting *Alfred L. Snapp & Son v. Puerto Rico*, 458 U.S. 592, 607 (1982)). The alleged injury to the populace must be "(a) concrete and particularized, and (b) actual and imminent, not 'conjectural' or 'hypothetical.'" *Id.* at 882, 885 (quoting *Defenders of Wildlife*, 504 U.S. at 560). And it must be one for which the citizens themselves "could not obtain complete relief through a private suit." *Connecticut v. Physicians Health Services of Connecticut, Inc.*, 103 F. Supp. 2d 495, 504 (D. Conn. 2000); *see Table Bluff Reservation*, 256 F.3d at 885 (citing *Physicians Health Services of Connecticut's* "full discussion of the doctrine"). Plaintiffs fail every requirement.

First, Plaintiffs have not alleged an injury to a "sufficiently substantial segment" of their populations. *Id.* Although the Supreme Court has not placed "any definitive limits" on the percentage of the population that must be adversely affected, "more must be alleged than injury to an identifiable group of individual residents." *Snapp*, 458 U.S. at 607; *see Oregon v. Legal Services Corp.*, 552 F.3d 965, 972 (9th Cir. 2009) (dismissing suit where "Oregon's only alleged injury [was] on behalf of its legal services providers"). Plaintiffs only allege injuries to egg producers who supposedly intend to export eggs to California after January 1, 2015. FAC. ¶¶ 6, 7, 85-93. Plaintiffs never allege how many companies that includes, but it is necessarily a small and discrete group. Indeed, Plaintiffs' own exhibits show that *no Oklahoma producers* export eggs to California. *See* FAC, Exh. E, at 5. Plaintiffs thus allege injury to a handful of companies, not a "substantial segment" of their populations.

Plaintiffs also fail to sufficiently allege a quasi-sovereign interest of their own, distinct from the interests of particular private parties. To survive a motion to dismiss, allegations of quasi-sovereign interests "must be sufficiently concrete to create an actual controversy between the State and the defendant." *Snapp*, 458 U.S. at 602. Plaintiffs' vague allegations do not meet this standard. First, they claim an interest "in protecting [their] citizens' economic health and constitutional rights." *E.g.*, FAC ¶¶ 10, 17. But Plaintiffs never explain how AB 1437 injures their citizens' economic health—only how it might injure a few egg producers' profits. Plaintiffs

1 speculate that AB 1437 may cause egg prices to "fall throughout the Midwest"—but this would
2 benefit the majority of their citizens who purchase eggs. FAC ¶ 88. And Plaintiffs' only
3 allegation of harm to "constitutional rights" is the mere existence of a statute that could only
4 conceivably apply to a handful of egg producers. Nor could AB 1437 threaten Plaintiffs' quasi-
5 sovereign interest in "preserving [their] own rightful status in the federal system," *e.g.*, FAC ¶ 10,
6 since it only regulates the sale of shell eggs inside California, with no regard for their origin, and
7 it treats producers from all states the same.

8 Even if Plaintiffs could meet the other requirements for *parens patriae* standing, they have
9 failed to allege any "concrete and particularized" and "actual and imminent" injury to the egg
10 producers. *Table Bluff Reservation*, 256 F.3d at 882 (quoting *Defenders of Wildlife*, 504 U.S. at
11 560). Plaintiffs assert, for instance, that egg producers need to act "*now*" if they wish to comply
12 with AB 1437 next year. FAC ¶ 90 (emphasis in original). But Plaintiffs never allege that any of
13 the egg producers they purport to represent actually plan to comply with AB 1437—or have
14 invested a single dollar in compliance. Likewise, Plaintiffs claim that their egg producers "will
15 face criminal sanctions beginning January 1, 2015," FAC ¶ 89, but never allege that any of their
16 egg producers are directly selling, or contracting to sell, shell eggs in California.

17 Plaintiffs also speculate that some producers may "walk away" from the California
18 market, flooding the markets in their own states, causing shell egg prices to fall, and "potentially
19 forcing some Missouri producers out of business." FAC ¶ 6. But this is nothing more than rank
20 conjecture. Plaintiffs never explain why egg producers who choose not to comply with
21 California's humane requirements cannot sell their eggs anywhere else in the United States.

