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UNITED STATES DISTRICT COURT

EASTERN DISTRICT 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, solely in her official capacity as Attorney General of California; KAREN ROSS, solely in her official capacity as Secretary of the California Department of Food and Agriculture,

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

PLAINTIFFS' AMENDED COMBINED OPPOSTION TO DEFENDANTS' MOTION TO DISMISS, PROPOSED DEFENDANT-INTERVENOR HSUS'S PROPOSED MOTION TO DISMISS, AND PROPOSED DEFENDANT-INTERVENOR ACEF'S PROPOSED MOTION FOR JUDGMENT ON THE PLEADINGS

Courtroom: 3, 15th floor
Judge: Hon. Kimberly J. Mueller
Action Filed: 02/03/2014

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INTRODUCTION

In this case, six egg-producing states—Missouri, Nebraska, Oklahoma, Alabama, Kentucky, and Iowa ("Plaintiff States")—challenge two new provisions of California law that effectively prohibit 95% of all eggs sold through interstate commerce, including 20 billion eggs produced each year in Plaintiffs' States alone, from being sold in California. Based on the dubious premise that eggs produced by hens in conventional cages are more likely to be contaminated with salmonella, Cal. Health & Safety Code §§ 25996-97 ("AB1437") and Cal. Code Regs. tit. 3, § 1350(d)(1) (collectively, "Shell Egg Laws") require egg farmers in the other 49 states to comply with California's minimum cage-size requirements *in their own states* if they want to sell their eggs to California consumers. Plaintiff States contend that the Shell Egg Laws violate the dormant Commerce Clause by discriminating against out-of-state egg farmers, regulating commerce that occurs wholly outside of California, and by imposing a substantial burden on interstate commerce that far exceeds any putative local benefit in California. We further allege that the Shell Egg Laws are expressly preempted by the salmonella control measures mandated in the Egg Products Inspection Act, 21 U.S.C. 1031 et seq. ("EPIA").

Two other potential parties—the Humane Society of the United States (HSUS) and the Association of California Egg Farmers (ACEF)—have moved to intervene. California has moved to dismiss the Amended Complaint for lack of standing and failure to state a claim, and HSUS and ACEF have filed proposed motions on the same grounds. Although the proposed motions to dismiss may become moot depending on the Court's intervention rulings, Plaintiffs respond to all three motions in this Amended Combined Memorandum in Opposition[1] to keep the case moving forward while the Court considers which parties may proceed.

[1] Under the parties' original stipulated briefing schedule, Plaintiffs' opposition to California's and HSUS's motions were due on May 12, and our opposition to ACEF's motion was due on May 16. After timely filing a combined opposition to the first two motions on May 12, undersigned counsel asked for opposing counsel's consent to amend Plaintiffs' Opposition by filing a single, combined Opposition Memorandum to all three motions to dismiss on May 16. Counsel for California asked for the same extension of time—four additional days—to file its reply. In a separately filed joint stipulation, the parties have asked the Court to grant Plaintiffs leave to file this Amended Combined Opposition on May 16 and for California to file its reply on June 5, 2014.

STATEMENT OF FACTS

California produces approximately 5 billion eggs per year and imports another 4 billion eggs from other states. Am. Compl. ¶50. Roughly 30% of the eggs imported to California—about 1.07 billion eggs per year—come from Iowa. Am. Compl. ¶51. In total, California consumes more than 9% of the eggs produced by Iowa farmers each year. Am. Compl. ¶52. Another 13% of California's imports—almost 600 million—come from Missouri and comprise one third of all eggs produced in Missouri annually. Am. Compl. ¶53. The State of Nebraska is one of the top ten largest egg producers in the United States, with production totaling 2.723 billion eggs in 2012. Am. Compl. ¶13. The State of Alabama is one of the top fifteen largest egg producers in the United States, with production totaling 2.139 billion eggs in 2012. Am. Compl. ¶19. Kentucky farmers produced approximately 1.037 billion eggs in 2012 and generated approximately $116 million in revenue for the state. Am. Compl. ¶28. Oklahoma farmers produced more than 700 million eggs in 2012 and generated approximately $90 million in revenue for the state. Am. Compl. ¶33. Precise figures on the number of eggs imported into California from Alabama, Nebraska, Oklahoma, and Kentucky are not yet known, but University of California Poultry Specialist Don Bell identifies Alabama, Nebraska, and Kentucky among the states whose eggs account for another 5.6% of total California imports. Am. Compl. ¶54.

In 2008, California voters passed Prop 2 "to prohibit the cruel confinement of farm animals" within California. Am. Compl. ¶55. Prop 2 amended the California Health and Safety Code by adding five new sections numbered 25990 through 25994, which do not become effective until January 1, 2015. Am. Compl. ¶56. Section 25990(a)-(b) provides 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." Am. Compl. ¶56. Section 25993 provides that a violation of §25990 shall constitute a misdemeanor punishable by up to a $1,000 fine and 180 days in county jail. Am. Compl. ¶56.

Researchers at the University of California–Davis have estimated that California egg producers will have to invest upwards of $385 million in capital improvements to bring their operations into compliance with Prop 2. Am. Compl. ¶57. In addition to increased capital costs,

researchers estimate that the larger enclosures required by Prop 2 will increase the ongoing cost of producing eggs in California by at least 20%. Am. Compl. ¶58. Recognizing that it would take several years to implement, Prop 2 gave California egg farmers a total of 2,249 days—from November 4, 2008 until January 1, 2015—to figure out how to comply with the law and to replace their existing cage systems with acceptable alternatives. Am. Compl. ¶59. The new capital costs and increased production costs associated with complying with Prop 2 would have placed California egg producers at a significant competitive disadvantage when compared to egg producers in Missouri and other states, and would likely have eliminated virtually all large scale egg-production in California within six years of Prop 2's effective date. Am. Compl. ¶60.

Faced with the negative impact Prop 2 would have on California's egg industry starting in 2015, the California Legislature in 2010 passed—and Governor Schwarzenegger signed—AB1437, which added three additional sections (§§25995 through 25997) to the California Health and Safety Code. Am. Compl. ¶62. Section 25996 provides that, "Commencing January 1, 2015, a shelled egg may not be sold or contracted to sell for human consumption in California if it 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 [§ 25990]." Am. Compl. ¶63. Section 25997 provides that a violation of §25996 shall constitute a misdemeanor punishable by up to a $1,000 fine and 180 days in county jail. Section 25996 was amended in 2013 to add "the seller knows or should have known" after the word "if." Am. Compl. ¶63. Whereas Prop 2 provided California egg farmers 2,249 days to come into compliance with its mandate, AB1437 gives Plaintiffs' egg farmers only 1,640 days—from July 6, 2010 until January 1, 2015—to do so. Put another way, California granted its own farmers an extra 609 days—one and two-thirds years—to bring their egg-production facilities into compliance with California law. Compare Am. Compl. Ex. A, § 1 with Ex. D, § 5.

In addition to the minimum dimensions for hen enclosures based on bird behavior under §§ 25990(a)-(b), the California Department of Food and Agriculture ("CDFA") has promulgated the following regulations establishing minimum dimensions based on floor space per bird—which may or may not be co-extensive with §§ 25990(a)-(b):

> 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. . . . An enclosure containing nine (9) or more egg-laying hens shall provide a minimum of 116 square inches of floor space per bird.

3 CA ADC § 1350(d)(1). Assuming egg farmers may satisfy the behavioral requirements of AB1437 with the spatial requirements of 3 CA ADC § 1350(d)(1), the cost of producing eggs will increase by at least 12%. Am. Compl. ¶65. If they must switch to entirely cage-free production to satisfy AB1437, however, production costs will increase by more than 34%. Am. Compl. ¶65.

The stated purpose of AB 1437 is "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 that may result in increased exposure to disease pathogens including salmonella." §25995(e). Am. Compl. ¶67. However, no scientific study conducted to date has found any correlation between cage size or stocking density and the incidence of Salmonella in egg-laying hens. Am. Compl. ¶68. Additionally, the most recent studies establish that there is no correlation between cage size or stocking density and stress levels in egg-laying hens. Am. Compl. ¶68.

The legislative history of AB 1437 suggests that the bill's true purpose was not to protect public health but rather to protect California farmers from the market effects of Prop 2 by "leveling the playing field" for out-of-state egg producers. Am. Compl. ¶69. An analysis by the California Assembly Committee on Appropriations following its May 13, 2009 committee hearings on AB 1437 stated as follows:

> Rationale. With the passage of Proposition 2 in November 2008, 63% of California's voters determined that it was a priority for the state to ensure the humane treatment of farm animals. However, the proposition only applies to in-state producers. The intent of this legislation is to level the playing field so that in-state producers are not disadvantaged. This bill would require that all eggs sold in

> California must be produced in a way that is compliant with the requirements of Proposition 2.

Bill Analysis of the California Assembly Committee on Appropriations, May 13, 2009 at 1. Am. Compl. Ex. M.

After AB 1437 passed both the California Assembly and the California Senate, the California Health & Human Services Agency (CHHS) prepared an Enrolled Bill Report for the Governor. Am. Compl. ¶70. That report stated in pertinent part, "Supporters of Proposition 2 claimed that giving egg-laying hens more space may reduce this type of salmonellosis by reducing the intestinal infection with Salmonella Enteritidis via reducing the stress of intensive confinement. Scientific evidence does not definitively support this conclusion." CHHS Enrolled Bill Report at 2. Am. Compl. Ex. K. Summarizing the arguments pro and con concerning AB 1437 later in its report, CHHS further stated that one of the arguments against enactment of the legislation is that there is "[n]o scientific evidence to support assertion of salmonella prevention." Id. at 5.

Indeed, the California Department of Food and Agriculture ("CDFA") concedes in the Legal Impact section of its own Enrolled Bill Report for AB 1437 that the bill's purported public health rationale is likely untenable. Am. Compl. ¶71. If AB 1437 were to be challenged on Commerce Clause grounds, the CDFA warned, California

> will have to establish that there is a public heath justification for limiting the confinement of egg-laying hens as set forth in section 25990. This will prove difficult because, given the lack of specificity as to the confinement limitations, it will invariably be hard to ascribe any particular public health risk for failure to comply. . . . [W]e doubt that the federal judiciary will allow the state to rely exclusively upon the findings of the Legislature, such as they are, to establish a public health justification for section 25990.

