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ASSOCIATION OF CALIFORNIA EGG FARMERS

UNITED STATES DISTRICT COURT
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.

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

Defendants.

CASE NO. 2:14-cv-00341-KJM-KJN

MEMORANDUM OF LAW IN SUPPORT OF [PROPOSED] MOTION TO DISMISS OR FOR JUDGMENT ON THE PLEADINGS OF PROPOSED DEFENDANT-INTERVENOR ASSOCIATION OF CALIFORNIA EGG FARMERS

Date: June 6, 2014

Time: 10:00am

Before: Hon. Kimberly J. Mueller

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INTRODUCTION

In this suit, six States purport to challenge the validity of California food safety and animal welfare provisions regulating the sale of eggs produced from hens confined in cages that do not meet certain minimum space requirements. Plaintiffs' claims fail as a matter of law on multiple grounds.

As an initial matter, Plaintiffs lack Article III standing to pursue this action. Plaintiffs do not dispute they lack standing to bring this action in their own right. Instead, they claim they are entitled to sue as *parens patriae* on behalf of their citizens. But *parens patriae* standing is not available where, as here, a State seeks to serve merely as the nominal representative of a small group of favored entities without advancing any sovereign or quasi-sovereign interests of its own.

Moreover, Plaintiffs' challenges fail on the merits. Plaintiffs' dormant Commerce Clause challenge (Count I) is squarely foreclosed by controlling precedent. Just last year, the Ninth Circuit rejected an indistinguishable challenge to a California animal welfare statute banning the sale of foie gras produced under inhumane conditions—whether in or out of state. *See Association des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 941-942 (9th Cir. 2013). This case—which implicates not only animal welfare, but also California's paramount interest in protecting food safety—follows *a fortiori* from that recent decision.

Plaintiffs' preemption challenge (Count II) fares no better. Plaintiffs invoke a portion of the preemption clause in the Federal Egg Products Inspection Act ("EPIA"), 21 U.S.C. § 1052(b). But both the plain text of § 1052(b) and the purpose of the EPIA make it unmistakable that, in relevant part, § 1052(b) preempts only competing state-law standards for *grading* eggs. As AB 1437 and § 1350 do not impose any egg-grading standards, they are unaffected by § 1052(b). Section 1052(b) by its terms also forecloses Plaintiffs' "field preemption" argument. For all these reasons, Plaintiffs' claims should be rejected.

BACKGROUND

In 2010, the California Legislature enacted AB 1437, requiring that all eggs sold in California come from hens that are allotted a minimum amount of space in their living enclosures:

> 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).

Cal. Health & Safety Code § 25996. The animal welfare standards referenced in AB 1437 were enacted in Proposition 2, which was adopted by California voters in 2008. Those standards require that "a person shall not tether or confine any covered animal [including egg-laying hens], on a farm, for all or the majority of any day, in a manner that prevents such animal from: (a) Lying down, standing up, and fully extending his or her limbs; and (b) Turning around freely." *Id.* § 25990.

The Legislature enacted AB 1437 to promote food safety. Cal. Health & Safety Code § 25995. The Legislature expressly found that "[e]gg-laying hens subjected to stress are more likely to have higher levels of pathogens in their intestines" and that such "conditions increase the likelihood that consumers will be exposed to higher levels of food-borne pathogens" such as *Salmonella*. *Id.* § 25995(c). It also noted that "*Salmonella* is the most commonly diagnosed food-borne illness in the United States." *Id.* § 25995(d). The Legislature thus declared its "intent" in enacting 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). Furthermore, the Legislature recognized that—in addition to promoting food safety—AB 1437 also "protects animal welfare." 2010 Stat. c. 51, § 1 (AB 1437) (codified at Cal. Health & Safety Code § 25997.1) (provisions added by AB 1437 are "in addition to … any *other* laws protecting animal welfare" (emphasis added)).

Plaintiffs' complaint also challenges certain aspects of § 1350 of title 3 of the California Code of Regulations. Section 1350 is entitled "Shell Egg Food Safety" and implements California's statutory objective of "assur[ing] that healthful and wholesome eggs of known quality are sold in California." Cal. Code Regs. tit. 3, § 1350(a) (citing Cal. Health & Safety Code § 27521(a)). To accomplish this purpose, § 1350 imposes several requirements on egg producers and handlers aimed at combating *Salmonella*. These include (1) implementing *Salmonella* prevention measures regarding production, storage, and transportation of shell eggs, *id.* § 1350(c)(1); (2) implementing a *Salmonella* monitoring program, which includes testing the "papers" in which hens are delivered and

hen housing, *id.* § 1350(c)(2); and (3) implementing and maintaining a minimum vaccination program to protect against infection with *Salmonella*, *id.* § 1350(c)(3). In the subsection specifically challenged in this case, § 1350 prohibits egg handlers and producers from "sell[ing] or contract[ing] to sell a shelled egg for human consumption in California" if it comes from a hen kept in an enclosure that does not provide a set minimum amount of space per hen:

> Commencing 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 that fails to comply with the following standards. For purposes of this section, an enclosure means any cage, crate, or other structure used to confine egg-laying hens: (1) An enclosure containing nine (9) or more egg-laying hens shall provide a minimum of 116 square inches of floor space per bird. Enclosures containing eight (8) or fewer birds shall provide a minimum amount of floor space per bird [according to a specified formula].