22 And even if Plaintiffs did allege an actual injury, they never explain why the producers
23 could not address it in their own private suits, as Plaintiffs must to assert *parens patriae* standing.
24 *See*, *e.g.*, *Physicians Health Services of Connecticut, Inc.*, 103 F. Supp. 2d at 504.

25 Plaintiffs' allegations are therefore insufficient on their face to establish standing. In the
26 alternative, these allegations cannot withstand factual scrutiny and Intervenor The Humane
27 Society of the United States ("HSUS") hereby requests jurisdictional discovery and an
28 appropriate evidentiary process to develop those jurisdictional facts. Information that HSUS has

already been able to gather from public sources shows that AB 1437 will affect few if any producers in the Plaintiffs' states. For example, CDFA records show that only a handful of companies in the Plaintiffs' states—and none in Alabama, Nebraska, or Oklahoma—are even registered to sell shell eggs in California (a legal prerequisite to selling eggs in the State).[10] Those records also show that the majority of entities registered to sell shell eggs in California are owned by just a few large companies, who may or may not have any intention, much less *concrete plans*, of selling their eggs in California after January 2015. *See Rosales v. United States*, 824 F.2d 799, 803 (9th Cir. 1987) ("A district court may hear evidence and make findings of fact necessary to rule on the subject matter jurisdiction question prior to trial, if the jurisdictional facts are not intertwined with the merits.") (citations omitted); *see also Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 n.13 (1978) ("[W]here issues arise as to jurisdiction or venue, discovery is available to ascertain the facts bearing on such issues.").

B. <u>The Complaint Fails to State a Dormant Commerce Clause Claim.</u>

The dormant Commerce Clause prohibits state laws whose object is local economic protectionism, but its restrictions are "by no means absolute" and "[s]tates retain authority under their general police powers to regulate matters of legitimate local concern, even though interstate commerce may be affected." *Maine v. Taylor,* 477 U.S. 131, 138 (1986) (internal quotation marks omitted). "As long as a State does not needlessly obstruct interstate trade or attempt to place itself in a position of economic isolation, it retains broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources." *Id.* at 151 (internal citations and quotation marks omitted). Courts only invalidate state laws under the Commerce Clause if the laws (1) directly regulate or discriminate against interstate commerce or favor in-

[10] CDFA records show that just one egg handler from each of Alabama, Nebraska, and Kentucky is registered to sell eggs in California, while no Oklahoman egg handlers are. *See* Exh. A to Declaration of Peter Brandt. And the Alabaman and Nebraskan handlers are only registered to sell egg *products* (not shell eggs), which are not covered by AB 1437. *Id.* Missouri has seven entities registered to sell shell eggs in California, but all are owned by just three companies. *Id.* And, although Iowa has 29 registrations, most belong to just a few businesses (*e.g.*, Centrum Valley has six registrations), or to producers of egg products or organic/cage-free eggs, which will not be affected by AB 1437. *Id.*

1 state economic interests over out-of-state interests, or (2) do not reflect legitimate state interests
2 and impose a burden on interstate commerce that "clearly exceeds the local benefits" of the laws.
3 *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986). AB 1437 is
4 entirely permissible under this standard.

5 **1. AB 1437 Does Not Discriminate Against or Directly Regulate**
6 **Interstate Commerce.**

7 Plaintiffs' Commerce Clause claim is foreclosed by *Association des Eleveurs,* 729 F.3d at
8 937. In that case, producers and sellers of *foie gras* brought a dormant Commerce Clause
9 challenge to California's ban on the sale of *foie gras* produced by force feeding birds in an
10 inhumane manner. *Id.* at 942. Like Plaintiffs here, the *foie gras* producers argued that the sales
11 ban discriminated against out-of-state producers that relied on the inhumane method of
12 production. *Id.* at 949. And like Plaintiffs here, the *foie gras* producers pointed out that a
13 different, unchallenged California law already prohibited the inhumane method of production in
14 California and claimed that, as a result, the sales ban was directed solely at out-of-state producers.
15 *Id.*

16 Both the district court and the Ninth Circuit summarily rejected their claims. The *foie*
17 *gras* sales ban, the Court of Appeals held, treated all private entities exactly the same. *Id.* at 948.
18 Its impact did not depend on "*where* the items were produced, but rather *how* they were
19 produced." *Id.* (Emphasis in original.) Because the law banned the sale of "both intrastate and
20 interstate products that are the result of force feeding a bird, it [wa]s not discriminatory." *Id.*