CDFA Enrolled Bill Report at 5. Am. Compl. ¶Ex. L.

Despite the absence of any scientific evidence to support the bill's purported public health rationale, CDFA urged the governor to sign AB1437 into law for purely economic reasons:

> RECOMMENDATION AND SUPPORTING ARGUMENTS:
>
> SIGN. In November 2008, voters passed Proposition 2, requiring California farm animals, including egg-laying hens, have room to move freely. Approximately 35% of shell eggs consumed in California are imported from out of state. California is the fifth largest producer behind Iowa, Ohio, Indiana and Pennsylvania, in that order. This will ensure a level playing field for California's shell egg producers by requiring out of state producers to comply with the state's animal care standards.

Am. Compl. Ex. L at 1. Later in the same report, CDFA warned the governor that the danger in not signing the bill was competition, not contamination:

> When Proposition 2 requirements are implemented in 2015, these producers will no longer be economically competitive with out-of-state producers. Without a level playing field with out-of-state producers, companies in California will no longer be able to operate in this state and will either go out of business or be forced to relocate to another state. This will result in a significant loss of jobs and reduction of tax revenue in California.

Id. at 3.

In his signing statement, Governor Schwarzenegger makes no mention of AB1437's purported public health rationale at all. Am. Compl. ¶74. The only purposes he cites for enacting the law is protecting California farmers from the market effects of Prop 2: "The voters' overwhelming approval of Proposition 2 demonstrated their strong support for the humane treatment of egg producing hens in California. By ensuring that all eggs sold in California meet the requirements of Proposition 2, this bill is good for both California egg producers and animal welfare." Am. Compl. Ex. N.

AB1437 also imposes a substantial burden on interstate commerce by forcing Plaintiffs' farmers either to forgo California's markets altogether or accept significantly increased production costs just to comply with California law. Am. Compl. ¶83. Those higher production costs will increase the price of eggs outside California as well as in. Am. Compl. ¶84. Because demand for eggs varies greatly throughout the year, egg producers in other states cannot simply

maintain separate facilities for their California-bound eggs. Am. Compl. ¶84. In high-demand months, Plaintiffs' farmers may not have enough eggs to meet California demand if only a fraction of their eggs are produced in compliance with AB1437. Am. Compl. ¶84. In low-demand months, there may be insufficient California demand to export all compliant eggs, forcing Plaintiffs' farmers to sell those eggs in their own states at higher prices than their competitors. Am. Compl. ¶84. Given those inefficiencies, Plaintiffs' egg farmers must choose either to bring their entire operations into compliance with AB1437 so that they always have enough supply to meet California demand, or else simply leave the California marketplace. Am. Compl. ¶84

For example, even if farmers in Missouri would choose to forgo the California market instead of incurring increased production costs, AB1437 would still impose a substantial burden on interstate commerce. Am. Compl. ¶87. Without California consumers, Missouri farmers would produce a surplus of 540 million eggs per year. Am. Compl. ¶87. If one third of Missouri's eggs suddenly had no buyer, supply would outpace demand by half a billion eggs, causing the price of eggs—as well as egg farmers' margins—to fall throughout the Midwest and potentially forcing some Missouri producers out of business. Am. Compl. ¶87. Egg producers in Nebraska, Alabama, Oklahoma, Kentucky, and Iowa face the same issues. Am. Compl. ¶87.

ARGUMENT

California, HSUS, and ACEF all move to dismiss Plaintiffs' Amended Complaint under Rules 12(b)(1) and 12(b)(6).[2] All three movants argue that Plaintiffs' factual allegations are insufficient to invoke this Court's subject-matter jurisdiction or to state a claim for relief.

[2] ACEF styled its motion as a "Motion to Dismiss or for Judgment on the Pleadings," but its request for judgment on the pleadings is premature. Rule 12(c) expressly provides, "*After the pleadings are closed*—but early enough not to delay trial—a party may move for judgment on the pleadings." Fed. R. Civ. P. 12(c) (emphasis added). As Defendants Harris and Ross have not yet answered Plaintiffs' Amended Complaint, the pleadings are not yet closed. *See Doe v. United States*, 419 F.3d 1058, 1061 (9th Cir. 2005) (holding "[plaintiff's] motion for judgment on the pleadings was filed before the [defendant] filed an answer. Accordingly, [plaintiff's] motion was premature and should have been denied").

California Motion to Dismiss ("Cal. Mem.") at 1; Proposed Defendant-Intervenor HSUS's Proposed Motion to Dismiss ("HSUS Mem.") at 2; Proposed Defendant-Intervenor ACEF's Proposed Motion to Dismiss or for Judgment on the Pleadings ("ACEF Mem.") at 1. In addition, HSUS questions the veracity of the jurisdictional facts alleged and "requests jurisdictional discovery and an appropriate evidentiary process to develop those jurisdictional facts." HSUS Mem. at 7.

A defendant may challenge the court's subject-matter jurisdiction both facially and factually. Federal courts evaluate facial challenges to their jurisdiction the same way they evaluate the sufficiency of a claim: "Accepting the plaintiff's allegations as true and drawing all reasonable inferences in the plaintiff's favor, the court determines whether the allegations are sufficient as a legal matter to invoke the court's jurisdiction." *Leite v. Crane Co.*, Case No. 12-16982, 2014 WL 1646924, at *2 (9th Cir. Apr. 25, 2014). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The Federal Rules of Civil Procedure "do[] not impose a probability requirement at the pleading stage; [they] simply call[] for enough fact to raise a reasonable expectation that discovery will reveal evidence" of the alleged constitutional violation. *Twombly*, 550 U.S. at 545.

By contrast, a factual challenge "contests the truth of the plaintiff's factual allegations, usually by introducing evidence outside the pleadings." *Leite*, 2014 WL 1646924, at *2. As HSUS notes in its Memorandum, courts need not assume plaintiffs' jurisdictional allegations are true when considering a factual challenge to their subject-matter jurisdiction and may review evidence outside the complaint. *Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1039 n. 2 (9th Cir. 2003). However, "[j]urisdictional dismissals in cases premised on federal-question jurisdiction are exceptional" and are warranted only "where the alleged claim under the constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining federal jurisdiction or where such claim is wholly insubstantial and frivolous." *Safe*

Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004). The Ninth Circuit has instructed that a "[j]urisdictional finding of genuinely disputed facts is inappropriate when the jurisdictional issue and substantive issues are so intertwined that the question of jurisdiction is dependent on the resolution of factual issues going to the merits of an action." *Id.* (internal quotations omitted). Jurisdictional and substantive issues are "intertwined" where "a statute provides the basis for both the subject matter jurisdiction of the federal court and the plaintiff's substantive claim for relief." *Id.*

I. Plaintiffs' constitutional challenge to the Shell Egg Laws satisfies the jurisdictional requirements of Article III.

In section II of its motion, California argues that Plaintiffs have no standing to challenge the Shell Egg Laws because the challenged regulations do not injure Plaintiffs themselves; at best, argues California, the challenged regulations might injure egg producers who reside in our states. Cal. Mem. at 7-8. In section III, California argues that even assuming the challenged regulations could injure Plaintiffs themselves, we have not sufficiently alleged that prosecution is likely to create an actual case or controversy. Cal. Mem. at 8-9. HSUS raises essentially the same arguments in its motion and suggests, in addition, that a subset of Plaintiffs do not ship a sufficient number of eggs into California to claim a personal stake in this litigation. However, "[h]ere, as in all standing inquiries, the critical question is whether ***at least one*** petitioner has 'alleged such a personal stake in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction.'" *Horne v. Flores*, 557 U.S. 433, 445 (2009) (quoting *Warth v. Seldin*, 422 U.S. 490, 498, (1975)). As discussed below, all six Plaintiffs have standing as *parens patriae* to challenge to the constitutionality of the Shell Egg Laws, the enforcement of which is clearly impending.

To bring a civil action in federal court, Article III of the Constitution first requires a plaintiff to establish her standing to sue. *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661, 186 L. Ed. 2d 768 (2013). Standing has three elements: (1) an "injury-in-fact" that is both "concrete and particularized" and "actual or imminent"; (2) a causal connection between the plaintiff's injury and the defendants' conduct; and (3) a likelihood that the injury will be redressed by the court.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). In the motions to dismiss, California and HSUS focus on the injury-in-fact element.

A. Plaintiffs have *parens patriae* standing to challenge the Shell Egg Laws to protect their quasi-sovereign interests in their citizens' economic health and constitutional rights as well as preserving their own rightful status within the federal system.

"States are not normal litigants for the purposes of invoking federal jurisdiction." *Massachusetts v. EPA*, 549 U.S. 497 (2007). In addition to the panoply of legal interests common to most litigants, "states have interests and capabilities beyond those of an individual by virtue of their sovereignty." *Oregon v. Legal Servs. Corp.*, 552 F.3d 965, 970 (9th Cir. 2009). For example, sovereigns have long possessed a "royal prerogative" to take care of citizens who could not manage their own affairs due to age or disability. *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 600 (1982). At common law, the King of England was said to exercise his royal prerogative as *parens patriae*—literally, "the parent of the country." *Id.* "In the United States, the 'royal prerogative' and the '*parens patriae*' function of the King passed to the States." *Hawaii v. Standard Oil Co. of Cal*., 405 U.S. 251, 257 (1972). Today, a state may sue on behalf of its citizens as *parens patriae* as long as it "[1] alleges injury to a sufficiently substantial segment of its population, [2] articulates an interest apart from the interests of particular private parties, and [3] expresses a 'quasi-sovereign' interest." *Washington v. Chimei Innolux Corp.*, 659 F.3d 842, 847 (9th Cir. 2011).