Id. § 1350(d).[1]

Like AB 1437, § 1350 is "intend[ed] to address the problem of the occurrence of *Salmonella enteritidis* (SE) contamination of shell eggs during egg production." Dep't of Food & Agric., *Shell Egg Food Safety: Initial Statement of Reasons* 2 (July 2012) ("2012 ISR"), a*vailable at* http://www.cdfa.ca.gov/ahfss/pdfs/regulations/Shell_Egg_Food_Safety_ISR_July_2012.pdf. The California Department of Food and Agriculture ("CDFA")'s Initial Statement of Reasons discussed in detail the threat posed by *Salmonella* to California's food safety, specifically highlighting the "ongoing concerns" with *Salmonella* in the wake of a May 2010 outbreak traceable to certain Iowa farms—an outbreak which had sickened hundreds of people nationwide and led to the recall of "more than 500 million eggs." *Id.* at 2-3; *see generally id.* at 2-5. Based on this and other evidence, CDFA "determined that there was a need for a state shell egg food safety regulatory program" and proposed what ultimately became § 1350. *Id.* at 3. With respect to § 1350's restrictions on the housing conditions of hens whose eggs are sold in California, CDFA explained that, "[a]s a general physiological princip[le], unfavorable or stressful environmental conditions can negatively affect an

[1] Egg producers and handlers are exempted from all requirements set forth in § 1350 if their shell eggs are processed with certain treatments that achieve "5-log destruction" (i.e., more than 99.9%) of *Salmonella*—in other words, they are pasteurized. Moreover, CDFA "anticipate[d] that most flocks with less than 3,000 hens [would] not need to make enclosure modifications to meet the proposed enclosure standards." 2012 ISR, *supra*, at 16.

animal's immune system." *Id.* at 10. It was therefore "reasonable to include minimum cage size requirements in th[e regulation's] proposal related to the reduction, control and monitoring of SE in egg-laying hens as part of [CDFA's] mandate to ensure the safety and quality of eggs sold to California consumers in accordance with Food and Agricultural Code section 27521." *Id.* at 11. The Office of Administrative Law also concluded that "the purpose of adding section 1350 … [was] to require egg producers and egg handlers to comply with food safety requirements in order to reduce the risk of Salmonella contamination in shell eggs sold for human consumption in California." *Notice of Approval of Regulatory Action* (May 6, 2013), *available at* http://www.cdfa.ca.gov/ahfss/pdfs/regulations/STD400ApprovedText.pdf.

On February 3, 2014, the State of Missouri initiated this action. Dkt. No. 2. On March 5, Missouri, along with five additional States—Nebraska, Oklahoma, Alabama, Kentucky, and Iowa—filed a First Amended Complaint ("FAC"). Dkt. No. 13. Plaintiffs seek to invalidate and enjoin enforcement of both AB 1437 and § 1350(d)—purportedly on the grounds that these provisions violate the dormant Commerce Clause, *id.* ¶¶ 95-101, and are preempted by federal law, *id.* ¶¶ 102-105. On April 8, 2014, the Association of California Egg Farmers ("ACEF") filed a motion to intervene in support of Defendants and submitted a proposed answer as required by Rule 24(c). Dkt. Nos. 33, 33-4. In this motion, ACEF requests that the Court dismiss Plaintiffs' complaint or, in the alternative, grant judgment on the pleadings in its favor.

ARGUMENT

The same standards apply whether this motion is viewed as a motion to dismiss or a motion for judgment on the pleadings. *United States ex rel. Cafasso v. General Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1054 n.4 (9th Cir. 2011). In deciding whether the allegations set forth in the complaint state a sufficient basis for Article III jurisdiction and whether they state a viable claim, the Court "'accept[s] as true all well-pleaded allegations of material fact.'" *Seven Arts Filmed Entm't Ltd. v. Content Media Corp. PLC*, 733 F.3d 1251, 1254 (9th Cir. 2013); *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). The Court need not, however, accept "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Seven Arts*, 733

F.3d at 1254; *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (requiring "enough facts to state a claim to relief that is plausible on its face"); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

I. PLAINTIFFS LACK ARTICLE III STANDING TO BRING THIS ACTION

Plaintiffs do not even attempt to allege a *direct* injury from AB 1437 or § 1350. Instead, they stake their claim to standing on the narrow doctrine of *parens patriae*. But Plaintiffs have failed to make allegations sufficient to satisfy the basic requirements for *parens patriae* standing: an injury affecting a "substantial segment" of their population and a sovereign or quasi-sovereign interest distinct from the private interests of their residents. Nor have Plaintiffs alleged the concrete and particularized injury that Article III requires in all cases.

"Article III of the Constitution confines the judicial power of federal courts to deciding actual 'Cases' or 'Controversies.'" *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661 (2013). "One essential aspect of this requirement is that any person invoking the power of a federal court must demonstrate standing to do so." *Id.* Plaintiffs "ha[ve] the burden of establishing standing." *Table Bluff Reservation (Wiyot Tribe) v. Philip Morris, Inc.*, 256 F.3d 879, 882 (9th Cir. 2001). "To establish Article III standing, an injury must be 'concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.'" *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013). "'[A]llegations of *possible* future injury' are not sufficient"; "'threatened injury must be *certainly impending* to constitute injury in fact.'" *Id.* (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)) (emphasis in original).

Where, as here, a State seeks to bring an action "on behalf of its citizens" as *parens patriae*, several additional requirements apply. *Table Bluff*, 256 F.3d at 885. The State must (1) "'allege[] injury to a sufficiently substantial segment of its population,'" (2) "'articulate[] an interest apart from the interests of particular private parties,'" and (3) "'express[] a quasi-sovereign interest.'" *Id.* at 885 (quoting *Alfred L. Snapp & Son, Inc. v. Puerto Rico* ("*Snapp*"), 458 U.S. 592, 607 (1982)); *accord Washington v. Chimei Innolux Corp.*, 659 F.3d 842, 847 (9th Cir. 2011). Thus, where private residents could "obtain complete relief through a private suit," there can be no *parens patriae* standing. *Connecticut v. Physicians Health Servs. of Conn., Inc.*, 103 F. Supp. 2d 495, 504 (D.

Conn. 2000), *aff'd*, 287 F.3d 110 (2d Cir. 2002); *see also Table Bluff*, 256 F.3d at 885 (approvingly citing *Connecticut*'s "full discussion of the doctrine"). Plaintiffs meet none of these requirements.

