No. 14-17111

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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-Appellants,

v.

KAMALA D. HARRIS, Attorney General of California; and
KAREN ROSS, Secretary of the
California Department of Food and Agriculture,

Defendants-Appellants

and

THE HUMANE SOCIETY OF THE UNITED STATES, and
THE ASSOCIATION OF CALIFORNIA EGG FARMERS,

Defendants-Intervenors-Appellees.

Appeal from the United States District Court for the Eastern District of California • Hon. Kimberly J. Mueller, District Judge

BRIEF OF THE AMERICAN FARM BUREAU FEDERATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

The American Farm Bureau Federation is a voluntary farm organization. It has no parent company and does not issue stock.

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INTRODUCTION & INTEREST OF THE *AMICUS*[*]

AB1437 presents out-of-state egg producers with a no-win choice. On the one hand, they can choose not to comply with the law, thereby opting out of an egg market that accounts for one in every eight eggs sold in the United States—10 billion in total. On the other hand, they can choose to comply with AB1437, which requires incurring the enormous capital costs associated with discarding their current cage systems and installing the cage systems required by California law. Estimates by the Congressional Research Service suggest that the transition costs will be between $25 and $30 per hen. For a medium-sized farm with 300,000 egg-laying hens, that means investing between $8 million and $9 million. Both choices are effectively irreversible: neither exiting a large market and its distribution networks nor investing in new capital equipment is easily undone.

AB1437 risks far more than harm to egg producers. Consumers will suffer as well. If allowed to remain in effect, AB1437 will dramatically reduce the supply of eggs in California, driving egg prices there through the roof—by over 40% for table eggs and 100% for other egg products, if

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* No party or counsel for any party authored this brief in whole or in part or otherwise contributed monetarily towards its preparation or submission. No other person other than the *amicus* and its members and counsel contributed monetarily towards the preparation or submission of this brief. All parties have consented to the filing of this brief.

the European experience is any guide. By the same token, because many farmers will elect not to upgrade their facilities to comply with AB1437, the law will flood markets outside of California with eggs that otherwise would have been sold within California. Prices will plummet throughout the rest of the Nation. The district court speculated that a drop in prices might benefit consumers—but it would not. If prices plummet, many egg farmers will be driven out of business. Not only will that inflict direct injury on each plaintiff State's economy, but as production collapses, prices outside of California will eventually spike as well.

And all of this will result from a law that is unconstitutional. As we explain below, California's naked effort to regulate conduct beyond its own borders violates the Supremacy, Commerce, Due Process, and Full Faith and Credit Clauses of the United States Constitution. And it is having a real, direct, and immediate impact on the national market for shell eggs. For their parts, out-of-state producers are placed between a rock (making irreversible capital investments needed to meet the AB1437's requirements) and a hard-place (exiting the California market altogether).

This case is therefore of vital importance to the American Farm Bureau Federation. AFBF was formed in 1919 and is the largest nonprofit general farm organization in the United States. Representing approxi-

mately six million member families in all 50 states and Puerto Rico, its membership produces every type of agricultural crop and commodity made in the United States, including eggs. Its mission is to protect, promote, and represent the business, economic, social, and educational interests of all American farmers. To that end, AFBF regularly participates as a friend of the court in cases with important implications for its members.

AFBF has a profound interest in this case because AB1437 stands to impose crushing costs on American egg producers outside of California and on their customers. To comply with the law, producers will have to make substantial capital investments to retool their equipment and facilities. If AB1437 is later found to be unconstitutional, those costs will be irreversibly sunk—and producers will no longer be able to supply the California market or their own home-state markets at competitive prices.

ARGUMENT

A. The plaintiff States have *parens patriae* standing

The States of Alabama, Iowa, Kentucky, Missouri, Nebraska, and Oklahoma brought this suit as *parens patriae* to protect the interests of their citizens at large. The district court held that the plaintiff States lack *parens patriae* standing because, in its view, they are actually "bring[ing] this action on behalf of egg farmers, not the general populace of their

states," and the States' interest in preventing California from regulating commerce extraterritorially, "without more, is insufficient to establish *parens patriae* standing." *Missouri v. Harris*, 2014 WL 4961473, at *12 (E.D. Cal. 2014).