Quasi-sovereign interests fall into two general categories. "First, a State has a quasi-sovereign interest in the health and well-being—both physical and economic—of its residents in general." *Alfred L. Snapp & Son*, 458 U.S. at 601. "The Court has not attempted to draw any definitive limits on the proportion of the population of the State that must be adversely affected by the challenged behavior." *Id.* at 607. "Although more must be alleged than injury to an identifiable group of individual residents, the indirect effects of the injury must be considered as well in determining whether the State has alleged injury to a sufficiently substantial segment of its population." *Id.* "One helpful indication in determining whether an alleged injury to the health

and welfare of its citizens suffices to give the State standing to sue as *parens patriae* is whether the injury is one that the State, if it could, would likely attempt to address through its sovereign lawmaking powers. *Id.*

Second, and "[d]istinct from but related to the general well-being of its residents, the State has an interest in securing observance of the terms under which it participates in the federal system." *Alfred L. Snapp & Son*, 458 U.S. at 601–02 (1982). "In the context of *parens patriae* actions, this means ensuring that the State and its residents are not excluded from the benefits that are to flow from participation in the federal system." *Id.* "Thus, the State need not wait for the Federal Government to vindicate the State's interest in the removal of barriers to the participation by its residents in the free flow of interstate commerce." *Id.* While it "must be more than a nominal party, . . . a State does have an interest, independent of the benefits that might accrue to any particular individual, in assuring that the benefits of the federal system are not denied to its general population." *Id.* at 608.

Whatever quasi-sovereign interest a state relies on in a *parens patriae* action, it "must be sufficiently concrete to create an actual controversy between the State and the defendant." *Alfred L. Snapp & Son*, 458 U.S. at 602. As the Supreme Court has noted, "[t]he vagueness of this concept can only be filled in by turning to individual cases." *Id.* Several cases are instructive here. In *State of Ga. v. Pennsylvania R. Co.*, for example, Georgia alleged a conspiracy by defendants to restrain trade and commerce among the States by fixing arbitrary and noncompetitive rates that discouraged the shipment of freight to and from Georgia. 324 U.S. 439, 443 (1945). Defendants argued that the state was suing to vindicate private interests and had no standing of its own, but the Supreme Court disagreed, holding that Georgia could maintain its suit as *parens patriae*:

> Georgia as a representative of the public is complaining of a wrong which, if proven, limits the opportunities of her people, shackles her industries, retards her development, and relegates her to an inferior economic position among her sister States. These are matters of grave public concern in which Georgia has an interest apart from that of particular individuals who may be affected.

324 U.S. 439, 450-451 (1945).

In another pair of cases, Pennsylvania and Ohio brought *parens patriae* actions alleging that West Virginia, in violation of the Commerce Clause, had given its own citizens a right of first refusal to purchase natural gas produced in West Virginia. *Pennsylvania v. West Virginia*, 262 U.S. 553, 592 (1923). On the issue of standing, the Supreme Court identified a "twofold interest":

> one as the proprietor of various public institutions and schools whose supply of gas will be largely curtailed or cut off by the threatened interference with the interstate current, *and the other as the representative of the consuming public whose supply will be similarly affected. Both interests are substantial and both are threatened with serious injury.*

Id. at 591 (emphasis added). The latter interest was sufficient to give both plaintiff states standing as *parens patriae*:

> The private consumers in each State ... constitute a substantial portion of the State's population. Their health, comfort and welfare are seriously jeopardized by the threatened withdrawal of the gas from the interstate stream. This is a matter of grave public concern in which the State, as representative of the public, has an interest apart from that of the individuals affected.

Id. at 592; *see also State of Missouri v. Illinois*, 180 U.S. 208, 241 (1901) ("if the health and comfort of the inhabitants of a state are threatened, the state is the proper party to represent and defend them"); *Kansas v. Colorado*, 206 U.S. 46, 99 (1907) (holding that Kansas's *parens patriae* action to enjoin Colorado's diversion of the Arkansas River was not "solely for the benefit of any individual citizen to protect his riparian rights. . . . [Kansas's] prosperity affects the general welfare of the state. The controversy rises, therefore, above a mere question of local private right and involves a matter of state interest, and must be considered from that standpoint.").

Finally, in *Alfred L. Snapp & Son*, Puerto Rico sued a consortium of East Coast apple growers under the Wagner-Peyser Act, 29 U.S.C. § 49 et seq., for hiring foreign agricultural laborers instead of Puerto Rican farmworkers. 458 U.S. at 609-10 (1982). Despite the relatively small number of its citizens affected, Puerto Rico asserted *parens patriae* standing because the

apple growers had deprived "the Commonwealth of Puerto Rico of its right to effectively participate in the benefits of the Federal Employment Service System of which it is a part," causing irreparable injury to Commonwealth's efforts "to promote opportunities for profitable employment for Puerto Rican laborers and to reduce unemployment in the Commonwealth." The Supreme Court agreed:

> we find that Puerto Rico does have *parens patriae* standing to pursue the interests of its residents in the Commonwealth's full and equal participation in the federal employment service [program]. Unemployment among Puerto Rican residents is surely a legitimate object of the Commonwealth's concern. Just as it may address that problem through its own legislation, it may also seek to assure its residents that they will have the full benefit of federal laws designed to address this problem. . . . Indeed, the fact that the Commonwealth participates directly in the operation of the federal employment scheme makes even more compelling its *parens patriae* interest in assuring that the scheme operates to the full benefit of its residents.

Alfred L. Snapp & Son, 458 U.S. at 609-10 (1982).

In this case, Plaintiffs have sufficiently alleged injury to quasi-sovereign interests on par with those asserted by Georgia, Pennsylvania, Ohio, Kansas, and Puerto Rico in the cases above. As in *State of Ga.*, 324 U.S. at 443 (1945), Plaintiffs here have alleged an effort to restrain interstate commerce by imposing higher costs on our producers if they want to compete in California. *Cf.* 324 U.S. at 443. And like the price fixing alleged by Georgia, the burdens California has placed on trade between its citizens and ours will "limit[] the opportunities of [our] people, shackle[] [our] industries, retard[] [our] development, and relegate[] [us] to an inferior economic position among our other sister States." *Id.* at 450-451.

Like the plaintiffs in *Pennsylvania v. West Virginia*, Plaintiffs here have sued a sister state on behalf of our own consumers whose supply of a vital commodity will be disrupted on January 1, 2015 due to legislation our citizens neither enacted nor have the power to repeal. *Cf.* 262 U.S. at 591. Just as West Virginia impaired the sale of natural gas across its state lines, California has impaired the sale of eggs across its state lines. Like the disruption of the natural

gas supply, California's disruption of the egg supply and the fluctuation of egg prices that disruption will cause in Plaintiff States are "matter[s] of grave public concern in which the State[s], as representative[s] of the public, ha[ve] an interest apart from that of the individuals affected." *Id.* In both cases, "the health, comfort, and welfare of Plaintiffs' citizens are 'seriously jeopardized by the threatened [disruption of] the supply [a vital commodity] in the interstate stream." 262 U.S. at 592.

Above all, the instant Plaintiffs assert the same quasi-sovereign interest identified by Puerto Rico in *Alfred L. Snapp & Son*—preserving our rightful place as co-equal sovereigns in our federal system. The gravamen of the Amended Complaint is that California is attempting to regulate conduct that occurs *in Missouri, Nebraska, Oklahoma, Alabama, Kentucky, and Iowa*.[3] Not only does that effort pose a direct challenge to the sovereignty of our six states, it leaves our citizens at the mercy of legislators they did not elect and cannot vote out of office. Like Puerto Rico, Plaintiffs initiated this suit to vindicate the federal rights of our own citizens. *Cf.* 262 U.S. at 592. Where Puerto Rico challenged the violation of its citizens' right to preferential hiring under the Wagner-Peyser Act, 29 U.S.C. § 49 et seq., here Plaintiffs challenge the violation of our citizens' right under the Commerce Clause to the free flow of goods across state lines without undue burdens imposed by individual states.

Having sufficiently alleged quasi-sovereign interests (a) in protecting the economic health and well-being of our consumers, and (b) in securing observance of the terms under which we participate in our federal system, Plaintiffs have standing as *parens patriae* to invoke this Court's subject-matter jurisdiction under Article III.

[3] Despite HSUS's claim to the contrary, AB1437 does not just regulate the "sale" of eggs in California. As previously established in this Motion's Statement of Facts, AB 1437 places egg producers in Plaintiff States in a dilemma: forgo California's markets altogether; or accept significantly increased production costs just to comply with the California law. The realities of the shelled-egg market disallow the possibility of satisfying AB 1437 and remaining competitive in states outside of California.

B. The Shell Egg Laws have already caused "concrete, particularized, and actual" injury to Plaintiffs, and additional injury is "clearly impending."

In cases such as this, where "plaintiffs seek to establish standing to challenge a law or regulation that is not presently being enforced against them, they must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1154 (9th Cir. 2000) (internal quotations omitted). However, "[o]ne does not have to await the consummation of threatened injury to obtain preventive relief." *Pennsylvania v. W. Virginia*, 262 U.S. at 593 (emphasis added). "When the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he should not be required to await and undergo a criminal prosecution as the sole means of seeking relief." *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 298 (1979) (internal quotations omitted). "If the injury is *certainly impending*, that is enough." *Pennsylvania v. W. Virginia*, 262 U.S. at 593 (emphasis added).