21 Nor was the ban directed solely at out-of-state producers. It regulated *both* out-of-state
22 and California entities to preclude such in-state sales. *Id.* at 949. And the in-state ban on force
23 feeding did not change that fact. The laws, the court held, served "different purpose[s]." *Id.* The
24 ban on force feeding prohibited Californian entities from producing *foie gras* in an inhumane
25 manner and selling it outside California, while the sales ban prohibited any entity from
26 "obtain[ing] *foie gras* produced out-of-state and sell[ing] it in California." *Id.*

27 So too here. Like California's *foie gras* ban, AB 1437 regulates the sale of eggs only in
28 California, and regulates those eggs equally regardless of where the eggs originated. And, like

1 the pair of laws in *Association des Eleveurs*, AB 1437 and Prop 2 serve different, but related,
2 purposes. Prop 2 prevents entities from *producing* shell eggs in California in an inhumane
3 manner, no matter where they are sold. AB 1437 prevents entities from *selling* shell eggs in
4 California produced in an unsafe and inhumane manner, no matter where they were produced.
5
6

2. AB 1437 Does Not Impose a Burden on Interstate Commerce That Exceeds Local Benefits.

7 *Association des Eleveurs* also demonstrates that AB 1437 is based on a legitimate state
8 interest and does not impose a burden on interstate commerce that clearly exceeds local benefits.
9 To prove the contrary, "a plaintiff must first show that the statute imposes a substantial burden
10 before the court will determine whether the benefits of the challenged laws are illusory." 729
11 F.3d at 951-52. "[M]ost statutes that impose a substantial burden on interstate commerce do so
12 because they are discriminatory," *id.* at 952, and—as illustrated above—Plaintiffs have failed to
13 make that showing. Absent discrimination, Plaintiffs bear the burden to provide "*specific details*
14 as to how the costs of the [challenged law] burdened interstate commerce." *S.D. Myers, Inc. v.*
15 *City and County of San Francisco*, 253 F.3d 461, 471 (9th Cir. 2001) (emphasis added); *see also*
16 *San Diego County Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1132 (9th Cir. 1996).
17 Plaintiffs' complaint only speculates about *possible* burdens—some mutually exclusive—
18 that AB 1437 *may* have on interstate commerce, assuming third-parties not before the court
19 choose to engage in a series of actions sometime in the future. For example, Plaintiffs say AB
20 1437 *might* force egg producers to convert all of their facilities to cage-free facilities. FAC ¶ 66.
21 But the law no more requires egg producers to change their facilities than it forces them to sell
22 their eggs in California. Apparently recognizing that fact, Plaintiffs also allege that "[w]ithout
23 California consumers, Missouri farmers would produce a surplus of 540 million eggs" causing the
24 price of eggs to fall "throughout the Midwest." FAC ¶ 88. That allegation is far too speculative
25 to ground a *parens patriae* dormant Commerce Clause claim at this stage. It is just as plausible,
26 if not more so, that egg producers who choose to forgo the California market will find alternative
27 markets—perhaps markets vacated by those producers that do choose to serve California. And
28 while producers who choose to sell in California may incur capital costs (that could even lead to a

greater profit), the Commerce Clause is not triggered "merely because a non-discriminatory regulation precludes a preferred, more profitable method of operating in a retail market." *Nat'l Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1154 (9th Cir. 2012).

Regardless, Plaintiffs' complaint does not contain non-conclusory allegations creating a plausible case that any burden is "clearly excessive in relation to the [law's] putative local benefits." *Ass'n des Eleveurs*, 729 F.3d at 952 (quoting *S.D. Myers, Inc.,* 253 F.3d at 471). California has legitimate state interests in protecting its citizens from exposure to disease pathogens such as *Salmonella* and in "prevent[ing] complicity in a practice that it deemed cruel to animals." *Id.; see* Cal. Health & Safety Code § 25995 (legislative findings concluding that AB 1437 is needed to promote food safety and animal welfare). Plaintiffs have provided "no reason to doubt that the State believed that the sales ban in California" would be effective in serving those purposes—which is why the Legislature overwhelmingly passed AB 1437. *Ass'n des Eleveurs*, 729 F.3d at 952.