That conclusion is wrong in every possible respect. It misconstrues the allegations, misstates the governing legal principles, and—most importantly for AFBF—ignores the systemic injury that AB1437, and other California laws like it, threaten to inflict on the national economy and our federalist system of government.

We begin with the governing legal standard. In order to proceed with a *parens patriae* suit, "the State must articulate an interest apart from the interests of particular private parties," meaning that it "must express a quasi-sovereign interest." *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 607 (1982). There are two distinct ways for a State to meet this requirement.

"First, a State has a quasi-sovereign interest in the health and well-being—both physical and economic—of its residents in general." *Snapp*, 458 U.S. at 607. On this score, there are no "definitive limits on the proportion of the population of the State that must be adversely affected by the challenged behavior." *Id*. To be sure, "more must be alleged than

injury to an identifiable group of individual residents," but by the same token, "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.* Accordingly, one well-accepted test to determine whether the alleged injury to a State's 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, a State has a quasi-sovereign interest in not being discriminatorily denied its rightful status within the federal system." *Snapp*, 458 U.S. at 607. Crucially, a State's "interest in securing observance of the terms under which it participates in the federal system" is a matter "[d]istinct from but related to the general well-being of its residents" and provides an independently sufficient basis for establishing *parens patriae* standing. *Id.* at 607-608.

Here, the complaint easily satisfies both these methods of establishing *parens patriae* standing.

1. Enforcement of AB1437 will affect a substantial proportion of the population of each plaintiff State

The complaint alleges that AB1437 will have dire consequences for egg farmers throughout each of the plaintiff States "by forcing Plaintiffs'

farmers either to forgo California's markets altogether or accept significantly increased production costs just to comply with California law." FAC ¶ 84. The district court dismissed this concern as merely a "generalized grievanc[e] on behalf of plaintiffs' egg farmers" and their private economic interests. *Harris*, 2014 WL 4961473, at *10. But that stingy view of the complaint ignores the broader facts.

AB1437 imposes minimum hen mobility and enclosure requirements that exceed those in conventional cage systems. The implementing regulations require at least 116 square inches of floor space per bird, and enclosures with eight or fewer birds must provide floor space according to a mathematical formula prescribing between 117 and 322 square inches per bird. *See* Cal. Code Regs., tit. 3 § 1350(d)(1). These requirements differ markedly from national industry standards for hen enclosure and mobility. Conventional systems typically house "between 4 and 7 birds per cage and provide about 67 square inches of space per bird." FAC ¶ 3. Nearly all eggs—*95%*—produced in the United States are laid in conventional cage systems; the remainder is produced in either cage-free or free-range systems. *See* Joel L. Greene & Tadlock Cowan, Cong. Research Serv. R42534, *Table Egg Production and Hen Welfare: Agreement and Legislative Proposals* 7 (2014) (hereinafter *CRS Report*).

Given the permissibility of conventional cage systems under current law and the substantial cost savings associated with their use, producers (unsurprisingly) have made large capital investments in buildings and equipment that use conventional cage systems. Yet AB1437 afforded producers only a five-year phase-in period between the passage and effective date of California's new cage standards—a serious burden for producers, because housing systems have a useful life of 25 to 30 years. *CRS Report* at 18.

A study from the University of California (Davis) concluded that existing investments in conventional battery cages are likely to be non-salvageable if producers become AB1437-compliant; producers will not be able to reuse them, or to convert them into facilities that meet AB1437's requirements. Hoy Carman, *Economic Aspects of Alternative California Egg Production Systems* 20 (2012) (hereinafter *Economic Aspects*) (Dkt. 13-6). Because the law's short phase-in period does not allow producers to recover the value of their existing capital investments across their useful life, valuable existing capital investments will be rendered worthless for most any egg farmer who makes the transition to comply with AB1437.

Although the costs associated with scrapping existing assets will be "large in dollar terms, th[ose] resources rendered useless" by California's

requirements will be "small in comparison to the new investment required by the legislation." *Economic Aspects* at 20. Over the short term, egg producers forced to meet AB1437's requirements will have to incur substantial changeover costs as they make capital improvements associated with switching buildings and equipment.