Plaintiffs have adequately alleged an actual, imminent, or at least "clearly impending" injury from AB1437 and §1350. In 2012, farmers in Plaintiff States produced more than 23 billion eggs, with a total production value of almost $2 billion. Am. Compl. Ex. O [Docket #13-15] at 12. At least 1.5 billion of those eggs were exported in their shells to California. A similar number of eggs were shipped to California in 2011. *Id*. It is hardly speculative for Plaintiffs to allege that a similar number would be shipped to California again in 2015. Nor is it speculative for Plaintiffs to allege that the vast majority of eggs produced in Plaintiff States are laid by hens in enclosures that do not comply with AB1437 and §1350. *See* HSUS Mem. at 3 (noting that "[a]lmost 95 percent of American's 292 million egg-laying hens are confined in battery cages"). Nor is it speculative that AB1437 and §1350 will become effective on January 1, 2015 or that Defendants will carry out their oaths to enforcement them. If history is any predictor of future events, it is eminently reasonable for the court to infer that egg producers in Plaintiffs States would continue to ship 1.5 billion eggs to California per year *but for AB1437 and §1350.*

C. This Court has subject-matter jurisdiction to hear all six Plaintiff States' challenges to the Shell Egg Laws.

California and HSUS specifically dispute the standing of Plaintiffs Alabama, Kentucky, Nebraska, and Oklahoma because no egg farmers in those states are registered to sell shell eggs in California, or the egg farmers who are registered in those states do not ship enough eggs into California to give these four states Article III standing. Even assuming those assertions are correct, it makes no difference to this Court's subject-matter jurisdiction. "Here, as in all standing inquiries, the critical question is whether ***at least one*** petitioner has 'alleged such a personal stake in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction.'" *Horne*, 557 U.S. at 445 (quoting *Warth v. Seldin*, 422 U.S. 490, 498, (1975)) (emphasis added). "[S]o long as ***at least one*** plaintiff has standing to raise each claim—as is the case here—[the court] need not address whether the remaining plaintiffs have standing." *Florida v. United States HHS*, 648 F.3d 1235, 1243 (11th Cir. 2011) (emphasis added); *see, also, Watt v. Energy Action Educ. Found.*, 454 U.S. 151, 160 (1981) ("Because we find California has standing, we do not consider the standing of the other plaintiffs."); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264 (1977) ("Because of the presence of this plaintiff, we need not consider whether the other individual and corporate plaintiffs have standing to maintain suit."); *ACLU of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd.*, 557 F.3d 1177, 1195 (11th Cir. 2009) ("Because Balzli has standing to raise those claims, we need not decide whether either of the organizational plaintiffs also has standing to do so."); *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1232, 320 U.S. App. D.C. 87 (D.C. Cir. 1996) ("For each claim, if constitutional and prudential standing can be shown for at least one plaintiff, we need not consider the standing of the other plaintiffs to raise that claim."). Neither California nor HSUS disputes that multiple egg producers *in Missouri and Iowa* are registered to sell—and do in fact sell—shell eggs in California. As long as this Court finds that either Missouri or Iowa has standing in this case, it need not even consider the standing of Alabama, Kentucky, Nebraska, and Oklahoma.

Nonetheless, Alabama, Nebraska, Oklahoma and Kentucky have standing in their own right. Collectively, farmers in these four states produced approximately 6,640,000,000 eggs in

2012. Am. Compl. Ex. O [Docket # 13-15] at 12. At least some of those shell eggs were shipped in to California in 2012 and 2013. Am. Compl. Ex. E [Docket #13-5] at 6; Cal. Mem. Ex. 2 [Docket #36-2] at ¶ 9-11. These egg producers, responsible for over 6 billion eggs a year with a value of production over $739 million, must now decide whether to invest enormous sums in new hen houses or stop selling in California. Am. Compl. Ex. O [Docket # 13-15] at 12. The forced withdrawal of producers from Alabama, Nebraska, Oklahoma, Kentucky and other states, from the largest market in the country, would flood the markets in the remaining 49 states with surplus eggs while artificially driving up the price of eggs in California. Such market manipulation would negatively impact anyone employed in egg production or sales in Alabama, Nebraska, Oklahoma and Kentucky. As Alabama, Nebraska, Oklahoma and Kentucky have an interest "in the removal of barriers to the participation by its residents in the free flow of interstate commerce," Alabama, Nebraska, Oklahoma and Kentucky have standing to bring their claims. *Alfred L. Snapp & Son*, 458 U.S. at 608.

Moreover, even if the number of egg *producers* in one of our states may number in single or double digits, the number of egg *consumers* in each state numbers in the millions. The increased production costs resulting from the mandates of AB1437 and §1350 don't just affect the price of eggs in California but all over the country. Yet, unlike California consumers, consumers living in the six Plaintiff States had no opportunity to vote for or against Prop 2, had no vote in electing the legislators who passed AB1437, and had no vote in electing the governor who appointed the Secretary of the California Department of Food and Agriculture, which promulgated §1350. Their only voice in this debate is through their own state governments—six of which stand before this Court as *parens patriae*—and their representatives in Congress. The Constitution vests Congress with the power to regulate trade among the states so that everyone has at least one representative at the table when trade restrictions are imposed. The Constitution also withholds that power from individual states so that one state's voters cannot set policy for another state's merchants.

Plaintiffs bring this suit to ensure our own rightful status as co-equal sovereigns within our federal system and to vindicate the rights of our citizens to buy and sell goods through interstate commerce except as regulated by ***our own*** duly elected representatives in Congress.

Accordingly, Plaintiffs have standing as *parens patriae,* and this Court has subject matter jurisdiction to hear our claims.

II. Plaintiffs have stated a claim that the Shell Egg Laws violate the dormant Commerce Clause.

Our Constitution is premised "upon the theory that the peoples of the several states must sink or swim together." *Baldwin v. G.A.F. Seelig, Inc*., 294 U.S. 511, 523 (1935). To that end, "the Framers granted Congress plenary authority over interstate commerce in the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality of State of Or*., 511 U.S. 93, 98-99 (1994). "The desire of the Forefathers to federalize regulation of foreign and interstate commerce stands in sharp contrast to their jealous preservation of power over their internal affairs. No other federal power was so universally assumed to be necessary[;] no other state power was so readily relinquished." *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 533-34 (1949).

On its face, the Commerce Clause is an affirmative grant of authority to the federal government, providing only that "[t]he Congress shall have Power ... To regulate Commerce ... among the several States." U.S. Const., Art. I, § 8. Nonetheless, the Supreme Court has long held that the Commerce Clause "not only empowers Congress to regulate interstate commerce, but also imposes limitations on the States in the absence of congressional action." *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 401 (1994) (O'Connor, J., concurring). "This negative command, known as the dormant Commerce Clause,…creates an area of trade free from interference by the States." *Am. Trucking Associations, Inc. v. Michigan Pub. Serv. Comm'n*, 545 U.S. 429, 433 (2005) (internal quotations and citations omitted). It promotes economic integration by "significantly limit[ing] the ability of States and localities to regulate or otherwise burden the flow of interstate commerce." *McBurney v. Young*, ––– U.S. ––––, 133 S.Ct. 1709, 1719 (2013). And it prevents a state from "jeopardizing the welfare of the Nation as a whole" by "plac[ing] burdens on the flow of commerce across its borders that commerce

wholly within those borders would not bear." *Am. Trucking Associations*, 545 U.S. at 433 (2005).

The Supreme Court has established a two-step approach to dormant Commerce Clause claims. *Brown–Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 578–79 (1986). In the first step, the court asks whether the challenged legislation discriminates against or directly regulates interstate commerce. *Nat'l Collegiate Athletic Ass'n v. Miller*, 10 F.3d 633, 638 (9th Cir. 1993). In the second step, the court asks whether an otherwise evenhanded, nondiscriminatory law nonetheless places a substantial burden on interstate commerce in excess of its putative local benefits. "Laws that discriminate against out-of-state entities are subject to strict scrutiny, while non-discriminatory laws only need to satisfy a less rigorous balancing test." *Nat'l Ass'n of Optometrists & Opticians LensCrafters, Inc. v. Brown*, 567 F.3d 521, 524 (9th Cir. 2009). "[A] statute that directly controls commerce occurring wholly outside the boundaries of a state exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature." *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989).

In this case, the Shell Egg Laws violate the Commerce Clause in three distinct ways. First, they were enacted for a discriminatory purpose and have a discriminatory effect of ***protecting California egg producers*** from out-of-state competition by eliminating the market advantage out-of-state egg farmers had over their California competitors under Prop 2. Second, the Shell Egg Laws ***regulate extraterritorial activity*** by requiring out-of-state egg producers who want to continue selling eggs in California to adopt more expensive production methods in their home states that necessarily burden their sales in states other than California. Third, the Shell Egg Laws impose a ***substantial burden on interstate commerce*** far in excess of any putative local food safety or animal welfare benefit by dramatically increasing production costs in other states without reducing the risk of salmonella contamination or improving the welfare of animals *in California*. As discussed below, Plaintiffs have sufficiently alleged the factual bases for each of these theories in our Amended Complaint. If the Court assumes those factual allegations to be true and makes all reasonable inferences in Plaintiffs' favor—as it must on a motion to dismiss

under Rule 12(b)(6)—both motions to dismiss Plaintiffs' Commerce Clause claims should be denied.

A. Plaintiffs have sufficiently alleged that the Shell Egg Laws were enacted for a *discriminatory purpose* and have a *discriminatory effect* in that they increase the cost of egg production in Plaintiff States solely to *protect California egg farmers* from having to compete with less expensive out-of-state eggs.

State statutes can discriminate against out-of-state interests in three different ways: (a) facially, (b) purposefully, or (c) in practical effect. *Nat'l Ass'n of Optometrists & Opticians LensCrafters, Inc. v. Brown*, 567 F.3d 521, 525 (9th Cir. 2009). If a state statute discriminates against out-of-state entities on its face, in its purpose, or in its practical effect, the court applies a heightened level of review resembling strict scrutiny. *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1087 (9th Cir. 2013). Under this rigorous analysis, the "burden falls upon the [enacting] state to demonstrate both that the statute serves a legitimate local purpose, and that this purpose could not be served as well by available nondiscriminatory means." *Maine v. Taylor*, 477 U.S. 131, 138 (1986) (internal quotations omitted). "The central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism," because these are the "laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent." *C & A Carbone, Inc.*, 511 U.S. at 390. "The clearest example of such legislation is a law that overtly blocks the flow of interstate commerce at a State's borders." *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).