3. AB 1437 Was Not Motivated by Local Economic Protectionism.

Plaintiffs speculate about the motivations of the California Legislature. But Plaintiffs do not, and cannot, credibly allege that California's Legislature passed AB 1437 for protectionist reasons. Plaintiffs cite only a single pre-enactment source to support their claim—a selective quotation from the report of one committee of one branch of the Legislature. *See* FAC ¶ 70 (quoting Bill Analysis of the California Assembly Committee on Appropriations). The rest of Plaintiffs' sources for the Legislature's purported motivations were prepared by *outside* entities *after* the Legislature approved AB 1437. *See, e.g.*, FAC ¶¶ 69, 71-74. These non-legislative after-the-fact documents provide no insight into the legislative intent behind AB 1437. Rather, the legislative findings in AB 1437, adopted with the bill, provide the best insight into the Legislature's purpose. *See Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 463 n.7 (1981) ("[We] assume that the objectives articulated by the legislature are [the] actual purposes of the statute, unless an examination of the circumstances forces us to conclude that they could not have been a goal of the legislation.") (internal citations omitted). And these findings have nothing to do with protectionism but instead reflect an even-handed desire that all eggs sold in California

should come from hens raised in more sanitary and humane conditions. *See* Cal. Health & Safety Code § 25995 (listing five legislative findings—all related to animal welfare or food safety—that drove AB 1437's passage). Plaintiffs' speculation does not show that the Legislature "needlessly obstruct[ed] interstate trade or attempt[ed] to place itself in a position of economic isolation." *Taylor*, 477 U.S. at 151 (internal citations omitted).

C. The Complaint Fails to State a Preemption Claim.

Plaintiffs also state no viable preemption claims. "Parties seeking to invalidate a state law based on preemption 'bear the considerable burden of overcoming 'the starting presumption that Congress does not intend to supplant state law.'" *Stengel v. Medtronic Inc.*, 704 F.3d 1224, 1227 (9th Cir. 2013) (en banc) (quoting *De Buono v. NYSA–ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 814 (1997)). Federal courts must "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress," particularly when Congress legislates "in a field which the States have traditionally occupied." *Id.* (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)). The primary subject of the EPIA—food safety—"has always been deemed a matter of peculiarly local concern." *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 144 (1963). And the states have a long history of regulating animal cruelty, dating back to "the early settlement of the Colonies." *U.S. v. Stevens*, 559 U.S. 460, 469 (2010). Plaintiffs' express and implied preemption claims cannot overcome this presumption against preemption.

1. The EPIA Does Not Expressly Preempt AB 1437.

AB 1437 is directly within the scope of state regulation expressly *authorized* by the EPIA. Plaintiffs' argument to the contrary is inconsistent with their own factual allegations, with the plain text and obvious purpose of the EPIA's preemption clause, and with the entire national egg safety regulatory framework, including FDA-approved laws in every single state.

a. Plaintiffs' Theory Is Contradicted By Their Own Allegations.

As a threshold matter, Plaintiffs' express preemption argument is contradicted by their own complaint. Plaintiffs argue that if AB 1437 was intended to reduce the risk of *Salmonella* contamination in shell eggs, it would impose standards "'in addition to or different from the

official Federal standards' enumerated in the EPIA, and would therefore be preempted by federal law." FAC ¶ 81. But Plaintiffs allege unequivocally and at length that AB 1437 *was not* intended to reduce the risk of contamination from *Salmonella* or other food-borne pathogens, and was instead animated by humane and local economic protectionist concerns. Plaintiffs cannot survive a motion to dismiss with a legal theory that is contradicted by their own complaint, where they have not pled facts in the alternative and claim no basis for doing so. *See Total Coverage, Inc. v. Cendant Settlement Services Group, Inc.*, 252 Fed. Appx. 123, 126 (9th Cir. 2007) ("[A] pleader may assert contradictory statements of fact only when legitimately in doubt about the facts in question.") (citation omitted); 5 Wright and Miller, Federal Practice and Procedure § 1285 (3d ed. 2004) (same).

b. AB 1437 Only Regulates Within the Scope Specifically Authorized by the EPIA.

Regardless, Plaintiffs misunderstand the scope of the EPIA and its preemption clause—which *does not* preempt all or even most state laws intended to reduce the risk of contamination of shell eggs.