First, each Plaintiff fails to allege injury to a "sufficiently substantial segment of its population"—which, under controlling precedent, must be more than "an identifiable group of individual residents." *Snapp*, 458 U.S. at 607. To the extent the complaint alleges any injury at all, *see infra* p. 8, it is limited to the economic harm that would allegedly befall some unspecified egg farmers residing within their borders who may intend to sell eggs in California after January 1, 2015 but would be subject to AB 1437 and § 1350. *E.g.*, FAC ¶¶ 6-7 (describing "[egg] farmers in our states" as "the people most directly affected" by AB 1437 and § 1350); *id.* ¶¶ 89-94. But, for all their emphasis on the egg producers within their territories, Plaintiffs never disclose how many companies belong in this limited group. Indeed, as California notes, for four of the six Plaintiff States (Alabama, Nebraska, Oklahoma, and Kentucky), the complaint does not even allege that *any* shell eggs produced in those States are currently sold in California. Cal. Defs' Mot. To Dismiss at 5, Dkt. No. 36; *see also* FAC Ex. E, at 6 tbl. 3, Dkt. No. 13-5 (Alabama, Nebraska, Oklahoma, and Kentucky not among the top fifteen States producing shell, liquid, and dry eggs imported into California). The only inference that can be reasonably drawn from these allegations is that—even on Plaintiffs' theory—their alleged injury affects, at most, an "[*in*]substantial segment" of Plaintiffs' respective populations. *Snapp*, 458 U.S. at 607.

Second, Plaintiffs articulate no "quasi-sovereign interest" distinct from the interests of the egg farmers they purport to represent. A State's quasi-sovereign interests are implicated where the conduct at issue amounts to a "public nuisance[]," *Snapp*, 458 U.S. at 604-605 (citing cases involving air and water pollution), or poses a broad-based threat to the State's "economic well-being," *id.* at 605-606 (citing cases involving restrictions on a State's access to natural gas and a conspiracy to fix freight rates that damaged a State's entire economy). To invoke *parens patriae* standing, a State must be more than a "nominal party without a real interest of its own"; it must have a quasi-sovereign interest that is "sufficiently concrete to create an actual controversy between the State and the defendant." *Id.* at 600, 602. Here, Plaintiffs vaguely assert that their suit "protect[s] [their] citizens' economic health and constitutional rights." FAC ¶¶ 10, 17, 22, 27, 32. But the

"citizens" to which Plaintiffs refer are, again, the limited number of egg farmers whose interests Plaintiffs purport to pursue. Plaintiffs make no factual allegation of any negative impact on any other segment of their population, and they seemingly acknowledge that a majority of Plaintiffs' residents would actually *benefit* if—as they allege—AB 1437 and § 1350 result in lower prices in some areas outside California. *See* FAC ¶ 88. Nor can Plaintiffs offer any explanation—and none exists—why the egg farmers cannot themselves vindicate their own interests directly through private suits. *See Connecticut*, 103 F. Supp. 2d at 504 (State must show it is acting "on behalf of individuals who could not obtain complete relief through a private suit"); *see also Purdue Pharma L.P. v. Kentucky*, 704 F.3d 208, 215 (2d Cir. 2013) ("'[W]hen the state merely asserts the personal claims of its citizens, it is not the real party in interest and cannot claim parens patriae standing.'" (citation omitted)); 17 Wright et al., *Federal Practice & Procedure: Civil 3d* § 4047, at 187 (noting that in the context of original jurisdiction in the Supreme Court, "[p]arens patriae standing is most likely to be recognized if there is a widespread injury to important interests of many individuals that cannot easily be calculated in monetary terms. More specifically individualized injury to primarily commercial or monetary interests is least likely to be recognized.").

Plaintiffs' allegation that their suit protects their own "rightful status within the federal system" fares no better. *E.g.*, FAC ¶ 10. While the Supreme Court has recognized that a State has a quasi-sovereign interest in preserving its access to "the benefits of the federal system," this interest extends only to "assuring that the benefits … are not denied *to its general population*." *Snapp*, 458 U.S. at 608 (emphasis added); *see also* 13B Wright et al., *Federal Practice & Procedure: Civil 3d* § 3531.11.1, at 111 (explaining that *parens patriae* requirements exist to protect against the risk "that a state may be choosing sides between different groups of citizens with conflicting interests").[2] Here, as noted above, Plaintiffs' only serious claim is to representing the interests *of a few egg farmers*—not their general population, which would actually benefit if egg prices were to "fall throughout the Midwest" as Plaintiffs hypothesize. FAC ¶ 88.

[2] Iowa also claims a quasi-sovereign interest in "regulating agricultural activity within its own borders." FAC ¶ 36. That interest is not implicated by the provisions at issue here, which—even on Plaintiffs' theory—leave Iowa's egg farmers entirely free to sell their eggs elsewhere.

Third, Plaintiffs have failed to allege that *anyone* stands to suffer a "concrete, particularized," and "certainly impending" injury in fact if AB 1437 and § 1350 become effective. *Clapper*, 133 S. Ct. at 1147. Plaintiffs contend that their farmers will have to "either comply with AB 1437 or lose access" to California's market, FAC ¶ 7, and that "any of [their] farmers who continue to export their eggs to California will face criminal sanctions," *id.* ¶ 89. But those assertions amount to pure speculation, as the complaint fails to identify a single egg producer in Plaintiffs' States that has made any plans—much less the required "'concrete plans'"—to sell eggs in California after January 2015. *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992)). To the contrary, as noted above, the number of farmers who import eggs into California from Nebraska, Oklahoma, Alabama, and Kentucky is likely small to non-existent. *Cf. Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000) (en banc) ("In evaluating the genuineness of a claimed threat of prosecution [for justiciability purposes], we look [among other things] to whether the plaintiffs have articulated a 'concrete plan' to violate the law in question.…"). Nor would allegations about egg producers' plans to sell in California be sufficient, without more, to establish an injury in fact for standing purposes. Plaintiffs would also have to allege that those specific farmers have not *already* independently taken the steps necessary to provide sufficient enclosure space for egg-laying hens—as an increasing number of egg farmers are doing throughout the nation. *See, e.g.*, FAC ¶ 41 (10% of Iowa's hens already in "enhanceable cages"). Plaintiffs have failed to address any of these questions necessary to establish a cognizable injury in fact—no doubt because Plaintiffs themselves are not participants in the egg industry. Plaintiffs' desire to take on the cause of a handful of their favorite residents does not justify replacing the injury-in-fact requirement with unsupported speculation. *See Summers*, 555 U.S. at 497-499 (rejecting injury-in-fact theory based on "statistical probability that some of [an organization's] members are threatened with concrete injury").