AB1437 violates the dormant Commerce Clause because it has both the discriminatory purpose and the discriminatory effect of protecting California egg farmers from out-of-state competition. On its face, AB1437 appears to treat egg producers within and without California the same by requiring both to adhere to the Prop 2's cage-size restrictions. However, California gave its own egg producers a full year and six months longer than out-of-state egg producers to bring their operations into compliance. Prop 2 passed on November 4, 2008 and takes effect on January 1, 2015, a total of 2,249 days later. AB1437 was not enacted until July 6, 2010, yet it too becomes effective on January 1, 2015, a total of 1,640 days later. AB1437 discriminates against

out-of-state interests in its practical effects because it affords its own farmers 609 days more time to come into compliance than those in Plaintiff States.[4]

Moreover, AB1437's legislative history and the circumstances of its enactment reveal a clear discriminatory purpose (and additional discriminatory effects). When California voters adopted Prop 2 back in 2008 to mandate larger enclosures for egg-laying hens *in California*, they made an economic choice: they were willing to pay more for each carton of California eggs in exchange for an alleged improvement in the quality of life for egg-laying hens in California. Even before the vote, economists at UC-Davis estimated that Prop 2 would cost California egg farmers $385 million in new capital improvements and increase their ongoing production costs by 20%. Am. Compl. ¶¶57-58. These economists warned that egg farmers in other states—who would not face these same increases in capital improvement and production costs—could continue to sell their eggs in California at their original, substantially lower price. Am. Compl. ¶60. California voters *chose* to adopt Prop 2 *despite* the warning that doing so would place egg farmers in their own state at a market disadvantage vis-à-vis egg farmers in other states.

California's elected officials were less acquiescent. As the CDFA warned in its Enrolled Bill Report on AB1437, Prop 2 would sharply increase California egg farmers' production costs to the point that they

> will no longer be economically competitive with out-of-state producers. *Without a level playing field with out-of-state producers*, companies in California will no longer be able to operate in this state and will either go out of business or be forced to relocate to another state. This will result in a significant loss of jobs and reduction of tax revenue in California.

Am. Compl. ¶73, Ex. L (emphasis added). Unable to protect California egg farmers from the cost increases imposed on them by California voters' agricultural policy choices, the Legislature decided to "level the playing field" by imposing the same costs on farmers *in other states*—

[4] The actual difference in time to come into compliance is likely much greater. California egg farmers probably knew about Prop 2 long before it appeared on the ballot but certainly no later than the day of the election. It is doubtful that egg farmers in Plaintiff States knew of AB1437—a law enacted across the country in another state —any earlier than the day it was passed and probably learned about it much later.

farmers with no recourse to change California law through the political process. The result was AB1437. Whereas Prop 2 prohibits people *in California* from keeping an egg-laying hen in a cage *in California* unless the hen has sufficient space to stand up, lie down, turn around, and fully extend its limbs *in California*, AB1437 has no impact on the living conditions of any egg-laying hens *in California*. Rather, it prohibits a class of eggs from entering or moving through the California stream of commerce based on conduct by the eggs' producers upstream and out-of-state. Yet, thanks to Prop 2, the disfavored conduct on which California discriminates between eggs that may and may not be sold *within* its borders is conduct that—conveniently for California's egg farmers—*can only occur outside of those borders*. In other words, AB1437 may appear neutral on its face, but it has the purpose and effect of discriminating against out-of-state egg producers.

In their motions to dismiss, Movants rely heavily on *Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 948 (9th Cir. 2013), to suggest Plaintiffs dormant Commerce Clause claims are "foreclosed." HSUS Mem. at 2; ACEF Mem. at 1. As a preliminary matter, the stark difference in procedural posture between that case and this one severely undermines Movant's arguments. In *Ass'n des Eleveurs*, the Ninth Circuit affirmed the district court's denial of the plaintiffs' motion for preliminary injunction. 729 F.3d at 944. The standard of review on appeal of a preliminary injunction is highly deferential: the Ninth Circuit "may reverse the district court only where the district court relied on an erroneous legal premise or abused its discretion." *Id.* Moreover, the bar for granting a preliminary injunction in the first place is quite high, and the burden is on the plaintiff to show "serious questions going to the merits and a hardship balance that tips sharply toward the plaintiff." *Id.* (quoting *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). By contrast, when considering a motion to dismiss, "this court must construe the complaint in the light most favorable to the plaintiff and accept as true the factual allegations of the complaint." *Mony Life Ins. Co. v. Marzocchi*, 857 F. Supp. 2d 993, 995 (E.D. Cal. 2012) (citing *Erickson v. Pardus*, 551 U.S. 89, 93–94, 127 S.Ct. 2197, 167 L.Ed.2d 1081 (2007)). Procedurally speaking, the two cases are apples and oranges.

Even if the same legal standard applied in both cases, AB1437 has a much stronger stench of economic protectionism than the complete foie gras at issue in *Ass'n des Eleveurs*. In

that case, California banned the sale within its borders of any product that was "*the result* of force feeding a bird for the purpose of enlarging the bird's liver beyond normal size." Cal. Health & Safety Code § 25982 (emphasis added). Noting that another section in the same chapter prohibited the *act* of force feeding itself within California, *see id.* §25981, plaintiff foie gras producers argued that in practical effect § 25982 would only harm producers outside the state. The Ninth Circuit disagreed, reasoning that §25981 and §25982 complement one another as two parts of a unified regulatory regime to "discourage the consumption of products produced by force feeding birds and prevent complicity in a practice that it deemed cruel to animals." *Ass'n des Eleveurs*, 729 F.3d at 952. As the court explained,

> Section 25981 prohibits entities from force feeding birds in California. But for §25981, a California producer could force feed ducks in California, and then sell foie gras outside of California. Section 25981, however, does not prohibit *the sale* of products produced by force feeding birds. That is where § 25982 comes in. Section 25982 applies to both California entities and out-of-state entities and precludes sales within California of products produced by force feeding birds regardless of where the force feeding occurred. Otherwise, California entities could obtain foie gras produced out-of-state and sell it in California.

Ass'n des Eleveurs de Canards, 729 F.3d at 949. Finding that "[s]ection 25982's economic impact does not depend on where the items were produced, but rather how they were produced," the Ninth Circuit held that a "statute that treat[s] all private companies exactly the same does not discriminate against interstate commerce … even when only out-of-state businesses are burdened because there are no comparable in-state businesses." *Id.* (citing *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 119–20 (1978)).

The Supreme Court case on which the Ninth Circuit relied does not support a similar conclusion in this case. In *Exxon*, Maryland enacted a law prohibiting petroleum producers and refiners from operating retail gas stations. 437 U.S. at 119. Observing that *every* petroleum producer and refiner that also owned retail stations in the state just happened to be an out-of-state business, Exxon argued that the law had a discriminatory effect: Because there were no

petroleum producers or refiners based in Maryland at the time, the only parties affected by the law were all out-of-state businesses. *Id.* at 125. The Supreme Court rejected Exxon's argument, however, noting that out-of-state petroleum *marketers* were still permitted to operate retail stores in Maryland; only *producers* and *refiners* were excluded. That every producer or refiner that operated retails stores in Maryland just happened to be an out-of-state entity was a coincidence that "does not lead, either logically or as a practical matter, to a conclusion that the State is discriminating against interstate commerce at the retail level." *Id.* at 125.

The Ninth Circuit cites this dictum in *Exxon* to suggest that it could not infer from the pre-existing absence of in-state foie gras producers that the ban on foie gras was aimed only at interstate commerce. *See Ass'n des Eleveurs*, 729 F.3d at 948. In both *Exxon* and *Ass'n des Eleveurs*, however, there were no comparable in-state businesses before the challenged statute was enacted. That is not the case here. As HSUS notes in its motion, almost 95% of the 292 million egg-laying hens in the United States are housed in conventional cages that do not comply with Prop 2. HSUS Mem. at 3. Prop 2 was enacted specifically to prohibit the use of these ubiquitous conventional cages in California by 2015. Thus, the *only* reason there will be no comparable in-state business affected by AB1437 is because California has legislated them out of existence. That was not the case in *Exxon* or *Ass'n des Eleveurs.* There was no *second* law in Maryland, as there is here, that actually *prohibited* the production or refinement of petroleum products in that state. There just weren't any producers or refiners in Maryland at the time. And while there was a second law in *Ass'n des Eleveurs*—banning not only sales of products resulting from force feeding but the act of force feeding itself—as in *Exxon*, there were no force-feeding foie gras producers in California at the time both laws were passed. By contrast, prior to the enactment of Prop 2, almost all hens in California were housed in conventional cages. It was only *after* conventional cages were outlawed by the voters through Prop 2, thus creating a market advantage for egg producers in other states, that the California Legislature enacted its ban on the sale of eggs from conventional cages. Given the timing of AB1437's passage and the warnings that California's egg industry would be doomed without it, there is *every reason* for this Court to infer that California enacted AB1437 with the sole purpose of hindering out-of-state competition.

The relationship between AB1437 and Prop 2 is very different from the relationship between §§ 25981-82 in *Ass'n des Eleveurs*. Those complementary laws were enacted on the *same day* (September 29, 2004) by the *same body* (the California Legislature) as part of the *same piece of legislation* (SB1520) and provided the *same amount of time* for in-state and out-of-state parties adversely affected by the statute to adjust their business for the coming change in the law (seven years and ten months—from September 29, 2004 through July 1, 2012). Moreover, §§25981-82 purported to have the *same legislative purpose* (animal welfare). By contrast, Prop 2 and AB1437 were enacted one year and seven months apart: Prop 2 was passed on November 2, 2008, whereas AB1437 passed on June 6, 2010. Prop 2 and AB1437 were made into law by different bodies through different democratic processes: Prop 2 was enacted by California voters through direct ballot initiative, whereas AB1437 was enacted by the California Legislature through votes in the Assembly and the Senate. Prop 2 gave California egg farmers 2,249 days to bring their farms and businesses into compliance before the new law would go into effect, whereas AB1437 gave Plaintiffs' egg farmers only 1,640 days.