These transition costs will be, in a word, *crushing*. One analysis from the University of California concluded that "investment in new or retrofitted housing facilities" would "cost[] in the range of $10 to $40 per bird." Daniel A. Sumner, et al., *Economic Effects of Proposed Restrictions on Egg-Laying Hen Housing in California* 36 (2008) (hereinafter *Economic Effects*) (Dkt. 13-3). Another estimate indicates that the per-hen cost to convert to enriched cages is $25 to $30, totaling $8 to $9 million on one producer's flock of 300,000 hens alone. *CRS Report* at 18. Putting that in perspective, there are over *300 million* egg-laying hens in the United States—reflecting an imputed national cost of many *billions* of dollars to comply with AB1437. Indeed, the transition costs just for producers within California are estimated to be "between $200 million and $800 million." *Economic Effects* at 36.

It is more than sufficient to establish *parens patriae* standing to allege that one State has enacted a law that threatens broad-based harm

to an entire industry within another State. *See Georgia v. Pennsylvania R.R.*, 324 U.S. 439, 450 (1945) (holding *parens patriae* standing appropriate where "the economy of Georgia and the welfare of her citizens have seriously suffered as the result of th[e] alleged conspiracy"). That is especially so here because the laws of the plaintiff States *permit* the conduct that AB1437 forbids. *Cf. Snapp*, 458 U.S. at 607 (it "suffices to give the State standing to sue as *parens patriae*" when "the State, if it could, would likely attempt to address [the matter] through its sovereign lawmaking powers").

But even if that were not so, the injury to each State's egg-consuming public assuredly *is* enough. In the face of such huge capital expenses, many egg farmers will simply refuse to assume the costs of upgrading to enriched cage systems and elect to exit the California market instead. *Economic Aspects* at 22; FAC ¶ 88. As a result of the new regulatory patchwork governing egg sales, California's egg market will effectively become segregated from other States' markets. Thus, at the same time that California consumers are facing sharply higher prices for eggs within that State's borders, the market for eggs in other States will be flooded with excess conventional eggs that otherwise would have been sold in California. FAC ¶ 88. With supply outside of California suddenly

outstripping demand by billions of eggs per year, the price of eggs will plummet in markets outside of California, likely "forcing some Missouri producers," and producers in the other plaintiff States, "out of business." *Id*. The predictable result will be an economic pendulum swing: Supply ultimately will decrease as producers drop out of the market, subsequently driving prices to spike in the plaintiff States.[1]

The district court dismissed all of this out of hand, concluding that, "[t]o the extent plaintiffs argue the implementation of AB 1437 may result in an increase in the cost of eggs, which may injure their citizens who are egg consumers, this argument is without merit." *Harris*, 2014 WL 4961473, at *10. It offered two reasons for this conclusion.

First, the district court speculated that the initial decrease in egg prices in the plaintiff States "may benefit plaintiffs' citizens rather than injure them." *Harris*, 2014 WL 4961473, at *10. That may be true in the short run, but the plaintiff States are entitled to take the long view—and

[1] After the European Union implemented similar hen enclosure and mobility requirements in January 2012 (*see* Directive 1999/74/EC), retail prices for table eggs increased 44%. *CRS Report* at 26. Prices for eggs used in the food industry increased by between 10% and 20%, while prices for pasteurized liquid eggs increased 102% year-over-year. *Id*. Price increases are likely to be even higher in California because the EU directive was enacted in 1999 (*see id*. at 25), giving farmers a 13-year phase-in period, allowing them to retain most of the value of their then-current cage systems. The minimal phase-in period here means that the transition to enriched cages is even more costly to U.S. egg farmers.

the district court was obligated to accept as true the well-pleaded allegations in the complaint, including the contents of each document and exhibit attached to it, which show that over the long run, prices will rise. *See In re NVIDIA Corp. Sec. Litig.*, 768 F.3d 1046, 1058 n.10 (9th Cir. 2014) (a document "incorporated by reference . . . is assumed to be true for purposes of a motion to dismiss, and both parties—and the Court—are free to refer to any of its contents").