II. PLAINTIFFS' DORMANT COMMERCE CLAUSE CHALLENGE IS MERITLESS

Plaintiffs' dormant Commerce Clause challenge fails as a matter of law. Supreme Court precedent makes clear that the "dormant" aspect of the Commerce Clause triggers rigorous judicial scrutiny only where the challenged state law regulates extraterritorially or discriminates against

products or entities from other States. AB 1437 and § 1350 do neither. Less than a year ago, the Ninth Circuit rejected a challenge to California's laws governing the production and sale of foie gras that are materially identical to AB 1437 and § 1350. *See Association des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937 (9th Cir. 2013). Like the provisions at issue here, the foie gras laws prohibited both the in-state *use* of an agricultural production method (force-feeding) and the in-state *sale* of products of that method (foie gras produced by force-feeding). *See id.* at 942 (citing Cal. Health & Safety Code §§ 25981-25982). On those facts, the Ninth Circuit rejected each one of the dormant Commerce Clause arguments Plaintiffs offer here.

A. AB 1437 And § 1350 Do Not Discriminate Against Interstate Commerce

"To determine whether a law violates th[e] so-called 'dormant' aspect of the Commerce Clause," courts "first ask whether it discriminates on its face against interstate commerce." *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007). Discrimination "means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Id.* (internal quotation marks omitted). As this formula suggests, laws that "treat in-state business interests exactly the same as out-of-state ones, do not 'discriminate against interstate commerce' for purposes of the dormant Commerce Clause." *Id.* at 345.

AB 1437 and § 1350 draw no distinction between California and non-California entities or products—they ban the sale of eggs in California no matter where they were produced if the egg-laying hen confinement requirements of the provisions were not met. The Ninth Circuit in *Association des Eleveurs* held that a law of this type does not discriminate based on geographic origin. Such a law's "economic impact," the Ninth Circuit recognized, "does not depend on *where* the items were produced, but rather *how* they were produced." *Ass'n des Eleveurs*, 729 F.3d at 948 (internal quotation marks omitted). Because the foie gras law "bans the sale of both intrastate and interstate products that are the result of force feeding a bird, it is not discriminatory." *Id.* The District Court for the Northern District of California recently relied on *Association des Eleveurs* in rejecting a similar challenge to California's ban on the sale of shark fins. *Chinatown Neighborhood Ass'n v. Harris*, No. 12-cv-03759, 2014 WL 1245047, at *7 (N.D. Cal. Mar. 25, 2014) ("Here, the

in-state and out-of-state interests are affected the same way. A ban that treats all parties the same and prohibits an item regardless of its origin is not discriminatory." (citing *Ass'n des Eleveurs*, 729 F.3d at 948)).

AB 1437 and § 1350 bear no resemblance to state regulations rejected by the Supreme Court as protectionist measures. For example, the Court has held invalid Michigan and New York laws that subjected out-of-state wineries, but not local ones, to a "regulatory gauntlet," *Granholm v. Heald*, 544 U.S. 460, 474 (2005); a Maine tax exemption that "expressly distinguishe[d] between entities that serve a principally interstate clientele and those that primarily serve an intrastate market," *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Maine*, 520 U.S. 564, 576 (1997); an Oregon surcharge imposed on the disposal of solid waste from out of state, *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality of Ore.*, 511 U.S. 93, 99-101 (1994); and a Pennsylvania law that "impos[ed] a heavier tax burden on out-of-state businesses that compete[d] in an interstate market than it impose[d] on its own residents who also engage[d] in" it, *Am. Trucking Ass'ns v. Scheiner*, 483 U.S. 266, 282 (1987). Each of these laws favored in-state actors over interstate actors. AB 1437 and § 1350, by contrast, "treat[] all private companies exactly the same." *Ass'n des Eleveurs*, 729 F.3d at 948 (internal quotation marks omitted).

B. AB 1437 And § 1350 Do Not Regulate Extraterritorially

"[A] statute violates the dormant Commerce Clause per se when it directly regulates interstate commerce." *Ass'n des Eleveurs*, 729 F.3d at 949 (internal quotation marks omitted). As the Ninth Circuit confirmed in *Association des Eleveurs*, laws like AB 1437 and § 1350 do not regulate extraterritorially. In that case, the Court held that because foie gras producers could continue to use their preferred production methods to serve other markets, "California's standards [we]re therefore not imposed as the sole production method Plaintiffs must follow." 729 F.3d at 950; *see also Chinatown Neighborhood Ass'n*, 2014 WL 1245047, at *8. The same is true here. Nothing prevents out-of-state producers from using their preferred hen cages and selling eggs in other states.