The EPIA's primary focus is federal inspection of "official plants," which are facilities where dried, frozen, or liquid "egg products"—but *not shell eggs*—are processed. *See* 21 U.S.C. §§ 1033(f), (q); 1034-1036. The EPIA's primary preemption clause provides that states may not impose "requirements within the scope of this chapter with respect to premises, facilities, and operations of any official plant" if those requirements are "in addition to or different than those made under this chapter." 21 U.S.C. § 1052(a). AB 1437 does not impose *any* "requirements" for "official plant[s]," and Plaintiffs notably do not rely on this clause.

The EPIA does not regulate shell-egg production (*i.e.,* the conditions under which laying hens produce eggs) *at all*, and for shell-egg handlers it provides only for minimal quarterly inspections "to assure that only eggs fit for human food are used for such purpose." 21 U.S.C. § 1034(d). Outside of "official plant[s]" that make "egg products," the EPIA *explicitly* authorizes state laws like AB 1437 that prevent the sale for human food of potentially contaminated shell eggs. The EPIA authorizes "any State or local jurisdiction [to] exercise jurisdiction with respect

to eggs and egg products for the purpose of preventing the distribution for human food purposes of any such articles which are outside of such a plant" if those eggs or egg products are "in violation of [the Food, Drug and Cosmetic Act (FDCA) or the Fair Packaging and Labeling Act (FPLA)] *or any State or local law consistent therewith*." 21 U.S.C. § 1052(b) (emphasis added). The test for "consistency" is whether a party could comply with both the state and federal laws at once. *See Jones v. Rath Packing Co.,* 430 U.S. 519, 540 (1977) ("Since it would be possible to comply with the state law without triggering federal enforcement action we conclude that *the state requirement is not inconsistent* with federal law.") (emphasis added).

The EPIA thus draws a clear distinction, using familiar terminology from the preemption case law. Within the "premises, facilities, and operations" of an "official plant," the EPIA's requirements establish a ceiling, and state laws imposing requirements "in addition to or different than" federal law are preempted. 21 U.S.C. § 1052(a). Outside of official plants, the EPIA establishes a *floor* for shell-egg regulation and explicitly invites supplemental regulation by FDA and the states that is "consistent" with the FDCA and FPLA. *Id.* at § 1052(b).

AB 1437 is tailored to fit within this statutory framework. The law reflects the judgment of the California Legislature that more stringent regulation was needed to protect shell-egg safety—particularly from *Salmonella* contamination—and to prevent cruelty to egg-laying hens. *See*, *e.g.*, Cal. Health & Safety Code § 25995(a) (endorsing findings of Pew Commission that "food animals that are treated well and provided with at least minimum accommodation of their natural behaviors and physical needs are healthier and safer for human consumption"). It only regulates the point of sale in California, which is unquestionably outside the "premises, facilities, and operations" of official plants. And it is consistent with the FDCA and FPLA, because egg retailers can comply with AB 1437 without violating either federal law.

c. Plaintiffs Misinterpret the Preemption Clause They Invoke.

Plaintiffs attempt to invalidate AB 1437—and nullify the EPIA's clause authorizing parallel state regulation of shell-egg safety—with a novel interpretation of a minor clause in 21 U.S.C. § 1052(b), which provides that no State or locality may "require the use of standards of quality, condition, weight, quantity, or grade which are in addition to or different from the official

Federal standards…." Plaintiffs claim that the "official Federal standards" referred to in that clause are the requirements for egg handling and production established by the EPIA, and that the clause shows that Congress meant those standards to be exclusive. FAC ¶ 81. That reading is inconsistent with the plain text. Unlike the primary preemption clause in § 1052(a), this sentence in § 1052(b) *does not* preempt state law "requirements within the scope of this chapter"—*i.e.*, within the regulatory scope of the EPIA itself. To the contrary, the official standards it references are defined by the EPIA as "the standards of quality, grades, and weight classes for eggs … *under the Agricultural Marketing Act* ["AMA"]." 21 U.S.C. § 1033(r) (emphasis added). Those are the familiar "*United States Standards, Grades, and Weight Classes for Shell Eggs*," as implemented by the voluntary egg grading program described in 7 C.F.R. Part 56 established under the AMA, which outlines a system for grading the "quality of individual shell eggs" based on the physical appearance and "apparent condition" of the eggs themselves. AMS, *United States Standards, Grades, and Weight Classes for Shell Eggs* 2 (Jul. 20, 2000). "AA Quality" eggs, for example, must be clean and unbroken, with the yolk "only slightly defined when the egg is twirled before the candling light," whereas a "Dirty" egg may have dirt adhering to the shell. *Id.* at 2-3.