Most strikingly, however, Prop 2 and AB1437 purport to have very different legislative *purposes*. Entitled the "Prevention of Farm Animal Cruelty Act," Prop 2 expressly states, "The *purpose* of this act is *to prohibit the cruel confinement of farm animals* in a manner that does not allow them to turn around freely, lie down, stand up, and fully extend their limbs." Am. Compl. Ex. A (emphasis added). Prop 2 says *nothing* about human health and safety, *nothing* about salmonella contamination. AB1437 tells a different story. Entitled "Treatment Of Animals--Shelled Eggs--Sale For Human Consumption," AB1437 purports to be based on the following Legislative Findings:

(a) According to the Pew Commission on Industrial Farm Production, 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.

(b) A key finding from the World Health Organization and Food and Agricultural Organization of the United Nations Salmonella Risk

> Assessment was that reducing flock prevalence results in a directly proportional reduction in human health risk.
>
> (c) Egg–laying hens subjected to stress are more likely to have higher levels of pathogens in their intestines and the conditions increase the likelihood that consumers will be exposed to higher levels of food-borne pathogens.
>
> (d) Salmonella is the most commonly diagnosed food-borne illness in the United States.
>
> (e) It is the intent of the Legislature 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.

Cal. Health & Safety. Code §25995. To the extent AB1437 even *mentions* animal welfare, it does so only as a means of protecting human health. The stark difference between the stated purposes of Prop 2 and AB1437 reeks of pretext and protectionism. If AB1437 imposed Prop 2's cage-size standards on out-of-state egg producers ***for the purpose*** of lowering the risk of salmonella contamination, one would expect Prop 2 to have made ***at least a passing reference*** to salmonella prevention.

The discriminatory purpose behind AB1437 is reminiscent of the labeling requirement invalidated by the Supreme Court in *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333 (1977). In that case, North Carolina enacted a statute that required closed containers of apples sold in the state to display either the applicable USDA grade or none at all. *Id.* at 337. That was a problem for apple producers in Washington, whose legislature had approved a stringent inspection and grading program to enhance the state's reputation as the nation's leading producer of apples. The Washington State grades, proudly displayed on the outside of their shipping containers, were equal to or better than the comparable grades and standards adopted by the USDA. *Id.* at 336. Thus, the North Carolina regulation required Washington to strip its carefully cultivated grading system from apple crates bound for North Carolina, depriving Washington apple growers from taking advantage of the state's reputation in which they invested

time and resources. Additionally, the nature of the apple market makes it impossible to know where each apple is going to end up when it is packed. Thus, if Washington apple growers wanted any of their apples to go to North Carolina, they would either have to repackage their products at the Carolina border or change their marketing practices nationwide.

The Supreme Court held the North Carolina regulation favored North Carolina apple growers who, "unlike their Washington competitors, were not forced to alter their marketing practices in order to comply with the statute…. Obviously, the increased costs imposed by the statute would tend to shield the local apple industry from the competition of Washington apple growers and dealers who are already at a competitive disadvantage because of their great distance from the North Carolina market." *Id.* at 351. The regulation also discriminated against Washington apples by "stripping away … the competitive and economic advantages it has earned for itself through its expensive inspection and grading system. Once again, the statute had no similar impact on the North Carolina apple industry and thus operated to its benefit." *Id.* Most importantly,

> the statute has a leveling effect which insidiously operates to the advantage of local apple producers.... [W]ith free market forces at work, Washington sellers would normally enjoy a distinct market advantage vis-à-vis local producers in those categories where the Washington grade is superior. However, because of the statute's operation, Washington apples which would otherwise qualify for and be sold under the superior Washington grades will now have to be marketed under their inferior USDA counterparts.

Id. at 351-52. This "leveling effect," noted the Supreme Court, was "the very sort of protection against competing out-of-state products that the Commerce Clause was designed to prohibit." *Id* at 352. Despite the statute's facial neutrality, the Supreme Court found the regulation's declared purpose—protecting North Carolina consumers from deception and fraud—to be "somewhat suspect." *Id.* The Court agreed that protecting consumers from deception was a legitimate state interest, but "the challenged statute does remarkably little to further that laudable goal." *Id.* at 353. "Since the statute does nothing at all to purify the flow of information at the retail level, it does little to protect consumers against the problems it was designed to eliminate," especially

since "nondiscriminatory alternatives to the outright ban of Washington State grades are readily available." *Id.* at 354.

In much the same vein, AB1437 similarly forces out-of-state producers to change their current practices in their home state. Just as Washington State's policy choices about apple production gave its apple producers a competitive advantage over North Carolina producers under free market forces, Plaintiff States have made agricultural policy choices about egg production in our states that should have given our egg producers a competitive advantage over California producers under free market forces. Like the North Carolina apple regulation, AB1437 has a "leveling effect which insidiously operates to the advantage of" California egg producers by "stripping away … the competitive and economic advantages" resulting from our states' policy decisions. Moreover, the stated purposed of AB1437 to protect the public health by lowering the risk of salmonella contamination is more than just "somewhat suspect" given statements like those in the California Health & Human Services Enrolled Bill Report on AB1437 that there is "[n]o scientific evidence to support assertion of salmonella prevention." Am. Compl. Ex. K, at 5. And, as eggs are routinely washed and inspected for salmonella contamination already under both federal and state law, "nondiscriminatory alternatives to the outright ban … are readily available."

The discriminatory purpose behind 3 CA ADC §1350(d)(1) is even more obvious than that of AB1347. Entitled "Shell Egg Food Safety," the first three subsections of §1350—which Plaintiffs are not challenging in this suit—are clearly aimed at preventing salmonella contamination. Subsection §1350(a) states the regulation's purpose "to assure that healthful and wholesome eggs of known quality are sold in California." Subsection §1350(b) exempts pasteurized shell eggs from the regulation's reach as long as the pasteurization process "achieves at least a 5-log destruction of SE [salmonella enteritidis] for shell eggs as defined in 21 CFR section 118.3." And subsection § 1350(c) requires egg producers with more than 3,000 hens to do each of the following:

(1) Implement Salmonella enterica serotype Enteritidis (SE) prevention measures in accordance with the Food and Drug Administration, Department of Health and

> Human Services' requirements for the production, storage, and transportation of shell eggs as specified in 21 CFR Part 118;
>
> (2) Implement a SE environmental monitoring program which includes testing for SE in "chick papers," (the papers in which chicks are delivered) and the house environment when the pullets are 14-16 weeks of age, 40-45 weeks of age, 4-6 weeks post-molt, and pre-depopulation; and
>
> (3) Implement and maintain a vaccination program to protect against infection with SE which includes at a minimum two attenuated live vaccinations and one killed or inactivated vaccination, or a demonstrated equivalent SE vaccination program approved by the Department.

Id. § 1350(c). Subsections (a) through (c) of §1350 took effect January 1, 2013. *Id.* §1350(a).

Subsection (d), like its statutory big sisters Prop 2 and AB1347, places minimum size requirements on cages for egg-laying hens. But where Prop 2's minimum cage sizes are described rather ambiguously in terms of bird behavior (e.g., enough room for the hen to turn around and extend its wings), §1350(d)(1) prescribes actual dimensions (e.g., an enclosure housing eight or more hens must provide at least 117 square inches of floor space her hen). *Id.* §1350(d)(1). Unlike the other three subsections of §1350, subsection (d) does not take effect until January 1, 2015—the same day as Prop 2 and AB1437. §1350(d). Thus, subsections (a) through (c) put specific measures for preventing salmonella contamination in place two years before requiring the additional space.

Presumably, CDFA provided a later effective date for subsection (d) to match Prop 2 and AB1437, but that raises a number of questions. First, what does §1350(d)(1) do in addition to Prop 2? Since a regulation cannot impose a standard less stringent than a statute, either Prop 2's behavior-based size restrictions must be smaller than 117 square inches per bird or §1350(d)(1) violates Prop 2. Second, subsections (a) through (c) do not purport to impose any obligations on egg producers *outside of California*, but subsection (d) makes clear that anyone who wants to sell eggs in California must comply with the size restrictions in subsection (d) regardless of the state in which the hens are kept. One wonders why CDFA decided to impose its cage-size restrictions on out-of-state egg farmers who want to sell eggs in California but not vaccinations or

inspections unless the purpose of the former is not to prevent salmonella but rather to neutralize the market advantage Prop 2 gave out of state egg producers.

B. Plaintiff States have sufficiently alleged that the Shell Egg Laws regulate extraterritorial activity in violation of the dormant Commerce Clause by altering the methods of egg production in Plaintiff State even as to eggs that will never be sold in California.

The Supreme Court has held on numerous occasions that the "Commerce Clause ... precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State," *Edgar v. MITE Corp*., 457 U.S. 624, 642-643 (1982) (plurality opinion). The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State. *Healy v. Beer Inst., Inc*., 491 U.S. 324, 336-37 (1989). "The practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation." *Id.*

As a practical matter, AB1437 regulates commerce occurring entirely outside of California by forcing egg farmers in Plaintiff States to change their production methods to comply with California law even for the portion of their eggs they intend to sell in-state or in other states beside California. As Plaintiffs have alleged and will prove at trial, it is not feasible for egg farmers in Plaintiff States to maintain some facilities that comply with AB1437 and some that do not. Am. Compl. ¶¶84-85. California's demand for eggs fluctuates throughout the year, but California-compliant eggs would be too expensive to sell anywhere else. Thus, AB1437 makes egg farmers *choose* whether to convert their entire operation to comply with California law or forgo California sales entirely.