Association des Eleveurs also rejects the argument that because regulation of in-state *production* was already in place, a subsequent *sale* ban must be intended only to target out-of-state

producers. *Compare* 729 F.3d at 949 ("Plaintiffs reason that § 25982 is 'apparently directed at farmers who feed their ducks and geese outside California,' because § 25981 already prohibits businesses in California from force feeding birds." (brackets omitted)), *with* FAC ¶ 83 (because "Prop 2 would already have required larger hen enclosures *within* the State of California … , the sole effect of AB 1437 will be the extraterritorial regulation of egg production"). As the Ninth Circuit explained, the sales ban constrains California entities as well: The sales ban prevents "both California entities and out-of-state entities" from obtaining the prohibited product outside the State and selling it in California. *Ass'n des Eleveurs*, 729 F.3d at 949.[3]

To the extent AB 1437 and § 1350 have an indirect economic effect on out-of-state egg producers, that is of no constitutional significance. "The mere fact that state action may have repercussions beyond state lines is of no judicial significance so long as the action is not within that domain which the Constitution forbids." *Osborn v. Ozlin*, 310 U.S. 53, 62 (1940) (Frankfurter, J.); *see also Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205, 220-221 (2d Cir. 2004) ("The extraterritorial effect described by appellants amounts to no more than the upstream pricing impact of a state regulation."). Indeed, the Ninth Circuit has held that States are "free to regulate commerce and contracts within their boundaries *with the goal of* influencing the out-of-state choices of market participants." *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1103 (9th Cir. 2013) (emphasis added) (upholding California fuel classifications which disfavored Midwestern ethanol based on higher-carbon energy sources used in its production), *petition for cert. filed*, No. 13-1149 (U.S. Mar. 20, 2014). Whatever indirect economic effects AB 1437 or § 1350 may produce beyond state lines, it does not impose on out-of-state egg producers any *legal obligation* to alter their production practices.

AB 1437 and § 1350 are a far cry from state laws actually held to regulate extraterritorially. For example, the Supreme Court has invalidated a series of liquor-pricing laws that placed shippers under a *legal obligation* not to change their pricing in other States. *See, e.g., Healy v. Beer Inst.*, 491

[3] In any case, a facially neutral law is not discriminatory even if "only out-of-state businesses are burdened because there are no comparable in-state businesses." *Ass'n des Eleveurs*, 729 F.3d at 948 (citing *Exxon v. Governor of Md.*, 437 U.S. 117 (1978)); *see also Nat'l Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1151 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 1241 (2013).

U.S. 324, 339 (1989); *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 582 (1986). These cases recognize that "[f]orcing a merchant to seek regulatory approval in one State before undertaking a transaction in another directly regulates interstate commerce." *Id.* AB 1437 and § 1350 do nothing of the kind: Out-of-state egg producers are entirely free to choose their preferred method of production and change it at any time.

C. AB 1437 And § 1350 Do Not Impose An Excessive Burden On Interstate Commerce

Nondiscriminatory state laws are subject to a less rigorous form of dormant Commerce Clause analysis: so-called *Pike* balancing. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). That balancing test asks whether "the burden imposed on commerce is clearly excessive in relation to the putative local benefits." *Id.* at 142. Judicial review under the test is highly deferential. As the Supreme Court noted in one recent case, "[s]tate laws frequently survive this *Pike* scrutiny." *Department of Revenue of Ky. v. Davis*, 553 U.S. 328, 339 (2008). In recent years, the Court has repeatedly rejected litigants' invitations to invalidate non-discriminatory statutes based on *Pike*. *See Davis*, 553 U.S. at 353; *United Haulers*, 550 U.S. at 346; *Northwest Cent. Pipeline Corp. v. State Corp. Comm'n of Kan.*, 489 U.S. 493, 525-526 (1989). It has warned against judicial second-guessing under *Pike* of quintessentially legislative judgments. *See Davis*, 553 U.S. at 353 ("[T]he Judicial Branch is not institutionally suited to draw reliable conclusions of the kind that would be necessary for the Davises to satisfy a *Pike* burden in this particular case."); *United Haulers*, 550 U.S. at 347 (opinion of Roberts, C.J., joined by Souter, Ginsburg, and Breyer, JJ.) (rejecting "invitations to rigorously scrutinize economic legislation passed under the auspices of the police power" under the *Pike* balancing test); *id.* at 360 (Scalia, J., concurring in part).

The Supreme Court has also "recognized that a number of its cases purporting to apply the *Pike* balancing test really turned on the discriminatory character of the challenged regulations." *National Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1150 (9th Cir. 2012) (citing *General Motors Corp. v. Tracy*, 519 U.S. 278, 298 n.12 (1997)), *cert. denied*, 133 S. Ct. 1241 (2013).[4] The last Supreme Court decision to find a *Pike* violation, *Bendix Autolite Corp. v.*

[4] In *Tracy*, the Supreme Court identified only two cases—both of which long predated *Pike*—in which it had "invalidated state laws under the dormant Commerce Clause that appear to have been

Midwesco Enterprises, Inc., 486 U.S. 888 (1988), involved an Ohio tolling statute that, in the Court's own words, "might have been held to be a discrimination that invalidates without extended inquiry." *Id.* at 891; *see also id.* at 898 (Scalia, J., concurring in judgment) (law was "on its face discriminatory because it applies only to out-of-state corporations"). Indeed, *Pike* itself involved a discriminatory law: The challenged administrative order "hoard[ed] a local resource"—in that case, cantaloupes—"for the benefit of local businesses that" packaged them for export to other States. *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 392 (1994) (citing *Pike*, 397 U.S. at 142). Absent discrimination, any review under *Pike* must be extremely deferential.

Here, the foie gras case establishes that laws like AB 1437 and § 1350 pass the *Pike* "balancing" test. The Court in *Association des Eleveurs* found no "substantial burden" on interstate commerce for several reasons that are equally applicable here: The law was not discriminatory; the foie gras industry, unlike interstate transportation or professional sports, does not have an inherent need for national uniformity;[5] and the law, while limiting the producers' ability to benefit from a "'more profitable' method of producing foie gras," did not preclude them from producing foie gras altogether. 729 F.3d at 952. As explained above, AB 1437 and § 1350 are not discriminatory. There is also no need for national uniformity in the regulation of the kinds of eggs that can be sold or the manner in which eggs are produced at the farm level. As explained below, federal law permits States to impose more stringent safety requirements on food production and does not foreclose States from enacting legislation like AB 1437 that limits sales of eggs that were not produced according to specified standards. *See infra* pp. 17-20. Finally, AB 1437 and § 1350 do not preclude out-of-state producers from producing eggs altogether, or even from producing eggs in a manner that does not adhere to their requirements; the laws only limit the ability to sell those eggs in California.