The preemption clause Plaintiffs invoke simply prohibits a state from mandating its own different or additional standard for *grading and classifying* eggs. If Congress had wanted to preempt all state regulation of shell-egg safety it would have used the broader reference to "requirements within the scope of this chapter" that it used in § 1052(a), would not have confined § 1052(a) preemption to the premises of "official plants," or would have preempted state law requirements concerning "adulterated" shell eggs—which is the defined term the EPIA always uses when it addresses possible contamination. 21 U.S.C. § 1033(a) (defining "adulterated").

Plaintiffs seek to circumvent this explicit statutory definition by relying on USDA regulations defining "quality" as "the inherent properties of any product which determine its relative degree of excellence," and defining "condition" as "any characteristic affecting a product's merchantability including, but not being limited to, the following: The state of preservation, cleanliness, soundness, wholesomeness, or fitness for human food of any product; or the processing, handling, or packaging which affects such product." 7 C.F.R § 57.1. But those

regulatory definitions are ambiguous on the issue posed in this case, and certainly do not require a construction of the "official Federal standards" clause that would contradict the statutory definition and negate the EPIA's explicit authorization of consistent state laws.

Plaintiffs also never allege that the amount of space given to a hen—the sole subject of AB 1437—affects the "inherent properties," the "relative degree of excellence," or the "cleanliness," "wholesomeness," or "merchantability" of her eggs. Indeed, the entire premise of Plaintiffs' dormant Commerce Clause claim is that AB 1437 distinguishes between *identical* eggs based on their origins. Plaintiffs argue at great length that AB 1437 is not genuinely attempting to identify any difference in the eggs themselves because they believe that there *is no difference* between the wholesomeness and fitness for human food of eggs allowed and rejected under AB 1437. *See* FAC ¶¶ 69-75. If the eggs allowed and rejected under AB 1437 are identical, then AB 1437 cannot distinguish between them based on their "quality" or "condition."

Plaintiffs' expansive interpretation of "standards of quality [or] condition" would also render the very next sentence of § 1052(b) superfluous. Just after the egg-grading clause they invoke, the statute provides that states may not impose temperature requirements on certain egg handlers "pertaining to eggs packaged for the ultimate consumer which are in addition to, or different from, Federal requirements." 21 U.S.C. § 1052(b). The clause preempting "the use of standards of quality, condition, weight, quantity, or grade which are in addition to or different from the official Federal standards" was already in the statute when Congress added the new clause preempting state temperature requirements in 1991. If the "quality, condition, weight, quantity, or grade" clause had the broad meaning that Plaintiffs are urging here, then a state law addressing the temperature at which eggs are handled and transported would constitute a "standard[] of quality [or] condition" in addition to the federal standards, and would have already been preempted. The separate preemption clause for temperature requirements would have been wholly unnecessary and superfluous. *See Schwab v. C.I.R.*, 715 F.3d 1169, 1175 (9th Cir. 2013) ("We should avoid an interpretation of a statute that renders any part of it superfluous and does not give effect to all of the words used by Congress.") (internal citations omitted).

d. Plaintiffs' Interpretation of EPIA Preemption Conflicts with the National Egg Safety Framework.

Plaintiffs' interpretation of this minor preemption clause also is in conflict with the complex regulatory framework that the EPIA is a part of. The EPIA anticipates that USDA and FDA will share regulation of egg safety. *See*, *e.g.*, 21 U.S.C. §§ 1034(d), 1052(b)-(d). And it expressly provides that it does not "diminish any authority conferred on the Secretary of Health and Human Services" under the FDCA. 21 U.S.C. § 1052(c). Under this shared authority, FDA has assumed primary jurisdiction over shell-egg safety, especially for the prevention of *Salmonella*. *See* 63 Fed Reg. 27502, 27502 (May 19, 1998) ("[R]egulation of shell eggs is primarily the responsibility of FDA"); 69 Fed. Reg. 56824, 56827 (Sep. 22, 2004) ("FDA has jurisdiction over the safety of foods generally, including shell eggs. . . ."). And FDA has made clear that state laws directed at further reducing *Salmonella* contamination in shell eggs are "consistent with" the FDCA, not preempted, and very welcome so long as they are *more stringent* than the federal standards. 74 Fed. Reg. 33030, 33091 (Jul. 9, 2009) (regulations are only "minimal national prevention measures" and "*do not preempt* . . . more stringent [state] requirements"); *see also* 21 C.F.R. § 118.12(d) (prohibiting only *Salmonella*-related state regulations that are "*less stringent*" than FDA regulations) (emphasis added).