Second, the court asserted that "an increase in the cost of eggs," standing alone, "does not satisfy the requirement of showing an injury in fact." *Harris*, 2014 WL 4961473, at *10 (citing *Table Bluff Reservation v. Philip Morris, Inc.*, 256 F.3d 879, 885 (9th Cir. 2001)). That is flat wrong. It is black-letter law that when plaintiffs allege that they "'paid more for a product than they otherwise would have paid' . . . they have suffered an Article III injury in fact." *Hinojos v. Kohl's Corp.*, 718 F.3d 1098, 1104 n.3 (9th Cir. 2013) (brackets omitted) (quoting *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 595 (9th Cir. 2012)). What else could it mean for a State to have a quasi-sovereign interest in the *economic* health and well-being of its residents? *See Snapp*, 458 U.S. at 607.

This Court's decision in *Table Bluff*—which involved an indirect, speculative and circuitous chain of passed-on costs following a multi-State

settlement with tobacco companies—does not suggest otherwise. *See* 256 F.3d at 885. Unlike the convoluted claim in *Table Bluff*, the claim here is straightforward: By manipulating supply of and demand for shell eggs at a national level, California's legislation will drive up the cost of eggs for consumers throughout the country, including within the plaintiff States. That is all that is necessary to establish *parens patriae* standing.

2. The plaintiff States have an interest in securing obedience to the limits on state power imposed by our federal system

Even if the plaintiff States had not alleged that AB1437 will affect substantial proportions of their populations—they assuredly have—they alternatively could establish *parens patriae* standing by asserting their quasi-sovereign interests in securing California's obedience to the limits on its power imposed by our federal system.[2]

There is no denying that AB1437 "ha[s] the practical effect of directly regulating conduct wholly outside of California." *Greater Los Angeles Agency on Deafness, Inc. v. Cable News Network, Inc.*, 742 F.3d

[2] The district court apparently believed that the plaintiff States must show *both* that a substantial proportion of their populations are impacted *and* that a federalism interest is at stake. *E.g.*, *Harris*, 2014 WL 4961473, at *9 (quoting *Table Bluff*, 256 F.3d at 885). That is incorrect. As the court elsewhere observed, there are "two general categories" of quasi-sovereign interests, including the "health and well-being" interest and the "rightful status within the federal system" interest. *Id.* (quoting *Snapp*, 458 U.S. at 602). Proof of either is sufficient. *Snapp*, 458 U.S. at 602.

414, 433 (9th Cir. 2014). As the plaintiff States explain (FAC ¶¶ 51-54), Missouri egg farmers export one third of their product to California, supplying 6% of the eggs consumed there. AB1437, on its face, is designed to regulate the way in which farmers in Missouri (and other States that supply the California egg market) produce those imported eggs.

The legislative history says as much. The express purpose of the law is "to apply the animal welfare provisions of Prop. 2 to all chickens producing eggs sold to California consumers," including those used to make eggs by "out-of-state producers." Bill Analysis, Cal. S. Food & Ag. Comm. 2 (Feb. 27, 2009) (http://perma.cc/D3XA-R939).

None of this is conjectural. Now that the law has gone into effect, one recent media report described a *California* inspector visiting farms in *Iowa* and *Ohio* to ensure compliance with AB1437. Derek Wallbank & Alan Bjerga, *California's Humane-Chicken Act Complicates U.S. Farm Law*, Bloomberg, Dec. 23, 2014 (http://perma.cc/ZV8U-QM5J). "After a full day of checks for food safety," the article reported, "along with an 'enclosure' audit in which the amount of cage space in a barn was compared to the number of birds within," the Midwest business "received certification" under *California* law. *Id.* Any other out-of-state farmers wishing to contract to sell eggs in the California egg market (the largest in the

country) will likewise have to conform their operations to AB1437 and submit to inspections and audits by California state officials, despite that they are not located (and have no political voice) in California.

It would be difficult to imagine a clearer example of a State overstepping the bounds of its authority within our federal system. Simply put, it is for Iowa and Ohio—*not* California—to regulate, inspect, and audit egg producers within their own borders. To conclude otherwise is to offend that "[t]he sovereignty of each State," which "implie[s] a limitation on the sovereignty of all of its sister States—a limitation express or implicit in both the original scheme of the Constitution and the [Due Process Clause of the] Fourteenth Amendment." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980).