Waste haulers in Wisconsin faced a nearly identical dilemma in *Nat'l Solid Wastes Mgmt. Ass'n v. Meyer*, 63 F.3d 652 (7th Cir. 1995). In that case, Wisconsin law barred certain kinds of waste from Wisconsin landfills unless that waste was generated "in a region that has an effective recycling program" as defined by Wisconsin law. *Id.* at 654. On its face, the law imposed the same requirements on in-state and out-of-state trash. But as a practical matter, in-state garbage

was much more likely to be generated "in a region that has an effective recycling program" because *every* region within Wisconsin is subject to Wisconsin law already. On the other hand, an out-of-state community may export its waste to Wisconsin landfills only if it first adopts recycling standards established by the Wisconsin legislature. Holding that the landfill law regulated extraterritorial activity, the Seven Circuit explained,

> The Wisconsin statute creates an embargo on waste from a hauler from another state, or a community within that state, unless that political entity has decided to adopt the Wisconsin view of environmental management. No matter what the alternate approaches to recycling may offer in terms of environmental benefits and costs, a waste generator/hauler can pass the Wisconsin border only if its community has opted for the Wisconsin plan. Similarly, the Wisconsin disposal site is deprived of the waste from out-of-state not because it is more noxious than waste produced the Wisconsin way, but simply because it comes from a community whose ways are not Wisconsin's ways. Moreover, the Wisconsin statute places the participant in interstate commerce in a difficult situation with respect to its participation in interstate commerce with other states. As we have noted earlier, if Wisconsin can insist on interstate haulers doing things the Wisconsin way in order to obtain access to the Wisconsin market, other states can insist on similar or different prerequisites to their markets.

Id., 661-62. AB1437 regulates out-of-state conduct in exactly the same way as the Wisconsin landfill law: it forces out-of-state egg producers to conform their production methods to California standards for if they want to export their eggs into California.

To see just how closely AB1437 mirrors the constitutional infirmities of the Wisconsin landfill law, take the Seventh Circuit's description above but substitutes "eggs" for "waste"; "California" for "Wisconsin"; "farmer" for "hauler"; and "salmonella prevention" for "recycling/environmental":

> The [California] statute creates an embargo on [eggs] from [farmers] from another state, or a community within that state, unless that political entity has decided to adopt the [California] view of [salmonella prevention]. No matter what the

> alternate approaches to [salmonella prevention] may offer in terms of [salmonella prevention] benefits and costs, an [egg] [farmer] can pass the [California] border only if its community has opted for the [California] plan. Similarly, the [California] disposal site is deprived of the [eggs] from out-of-state not because [they] [are] more noxious than [eggs] produced the [California] way, but simply because [they] come[] from a community whose ways are not [California's] ways. Moreover, the [California] statute places the participant in interstate commerce in a difficult situation with respect to its participation in interstate commerce with other states. As we have noted earlier, if [California] can insist on interstate [farmers] doing things the [California] way in order to obtain access to the [California] market, other states can insist on similar or different prerequisites to their markets.

As a practical matter, most egg farmers that currently ship eggs to California will have to comply with AB1437 unless they want to lose a huge portion of their business, but that also means that they will have to charge more for the eggs they sell in their home state. Effectively, AB1437 forces egg farmers in Plaintiff States to adopt California's approach to hen housing and raise their prices in their home states if they want to participate in interstate commerce with California.

C. Plaintiffs have sufficiently alleged that the Shell Egg Laws impose extraordinary burdens on interstate commerce far in excess of their putative local benefits on the risk of salmonella contamination.

Even if a challenged statute neither discriminates against out-of-state interests nor regulates extraterritorial conduct, it still violates the dormant commerce clause if the burden it imposes on such commerce is "clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). This balancing test requires the court to weigh the burden on interstate commerce against the alleged benefit to the state restricting trade. "If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved,

and on whether it could be promoted as well with a lesser impact on interstate activities." *Id.* *This is a fact intensive inquiry*.

Plaintiffs have alleged that AB1437 places *extraordinary* burdens on the sale of eggs through interstate commerce by forcing egg farmers in Plaintiff States to invest hundreds of millions of dollars in new capital improvements and increased production costs as the price of admission into California's markets. And as discussed above, those higher costs increase the price of eggs not just in California but in Plaintiff States as well. Plaintiffs will establish the amount of burden at trial through expert testimony. Plaintiffs have also alleged the putative local interests California claims to advance through AB1437 are mere pretext for economic protectionism. At trial, Plaintiffs will offer expert testimony showing that there is no scientific basis for AB1437's dubious causal link between cage size and salmonella contamination and, therefore, that the burdens on interstate commerce far exceed any purported benefit to public health. Both California and HSUS cite animal welfare as an additional "local interest" advanced by AB1437, but the only animals whose welfare AB1437 could possibly affect are *those in Plaintiff States* because Prop 2 already imposes the same restrictions on California farmers.

Furthermore, this divide has the potential to cause the development of two different egg markets separated by the California border. Allowing states to discriminate against out-of-state egg producers invites "a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause." *Granholm v. Heald*, 544 U.S. 460, 473 (2005)(quoting *Dean Milk Co. v. Madison*, 340 U.S. 349, 356 (1951)). A corollary concern of the dormant Commerce Clause is that "this Nation is a common market in which state lines cannot be made barriers to the free flow of both raw and finished goods." *Nat'l Ass'n of Optometrists & Opticians v. Harri*s, 682 F.3d 1144, 1148 (2012).

III. Plaintiffs have sufficiently alleged that the Shell Egg Laws are preempted by the federal Egg Products Inspection Act, 21 U.S.C. §1031 et seq.

California claims that its legislature passed AB1437 to protect California consumers from salmonella-contaminated eggs by lowering the stress levels of egg-laying hens. Cal. Health & Safety Code § 25995. Plaintiffs will prove that this "food-safety" rationale is a pretext for protecting California's egg industry from out-of-state competition by increasing the production costs of egg farmers across the country. But even if the Court were to believe that AB1437 was actually intended to prevent salmonella contamination, the law would be preempted by the federal Egg Products Inspection Act ("EPIA"), 21 U.S.C. §1031 et seq.

Article VI provides that the federal Constitution "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. The Supremacy Clause grants Congress the power to preempt state law in any of three ways:

> First, Congress may preempt state law by so stating in express terms. Second, preemption may be inferred when federal regulation in a particular field is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. In such cases of field preemption, the mere volume and complexity of federal regulations demonstrate an implicit congressional intent to displace all state law. Third, preemption may be implied when state law actually conflicts with federal law. Such a conflict arises when compliance with both federal and state regulations is a physical impossibility, or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Aguayo v. U.S. Bank, 653 F.3d 912, 918 (9th Cir. 2011). "These three forms of preemption are commonly referred to as express, field, and conflict preemption, respectively." *Id.* "[T]he dispositive issue in any federal preemption question remains congressional intent: Did Congress, in enacting the Federal Statute, intend to exercise its constitutionally delegated authority to set aside the laws of a State? If so, the Supremacy Clause requires courts to follow federal, not state, law." *Id.*

A. Congress intended the Egg Products Inspection Act to establish uniform national standards for the "quality" and "condition" of shell eggs to reduce trade barriers between the states and prevent salmonella contamination.

Although the Agricultural Marketing Act of 1946 (7 U.S.C. § 1622(c)) "directed and authorized" the Secretary of the Agriculture "[t]o develop and improve standards of quality, condition, quantity, grade, and packaging, and recommend and demonstrate such standards in order to encourage uniformity and consistency in commercial practices," 7 U.S.C. § 1622(c), (d), and (h) (emphasis added), the Secretary never developed any national standards for the quality or condition of shell eggs. The resulting patchwork of inconsistent state regulations was impeding interstate commerce while not adequately protecting the public from egg-borne pathogens like salmonella.

In 1970, Congress concluded that it was "essential, in the public interest, that the health and welfare of consumers be protected by the adoption of measures … for assuring that eggs … are wholesome, otherwise not adulterated, and properly labeled and packaged." 21 U.S.C. § 1031. To that end, Congress passed the Egg Productions Inspection Act, 21 U.S.C. § 1031 et seq., which elevated the Agricultural Marketing Act's precatory goal of uniform national standards for shell eggs to a legislative mandate:

> It is hereby declared to be the policy of the Congress to provide … restrictions upon the disposition of certain qualities of eggs, and ***uniformity of standards for eggs***, and otherwise regulate the processing and distribution of eggs and egg products as hereinafter prescribed to prevent the movement or sale for human food, of eggs and egg products which are adulterated.

21 U.S.C. § 1032 (emphasis added). To promote the establishment and success of truly uniform national standards, Congress unequivocally expressed its intent that the EPIA preempt state law: "For eggs which have moved or are moving in interstate or foreign commerce, no State or local jurisdiction may require the use of standards of quality [or] condition …, which are in addition to or different from the official Federal standards." 21 U.S.C. § 1052(b).

The precise preemption question before this Court is the Shell Egg Laws "require the use of standards of quality [or] condition …, which are in addition to or different from the official

Federal standards" imposed by the EPIA. If so, they are preempted. Neither "condition" nor "quality" is defined in the statute, but the EPIA grants USDA broad authority to promulgate "such rules and regulations as he deems necessary to carry out the purposes or provisions of this chapter." 21 U.S.C. § 1043. Pursuant to that rulemaking authority, USDA has defined "quality" to mean "the inherent properties of any product which determine its relative degree of excellence." 7 C.F.R. § 57.1. USDA defined "condition" even more broadly to mean "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.

As used in the EPIA's preemption clause, "condition" is much broader than—and completely subsumes—"adulterated," which the EPIA defines as "bear[ing] or contain[ing] any poisonous or deleterious substance [like salmonella or other bacteria] which may render it injurious to health." 21 U.S.C. § 1033. Eggs that are contaminated with salmonella or other harmful bacteria are clearly "adulterated" within the meaning of the §1033 of the EPIA because they bear or contain a poisonous or deleterious substance. *See also United States v. 1200 Cans of Pasteurized Whole Eggs*, 339 F.Supp. 131, 136 (N.D. Ga. 1972) (eggs containing salmonella are "adulterated" for purposes of the Food, Drug, and Cosmetic Act, 21 U.S.C. § 342(a) (1), which uses the same definition of "adulterated" as the EPIA). But salmonella contamination is also a "condition" of eggs within the meaning of §1052(b). It is difficult to imagine any characteristic more likely to affect the merchantability of shell eggs than "bearing or containing a poisonous or deleterious substance" like salmonella. *Compare* 7 C.F.R. § 57.1 *with* 21 U.S.C. § 1033.