Yet Plaintiffs' interpretation of EPIA preemption would invalidate the very state laws that FDA has urged states to adopt to strengthen its national egg safety framework. For example, at FDA's invitation, all 50 states have adopted some version of the FDA Food Code, which imposes shell-egg safety requirements more stringent than the EPIA or FDCA's requirements. 74 Fed. Reg. at 33091; *see*, *e.g.*, FDA Food Code (2013) § 3-202.11 (regarding refrigeration of shell eggs); *id.* § 3-302.13 (regarding use of unpasteurized shell eggs); *id.* § 3-401.11 (regarding egg cooking temperatures). Plaintiffs' interpretation would wipe out all of these state laws as being "in addition to" to the "official Federal standards" because the AMS Egg Grading Standards do not address these issues or any other aspect of egg safety. Egg cooking temperature, for example, is not regulated by the EPIA at all. Plaintiffs' preemption theory would invalidate all state law governing this major human health concern, and leave consumers completely unprotected.

Indeed, Plaintiffs' interpretation of the EPIA's preemption clause is so sweeping that it would preempt all state tort actions stemming from eggs contaminated with *Salmonella.* For example, in *NuCal Foods, Inc. v. Quality Egg LLC,* this Court rejected a motion to dismiss a claim against Quality Egg stemming from its alleged negligence and fraud in selling eggs contaminated with *Salmonella*—which allegedly sickened 62,000 people—to a California egg wholesaler. 918 F.Supp.2d 1023 (E.D. Cal. 2013). Under Plaintiffs' theory here, the EPIA preempts these tort claims because they seek to impose requirements for the "condition" and "quality" of eggs "in addition to" those imposed by the EPIA. *See Riegel v. Medtronic, Inc.*, 552 U.S. 312, 324 (2008) (holding that a preemption clause barring additional state "requirements" applied equally to state laws and "common-law duties"). Plaintiffs' theory would also preempt recent lawsuits seeking compensation for injuries suffered when one Iowa-based producer allegedly *knowingly* sold eggs contaminated with Salmonella.[11]

2. The EPIA Does Not Impliedly Preempt AB 1437.

Plaintiffs also allege that the EPIA preempts the (undefined) field that AB 1437 regulates. FAC ¶ 104. Field preemption can be inferred from "a framework of regulation 'so pervasive . . . that Congress left no room for the States to supplement it' or [from] a 'federal interest . . . so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'" *Arizona v. United States*, 132 S.Ct. 2492, 2501 (2012) (internal citations omitted). Neither Plaintiffs' conclusory allegations, nor any amendment, could save this claim.

In *Florida Lime & Avocado Growers*, the Supreme Court recognized that "the supervision of the readying of foodstuffs for market has always been deemed a matter of peculiarly local concern." 373 U.S. at 144. Federal food production and processing regulation, "however comprehensive for those purposes that regulation may be, does not of itself import displacement of state control over the distribution and retail sale of those commodities in the interests of the

[11] For example, numerous victims of *Salmonella*-poisoning from the Quality Egg *Salmonella* outbreak sued the company. A federal district court rejected Quality Egg's motion to dismiss six of these consolidated actions. *See Holt v. Quality Egg, LLC*, 777 F.Supp.2d 1160 (N.D. Iowa 2011). Under Plaintiffs' theory, these actions would have been preempted.

1 consumers of the commodities within the State." *Id.* at 145. Similarly, here, control over the sale
2 of eggs is an inherently local matter, as are animal welfare regulations. The EPIA does not
3 attempt to regulate in either field, contains no housing standards or space requirements for egg-
4 laying hens, and explicitly contemplates state regulation of eggs and egg products. 21 U.S.C.
5 § 1052(b). The EPIA thus does not occupy the field of regulation of egg safety, or of basic
6 humane standards for laying hens.

7 **V. CONCLUSION**

8 For the foregoing reasons, this Court should dismiss Plaintiffs' complaint with prejudice.

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10 Dated: March 26, 2014 SCHIFF HARDIN LLP

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12 By: */s/ Bruce A. Wagman*
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