Against this backdrop, it blinks reality to say that Alabama, Iowa, Kentucky, Missouri, Nebraska, and Oklahoma lack a quasi-sovereign interest in stopping California from regulating the production of shell eggs within *their* sovereign borders. *Snapp* could hardly be clearer that every State has "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." *Snapp*, 458 U.S. at 608. Precisely so here.

B. The underlying controversy is ripe for judicial resolution

The district court held, alternatively, that the suit here is not ripe for judicial resolution. *Harris*, 2014 WL 4961473, at *13-16. Viewing the case as one concerning a "claimed threat of prosecution" under AB1437, the district court reasoned that that plaintiff States "do not identify any threat to initiate proceedings made against their egg farmers." *Id*. at *15. That is a puzzling observation. The plaintiff States have brought suit not to protect individual citizens from criminal prosecution under AB1437, but to protect their general populations from extraterritorial regulation by California's legislature and from the deleterious economic effects of California's bald regulatory overreach. As to *that* injury—the actual injury that the plaintiff State seek to remedy—the case is plainly ripe.

A case is ripe under Article III if "the facts alleged" demonstrate "a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *In re Coleman*, 560 F.3d 1000, 1005 (9th Cir. 2009) (quoting *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007)). To satisfy this standard, "[t]he issues presented must be 'definite and concrete, not hypothetical or abstract.'" *Id*. (quoting *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000) (en banc)).

There is nothing hypothetical or abstract about the issues presented here. AB1437 has taken effect. All egg farmers within the plaintiff States are now suffering injury in one of two ways. Any farmer who has incurred the upgrade costs required by AB1437 has suffered a direct and concrete economic injury, and—by virtue of taking on higher production costs—is now no longer able to compete in markets other than California. By contrast, any farmer who has not incurred the upgrade costs required by AB1437 is now legally forbidden to sell eggs in California. AB1437 is thus disrupting the flow of interstate commerce *now*, regardless whether any one particular farmer intends to violate the law at some future point, opening that farmer to prosecution. Article III requires nothing more from the plaintiff States before allowing them to sue as *parens patriae*.

C. AB1437 violates the Federal Constitution

Finally, although we appreciate that the merits of the lawsuit are not before the Court, we offer as context a brief explanation as to why AB1437 is invalid for three distinct reasons. It is preempted by the federal Egg Products Inspection Act (EPIA), barred by the dormant Commerce Clause, and violates the principles of sovereignty and interstate comity that inhere in the Due Process and Full Faith and Credit Clauses.

1. AB1437 is preempted

"[T]he best evidence" of Congress's intent to preempt state law is the "plain wording" of an "express preemption clause." *Holmes v. Merck & Co.*, 697 F.3d 1080, 1085 (9th Cir. 2012). Here, the Egg Products Inspection Act (EPIA) contains just such a clause, expressly forbidding inconsistent state laws addressing the "standards of . . . condition" of shell eggs. 21 U.S.C. § 1052(b). That section provides:

> 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 [promulgated under the Agricultural Marketing Act of 1946].

USDA has defined "condition" under the EPIA to mean "any characteristic affecting a product's merchantability including . . . [t]he state of preservation, cleanliness, soundness, wholesomeness, or fitness for human food of any product." 7 C.F.R. § 57.1. The question, therefore, is simply whether AB1437 imposes a standard of "soundness, wholesomeness, or fitness for human food" for shell eggs, beyond those set elsewhere by USDA or the FDA under the Agricultural Marketing Act of 1946.

It purports to do exactly that.

Crucially, a "wholesome" egg is one that is "not adulterated"; conversely, an "adulterated" egg is one that is "unwholesome." 21 U.S.C.

§ 1031. The EPIA defines an "adulterated" egg as any egg that, among other things, "has been prepared, packaged, or held under insanitary conditions . . . whereby it may have been rendered injurious to health." 21 U.S.C. § 1033(a)(4).

If that sounds familiar, it is because the California legislature asserted that AB1437 would eliminate just such conditions: the supposedly "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). That theme was repeated in this very litigation by the briefs of intervenors, the Humane Society of the United States and the Center for Food Safety in proceedings below. Each reiterated California's position that eggs produced from hens held in conventional cage systems are more likely to be injurious to human health. *See* Dkt. 27-2, at 3; Dkt. 71, at 5-12.