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genuinely nondiscriminatory." 519 U.S. at 298 n.12. Both of those cases involved interstate transportation, which has a "compelling need for national uniformity in regulation." *Id.*; *see also Ass'n des Eleveurs*, 729 F.3d at 952.

[5] *See also Pacific Nw. Venison Producers v. Smitch*, 20 F.3d 1008, 1014 (9th Cir. 1994) ("This is not a matter in which national uniformity is important. Most states and Canadian provinces ban some species of wildlife, and the lists of prohibited species vary widely.").

The Court in *Association des Eleveurs* also concluded that the laws at issue there furthered a "legitimate state purpose" despite the foie-gras producers' argument that "precluding sales of products produced by force feeding birds 'does nothing' to prevent animal cruelty in California." 729 F.3d at 952; c*f.* FAC ¶ 100 ("AB1437 and 3 CA ADC § 1350(d)(1) serve no legitimate state purpose because they do not protect the welfare of any animals within the State of California"). The Court found it sufficient that "the State believed that the sales ban in California may discourage the consumption of products produced by force feeding birds and prevent complicity in a practice that it deemed cruel to animals." 729 F.3d at 952. Here, the legislative justification is even stronger: While the foie gras laws were supported only by an animal welfare rationale, AB 1437 and § 1350 promote both animal welfare and food safety. *See supra* pp. 1-2.

D. There Is No Basis To Question California's Public Health Purpose

In AB 1437, the California legislature found that egg-laying hens "subjected to stress are more likely to have higher levels of pathogens in their intestines," which leads to an increased likelihood of "food-borne pathogens," including *Salmonella*. AB 1437, § 1 (codified at Cal. Health & Safety Code § 25995(c)). Similarly, the CDFA found that it was reasonable to prescribe "minimum cage size requirements in" its regulatory "proposal related to the reduction, control and monitoring of [*Salmonella*] in egg-laying hens." 2012 ISR, *supra*, at 11; *see also id.* at 9-13.

Plaintiffs acknowledge that AB 1437 and § 1350 have the "stated purpose" of "prevent[ing] salmonella contamination." FAC ¶¶ 100, 68. And they do not dispute that protecting public health is a legitimate state purpose. *See, e.g.*, *Maine v. Taylor*, 477 U.S. 131, 152 (1986). Instead, they ask the Court to dismiss the Legislature's stated purpose as "pretextual" based on snippets of legislative history and scientific literature. FAC ¶¶ 68-69, 100. This argument fails on numerous grounds.

It is well settled that courts "will 'assume that the objectives articulated by the legislature are actual purposes of the statute, unless an examination of the circumstances forces [them] to conclude that they *could not have been* a goal of the legislation.'" *Rocky Mountain Farmers*, 730 F.3d at 1097-1098 (quoting *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 463 n.7 (1981) (emphasis added)). *Clover Leaf* illustrates the principle: The Supreme Court rejected the challengers' "discriminatory purpose" argument *despite* the district court's having made a "finding"

that the law's "actual basis was to promote the economic interest of" certain local industries, not its stated environmental objectives. 449 U.S. at 471 n.15 (internal quotation marks omitted).

In this case, the Legislature made detailed findings about AB 1437's public health purpose. It concluded that "[e]gg-laying hens subjected to stress are more likely to have higher levels of pathogens in their intestines" and that such "conditions increase the likelihood that consumers will be exposed to higher levels of food-borne pathogens" such as *Salmonella*. Cal. Health & Safety Code § 25995(c). The Legislature thus clearly declared its "intent" in enacting 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). In reaching this conclusion, the Legislature also cited two studies. *See* AB 1437, § 1.[6] These findings more than suffice to demonstrate that protecting public health "could … have been a goal of the legislation." *Rocky Mountain Farmers*, 730 F.3d at 1097-1098.

Plaintiffs' contrary contentions have no merit. The complaint cites only one pre-enactment source, an Assembly committee report. *See* FAC ¶ 70. But that report—which was never approved by a majority of even one chamber of the Legislature—cannot trump the clear statement of purpose in AB 1437 approved by majorities of both.[7] The rest of the comments on which Plaintiffs rely "were made by … state administrative agenc[ies]" after the statute had passed the Legislature, "and thus constitute weak evidence of legislative intent." *Taylor*, 477 U.S. at 150.

In any event, the agency statements cited by Plaintiffs do not support their theory of pretext. The CHHS report cited in paragraph 71 of the First Amended Complaint asserts only that the

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[6] One of those studies found that "the scale and methods common to [Industrial Farm Animal Production ("IFAP")] can significantly affect pathogen contamination of consumer food products." Pew Commission on Industrial Farm Animal Production, *Putting Meat on the Table: Industrial Farm Animal Production in America* 13 (2008), *available at* http://www.ncifap.org/_images/PCIFAPFin.pdf; *see also id.* at 6 (IFAP includes "battery cages for egg-laying hens").

[7] *See also Clover Leaf Creamery*, 449 U.S. at 463 n.7 ("We will not invalidate a state statute under the Equal Protection Clause merely because some legislators sought to obtain votes for the measure on the basis of its beneficial side effects on state industry."); *id.* at 470 n.14 (noting "obvious factual connection between the rationality analysis under the Equal Protection Clause and the balancing of interests under the Commerce Clause").

scientific evidence supporting the public-health purpose is "not definitive[]"; it does not question that the purpose was *genuinely held*.[8] The CDFA analysis cited in paragraph 72 of the First Amended Complaint merely reflects a state agency's view of the requirements of federal law; it does not call into question the Legislature's sincerity in pursuing a public-health benefit. Similarly, the CDFA report cited in paragraphs 73-74 says nothing about the Legislature's purpose or Governor Schwarzenegger's motivations. In short, these sources lend no support to Plaintiffs' pretext theory.