Other federal courts have held that state regulations concerning the quality or condition of shell eggs, even though not directly in conflict with federal law, are completely preempted by the EPIA. In *United Egg Producers v. Davilla*, 871 F.Supp. 106, 108-109 (D. Puerto Rico 1994), *affirmed* 77 F.3d 567 (1st Cir. 1996), the court invalidated state regulations that required eggs be sold within 42 days, imposed additional standards for eggs sold as "fresh," and prohibited marketing eggs in a weight class inferior to "small." 871 F.Supp. at 108-09. Because these provisions imposed standards for ***quality, condition and weight*** of shell eggs that were "in

addition to or different than" federal law, they were expressly preempted by the EPIA. *Id.* The court further invalidated a pair of local regulations that required egg cartons (a) to be labeled with the name or address of the importer of the eggs and (b) to be approved by the Puerto Rican Secretary of Agriculture, both of which imposed standards for packaging and labeling "in addition to or different than" those imposed by the EPIA. *Id*.

Arguably, salmonella contamination also falls within the USDA's definition of "quality" set forth in 7 CFR § 57.1. In *Koretoff v. Vilsack*, 841 F.Supp.2d 1 (D.D.C. 2012) *affirmed* 707 F.3d 394 (D.C. Cir. 2013), the court held that USDA salmonella control regulations concerning California almonds were within the Secretary's power under the Agricultural Marketing Agreement Act of 1937 because that Act authorizes the Secretary to adopt regulations concerning the "quality" of almonds. In that case, "quality" was not defined in the statute at issue, so the court looked to the Oxford English Dictionary for its plain meaning. In substantially similar terms to USDA's definition of quality in this case ("the inherent properties of any product which determine its relative degree of excellence"), the OED defined the "quality" of a thing as "[a]n attribute, property; a special feature or characteristic," or "[a] particular class, kind, or grade of something, as determined by its character, esp[ecially] its excellence." *Id.* at 10. Based on that definition, the court in *Koretoff* concluded that "whether almonds are contaminated by *Salmonella* might reasonably be deemed a 'property' or a 'characteristic' of almonds, and *Salmonella*-free almonds might constitute a 'particular class' of almonds defined by 'its excellence.'" *Id.*

B. The cage-size provisions of the Shell Egg Laws impose standards of quality and condition on the sale of eggs in California "which are in addition to or different from the official Federal standards."

Before its can determine whether AB1437 "require[s] the use of standards of quality [or] condition …, which are in addition to or different from the official Federal standards," the Court must first determine what standards of quality or condition are imposed by the EPIA and AB1437 respectively. In the EPIA, Congress found it "essential" to "the health and welfare of consumers" for the federal government to adopt measures "for assuring that eggs … are … not

adulterated." 21 U.S.C. § 1031. Based on that finding, Congress adopted a "policy … to provide … restrictions upon the disposition of certain qualities of eggs, and uniformity of standards for eggs, … to prevent the movement or sale for human food, of eggs and egg products which are ***adulterated***." *Id*. § 1032. Finally, Congress defined "adulterated" to include salmonella contamination. *Id*. § 1033. Read together, these three consecutive provisions show that Congress intended the EPIA to impose ***uniform national standards for eggs related to the quality or condition of being adulterated with salmonella*** or other dangerous bacteria.

This conclusion is also supported by the legislative history. In his statement the U.S. Committee on Agriculture during its review of the EPIA, Assistant Secretary of Agriculture Richard Lyng, stated as follows:

> Salmonellosis is one of the major food-borne illnesses affecting human beings. Salmonellae and other pathogenic bacteria are carried on the shell of the dirty egg and may result in contamination when the egg is broken. In addition, if the shell is cracked or broken, bacteria may enter the egg….
>
> To insure uniformity of labeling, standards, and other provisions and enhance the free movement of eggs and egg products in interstate commerce, the bill would provide that … ***no state*** or local jurisdiction ***could restrict entry of shell eggs to only those meeting certain of the Federal grade standards or weight classes or otherwise require the use of shell egg standards of quality [or] condition … in addition to or different from the Federal standards….*** Most states have closely patterned their requirements for standards, grades, and weight classes after the official standards used by the U.S. Department of Agriculture. A few states have different requirements. This has been a great concern to producers and handlers in States shipping their eggs into these areas, as they are virtually grading under two sets of requirements—one the requirements for the State of origin, and two, for the State where the eggs are received. Such barriers hinder orderly marketing and tend to increase marketing costs….

> In conclusion, ***legislation is needed to regulate the movement of eggs that could pose a public health problem, insure the wholesomeness of egg products, and provide uniformity in labeling and standards for eggs and egg products***.

H.R. Rep. No. 91-1670 (Dec. 3, 1970), attached to this Opposition as Ex. 1, at pp. 2-6.

Just as Congress intended when it passed the EPIA, the California Legislature intended AB1437 to impose standards for sale of eggs in California based on a "quality" or "condition" allegedly related to the likelihood that such eggs would be adulterated with salmonella. In its Legislative findings and declarations, the Legislature concluded that "Egg-laying hens subjected to stress are more likely to have higher levels of pathogens in their intestines and the conditions increase the likelihood that consumers will be exposed to higher levels of food-borne pathogens." Cal. Health & Safety Code § 25995(c). Based on this alleged correlation between stress and salmonella contamination, the Legislature declared its "intent … 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). And to effectuate the Legislature's intent to protect its citizens from increased exposure to salmonella, Cal. Health & Safety Code § 25996 categorically bars the sale of any egg that is "the product of an egg-laying hen that was confined on a farm or place that is not incompliance with the animal care standards" of Prop 2.

Regardless of how California packages § 25996, being "the product of an egg-laying hen that was confined on a farm or place that is not in compliance with the animal care standards set forth in Chapter 13.8" ***is just another standard of quality or condition*** that California is trying to impose on the sale of eggs. More importantly, it is a standard of quality or condition that is ***in addition to or different from*** the standards of quality and condition imposed by the EPIA. Recall that "quality," as used in 21 U.S.C. § 1052(b), means "the inherent properties of any product which determine its relative degree of excellence." 7 C.F.R. § 57.1. And "condition" means "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. If, as California contends, egg-laying hens living in conventional cages really are more likely to have higher levels of pathogens in their intestines than cage-free hens—and therefore more likely to lay eggs contaminated with salmonella—then surely ***not*** being the product of a hen confined in violation of Prop 2 must be an "inherent propert[y]" of an egg "which determine[s] its relative degree of excellence" as well as a "characteristic affecting [an egg's] merchantability including [its] cleanliness, soundness, wholesomeness, or fitness for human food."

Where Congress has expressly declared a policy of national uniformity with respect to the standards of quality and condition of an agricultural product, the Supreme Court has held that such legislation preempts the field and leaves no room for state laws that are different from or in addition to federal law. *Campbell v. Hussey*, 368 U.S. 297, 300-302, 82 S.Ct. 327 (1962) (holding that non-conflicting supplementary state labeling regulations for tobacco were completely preempted by the Federal Tobacco Inspection Act). As the Supreme Court explained in *Campbell*:

> We do not have here the question whether Georgia's law conflicts with the federal law. Rather we have the question of pre-emption. Under the federal law there can be but one 'official' standard—one that is 'uniform' and that eliminates all confusion by classifying tobacco not by geographical origin but by its characteristics. In other words, our view is that Congress, in legislating concerning the types of tobacco sold at auction, preempted the field and left no room for any supplementary state regulation concerning those same types. As we have seen, the Federal Tobacco Inspection Act in § 2, 7 U.S.C. § 511a, says that '***uniform standards of classification and inspection***' are '***imperative for the protection of producers and others engaged in commerce and the public interest therein***.'…
>
> We have then a case where the federal law excludes local regulation, even though the latter does no more than supplement the former. Under the definition of types or grades of tobacco and the labeling which the Federal Government has adopted,

> complementary state regulation is as fatal as state regulations which conflict with the federal scheme.

368 U.S. at 300-01, 302 (emphasis added). The EPIA goes even further than the Tobacco Inspection Act. Like that law, the EPIA includes an express mandate for national uniformity in regulation; but unlike the Tobacco Inspection Act, the EPIA also includes an express preemption clause. 21 U.S.C. § 1052(b). Similarly, in *National Meat Assn v. Harris*, 132 S.Ct. 965, 181 L.Ed.2d 950 (2012), the Supreme Court held that where, as here, a federal statute contains a preemption clause prohibiting state and local requirements "in addition to, or different than" those provided under federal law, the "preemption clause sweeps widely—and in so doing, blocks the application of [the state law] challenged here. The clause prevents a State from imposing any additional or different—even if non-conflicting—requirements that fall within the scope of the Act." 132 S.Ct. at 969-70.

As noted at the outset of our memorandum in opposition, Plaintiffs dispute that AB1437 has anything to do with public health and rather everything to do with protecting California egg farmers from out-of-state competition. But even if the Court were to conclude that the California Legislature actually passed AB1437 "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," Cal. Health & Safety Code § 25995(e), then the Court should also conclude that AB1437 "require[s] the use of standards of quality [or] condition …, which are in addition to or different from the official Federal standards" of the EPIA. Accordingly, AB1437 and §1350 are expressly preempted by 21 U.S.C. §1052(b) and Article VI of the United States Constitution.

CONCLUSION

For the reasons stated above, this Court has subject-matter jurisdiction over Plaintiffs' *parens patriae* claims, and Plaintiffs have sufficiently stated a claim for which relief can be granted under both the Commerce and Supremacy Clauses of the United States Constitution. The motions to dismiss filed by California and HSUS should therefore be denied.

May 16, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on May 16, 2014, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

PLAINTIFFS' AMENDED COMBINED OPPOSTION TO DEFENDANTS' MOTION TO DISMISS, PROPOSED DEFENDANT-INTERVENOR HSUS'S PROPOSED MOTION TO DISMISS, AND PROPOSED DEFENDANT-INTERVENOR ACEF'S PROPOSED MOTION FOR JUDGMENT ON THE PLEADINGS

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ J. Andrew Hirth

J. ANDREW HIRTH