Plaintiffs' attack on § 1350 is even more meritless. CDFA stated that the regulation's purpose was "to ensure the quality and safety of shell eggs sold for human consumption by reducing the occurrence of *Salmonella enterica* … contamination of shell eggs during egg production." 2012 ISR, *supra*, at 2. CDFA considered various research studies and ultimately concluded that the chosen "minimum enclosure requirements" would promote "healthy flocks that are housed in a safe and sanitary environment." *Id.* at 10. Plaintiffs can identify nothing that calls into question the sincerity of this conclusion. To the contrary, that CDFA applied the cage-size rules only to those egg producers for whom cage overcrowding actually poses a health risk definitively *refutes* any claim that this public-health purpose was pretextual. Section 1350(b) *exempts* from the cage-size standards "[r]egistered egg producers or egg handlers whose shell eggs are processed with a treatment such as pasteurization to ensure safety." This exemption shows that the public-health rationale, far from being pretextual, in fact dictated the scope of CDFA's regulation.

In sum, the Commerce Clause does not prevent a State from enacting nondiscriminatory regulations, regardless of whether the chosen policies embody a view of the public good that diverges from that of other States. "[T]he Framers' distrust of economic Balkanization was limited by their federalism favoring a degree of local autonomy." *Davis*, 553 U.S. at 338. "Within the federal system, a courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *Rocky Mountain Farmers*, 730 F.3d at 1087 (internal quotation marks omitted). That is all California has done here.

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[8] Pursuing in good faith a public benefit based on less than "definitive" evidence is no constitutional flaw. *See, e.g., Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487 (1955) ("The Oklahoma law may exact a needless, wasteful requirement in many cases. But it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement.").

III. THE FEDERAL EGG PRODUCTS INSPECTION ACT DOES NOT PREEMPT AB 1437 AND § 1350

Plaintiffs' contention that the EPIA preempts AB 1437 and § 1350 is meritless. The preemption clause on which Plaintiffs rely—21 U.S.C. § 1052(b)—addresses egg-*grading* standards. It has nothing to do with conditions in which egg-laying hens are confined or the sales of eggs from hens confined in certain conditions—the subject matter of AB 1437 and § 1350. Nor is there any basis for Plaintiffs' (cursory) invocation of "field preemption."

A. Supreme Court Precedent Requires Courts To Construe Federal Statutes To Avoid Preemption Where Possible

To prevail on their preemption claim, Plaintiffs must overcome the longstanding "presumption that Congress does not intend to supplant state law." *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654 (1995). Food safety and animal welfare are areas of traditional local regulation. *See Florida Lime & Avocado Growers Inc. v. Paul*, 373 U.S. 132, 144 (1963) ("[T]he supervision of the readying of foodstuffs for market has always been deemed a matter of peculiarly local concern."); *United States v. Stevens*, 559 U.S. 460, 469 (2010) ("[T]he prohibition of animal cruelty itself has a long history in American law, starting with the early settlement of the Colonies."); *see generally* David Favre & Vivien Tang, *The Development of Anti-Cruelty Laws During the 1800's*, 1993 Det. C.L. Rev. 1 (1993). When "Congress legislate[s] … in [a] field which the States have traditionally occupied," courts "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." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). In light of this long-settled "presumption," *N.Y. State Conf. of Blue Cross & Blue Shield Plans*, 514 U.S. at 654, courts interpreting express preemption clauses apply a rule of narrow construction: "[W]hen the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors pre-emption.'" *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008) (quoting *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005)).

B. Section 1052(b)(1) Merely Bars States From Adopting Competing Egg-Grading Standards And Thus Does Not Reach AB 1437 And § 1350

The Court should reject Plaintiffs' contention that the EPIA's express preemption provision—21 U.S.C. § 1052(b)(1)—preempts AB 1437 and § 1350. The provision states that "no

State or local jurisdiction may require the use of standards of quality, condition, weight, quantity, or grade which are in addition to or different from the official Federal standards." 21 U.S.C. § 1052(b)(1). Plaintiffs treat this clause as an open-ended ban on *any* state law "intended to regulate the quality and condition of eggs," FAC ¶ 79, regardless of whether the law imposes *standards* for eggs. *See id.* ¶¶ 80-81. The plain text of § 1052(b)(1) forecloses Plaintiffs' argument.

The EPIA states that one of its declared purposes is to "provide for the … uniformity of standards for eggs." 21 U.S.C. § 1032. To this end, § 1052(b)(1) preempts state laws imposing "standards of quality, condition, weight, quantity, or grade which are in addition to or different from *the official Federal standards*." 21 U.S.C. § 1052(b)(1) (emphasis added).[9] The Act defines "official standards" as "the standards of quality, grades, and weight classes for eggs, in effect upon the effective date of this chapter, or as thereafter amended, under the Agricultural Marketing Act of 1946." 21 U.S.C. § 1033(r); *see also* 7 C.F.R. § 56.1 ("Official standards means the official U.S. standards grades, and weight classes for shell eggs maintained by and available from Poultry Programs, [Agricultural Marketing Service]."). The Agricultural Marketing Service publishes those "official Federal standards" as the *United States Standards, Grades, and Weight Classes for Shell Eggs* (July 20, 2000), *available at* http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELDEV3004376. The Standards describe different classifications of egg shells, whites, and yolks, *see id.* §§ 56.208, 56.210, 56.211, and then assign quality grades to whole eggs based on those features. The "official Federal standards" are a uniform code for grading the intrinsic qualities of shell eggs, so that buyers and sellers know what they are getting. Thus, § 1052(b)(1) precludes standards "of quality, condition, weight, quantity, or grade" that compete with that uniform code.

AB 1437 and § 1350 plainly do not establish a competing set of egg-grading standards. Indeed, Plaintiffs do not claim otherwise. Instead, Plaintiffs point to the fact that AB 1437 aims to *improve* the overall "quality" and "condition" of eggs sold in California by reducing the risk of *Salmonella* contamination. FAC ¶¶ 80-81. That is true, but irrelevant. The Act's preemption clause

[9] *See Freeman v. Quicken Loans, Inc.*, 132 S. Ct. 2034, 2042 (2012) (The "canon of *noscitur a sociis* … counsels that a word is given more precise content by the neighboring words with which it is associated."); Antonin Scalia & Bryan A. Garner, *Reading Law* § 31 (2012).

prohibits only one *means* of improving the quality of shell eggs—"requir[ing] the use of" different or additional grading standards. AB 1437 and § 1350 do not compete with the "official Federal standards"—they seek to ensure that eggs sold in California perform better *under those standards*.[10]

Plaintiffs' construction of § 1052(b)(1) is also refuted by a neighboring clause. Section 1052(b)(2) provides that "with respect to egg handlers specified in paragraphs (1) and (2) of section 1034(e) of … title [21], no State or local jurisdiction may impose temperature requirements pertaining to eggs packaged for the ultimate consumer which are in addition to, or different from, Federal requirements." The purpose of temperature requirements is to prevent bacterial contamination of eggs.[11] If, as Plaintiffs contend, § 1052(b)(1) preempts all state laws "intended to reduce the risk of … food-borne pathogens" in eggs (FAC ¶ 81), § 1052(b)(1) would also preempt temperature requirements. Because Plaintiffs' interpretation of § 1052(b)(1) would render § 1052(b)(2) meaningless, it should be rejected. *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1970) (Federal courts "are obliged to give effect, if possible, to every word Congress used.").

Indeed, Plaintiffs' strained construction of § 1052(b)(1) cannot be squared with the overall federal regulatory scheme for eggs. The structure and purpose of the EPIA confirm that the "standards" referenced in § 1052(b)(1) have nothing to do with the living conditions of egg-laying hens or the sale of eggs from hens confined in specified conditions. The EPIA primarily regulates *food-processing* facilities that produce "egg products" (dried, frozen, or liquid eggs) from shell eggs. *See, e.g.*, 21 U.S.C. § 1034 ("Inspection of egg products"); § 1035 ("Sanitary operating practices in official plants"); § 1036 ("Pasteurization and labeling of egg products at official plants"). It also imposes some requirements on egg handlers, *see, e.g.*, *id.* § 1034(e) (refrigeration), and prohibits buying, selling, or using in food preparation "restricted eggs" (eggs not fit for consumption for a variety of reasons), *see id.* § 1037(a)(1)-(2); § 1033(g)(8) (defining "restricted egg"). But no

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[10] An egg contaminated with *Salmonella* would be deemed a "Loss" under the *United States Standards*, § 56.212(a). *See also* 21 U.S.C. § 342(a).

[11] *See, e.g.*, FDA, *Food Labeling, Safe Handling Statements, Labeling of Shell Eggs; Refrigeration of Shell Eggs Held for Retail Distribution*, 65 Fed. Reg. 76,092 (Dec. 5, 2000) ("The agency also is requiring that … shell eggs be stored and displayed under refrigeration at a temperature of 7.2 degrees C (45 degrees F) or less. FDA is taking these actions because of the number of outbreaks of foodborne illnesses and deaths caused by Salmonella Enteritidis (SE) ….").

provision of the EPIA purports to regulate the living conditions of egg-laying hens or the sale of eggs from hens confined in specified conditions. Thus, when the FDA promulgated regulations aimed at preventing *Salmonella* contamination in egg production, it did so under the Public Health Service Act and the Food, Drug, and Cosmetic Act—not the EIPA. *See Prevention of Salmonella Enteritidis in Shell Eggs During Production, Storage, and Transportation*, 74 Fed. Reg. 33,030, 33,049 (2009). And, in that rulemaking, the FDA made clear that its regulations do not preempt more stringent state standards. *See id.* at 33,091 ("[T]he requirements of this final rule do not preempt State and local laws, regulations, and ordinances that establish more stringent requirements with respect to prevention of SE in shell eggs during production, storage, or transportation.").

Finally, Plaintiffs' reading of § 1052(b)(1) would have the bizarre consequence of prohibiting state efforts to improve performance under the existing Federal grade standards. That cannot be what Congress intended. The Act's purpose is to protect "the health and welfare of consumers" by "assuring that eggs and egg products distributed to them and used in products consumed by them are wholesome, otherwise not adulterated, and properly labeled and packaged." 21 U.S.C. § 1031. By preventing States from implementing more stringent standards, the meaning Plaintiffs ascribe to § 1052(b)(1) would run contrary to Congress' declared purpose.

Because Plaintiffs have not advanced a plausible construction of § 1052(b)(1), much less established that theirs is the *only* plausible construction, Plaintiffs' express preemption claim fails as a matter of law. *See Altria Grp.*, 555 U.S. at 77.

C. Plaintiffs' Field Preemption Argument Is Meritless

The text of the EPIA also squarely refutes Plaintiffs' field preemption argument. *See* FAC ¶ 104. The last sentence of § 1052(b) concludes that paragraph's list of preemption clauses with this caveat: "Otherwise the provisions of this chapter shall not invalidate any law or other provisions of any State or other jurisdiction *in the absence of a conflict with this chapter*." 21 U.S.C. § 1052(b)(3) (emphasis added). This sentence disclaims any intent to occupy the field; beyond the scope of the express preemption clauses, only an actual conflict with the Act triggers preemption.

CONCLUSION

For the reasons set forth above, Plaintiffs' claims should be rejected.

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Respectfully submitted,

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