Understood in this way, AB1437 purports to define a new category of eggs that are "adulterated" (that have "been prepared, packaged, or held under insanitary conditions") within the meaning of the EPIA, including all eggs produced using standard cage systems. That is, it purports to

impose an additional standard for an egg to qualify as *wholesome*. That, it may not do.[3]

In response, California argued below that "[t]he preemption clause at issue here—section 1052(b)—provides a floor, not a ceiling for shell egg regulation and specifically allows additional regulation by the states that is *consistent* with federal law." Defs' Mem. in Support of Mot. to Dismiss 18 (Dkt. 36). That bewildering claim cannot be squared with the plain language of the federal statute, which forbids States from "requir[ing]" the use of standards that "are in addition to or different from" the federal standards. 21 U.S.C. § 1052(b). There is no possible way to understand that language except as setting a ceiling, not a floor.

2. AB1437 violates the dormant Commerce Clause

A state law violates the Commerce Clause if it regulates extra-territorial conduct in design and effect or if it unreasonably burdens interstate commerce. AB1437 does both.

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[3] California argued below that "there is no support for . . . reading" the word "condition" in 21 U.S.C. § 1052(b) to have the meaning assigned to it by the Secretary of Agriculture in 7 C.F.R. § 57.1. *See* Cal. MTD 18 (Dkt. 36). That is so, according to California, because the phrase "official Federal standards" in Section 1052(b) is defined to mean those standards set for the *grading* of eggs under the Agricultural Marketing Service Poultry Program. That is a non-sequitur. The statute is clear that the States may not add standards concerning *either* "grade" *or* "quality" *or* "condition." 21 U.S.C. § 1052(b).

As we already have explained, AB1437 "ha[s] the practical effect of directly regulating conduct wholly outside of California" and is, for that reason, per se invalid under the dormant Commerce Clause. *See Greater Los Angeles Agency on Deafness*, 742 F.3d at 433. AB1437, on its face, is designed to control the way in which farmers in States that supply the California egg market produce those imported eggs. The legislative history expressly says as much (Bill Analysis, Cal. S. Food & Ag. Comm. (Feb. 27, 2009) (http://perma.cc/D3XA-R939)), and recent experience confirms as much. *See* Wallbank & Bjerga, *supra*. Indeed, it would be hard to imagine more compelling evidence of a California law "directly regulating conduct wholly outside of California" than a California state official inspecting and auditing farming operations in Iowa and Ohio. *See id.* (describing recent inspection).

Even if AB1437 were not per se invalid as a direct regulation of extraterritorial egg production, it would fail the balancing test set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). That test asks "whether the 'burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits.'" *Greater Los Angeles Agency on Deafness*, 742 F.3d at 433 (quoting *Pike*, 397 U.S. at 142).

Here, the burden imposed on out-of-state egg producers is significant. The larger enclosures required by the law will impose enormous up-front costs and increase the ongoing cost of producing eggs by more than 12%. *See Economic Aspects* at 15. As we explained above, that increase in production costs will push some producers to exit the market altogether. And those producers who choose to substitute to other markets—whether for conventional or enriched-cage eggs—will find that increased supply in those markets will reduce prices to a level that makes recovering their capital investments impossible. *See* Angela Black, *The Economic Effects of Proposed Changes to Ohio's Animal Housing Regulations on Egg Producers and Consumers* 8 (May 25, 2010) (https://perma.cc/2XJG-DG8H).

By contrast, there is *no* evidence establishing that cage size has an effect on an egg's safety or fitness for human consumption. In fact, a report prepared for then-Governor Schwarzenegger by the California Department of Food and Agriculture warned that supporting "a public health justification for limiting the confinement of egg-laying hens" would "prove difficult" because the department could not "ascribe any particular public health risk for failure to comply" with the law's standards. California Dept. of Food and Agriculture, Enrolled Bill Report on AB 1437, at 5 (June 28, 2010) (Dkt. 13-12); *see also* P. S. Holt, et al., *The impact of different*

housing systems on egg safety and quality, 90 Poultry Science 251, 259-260 (2011) (concluding that "[t]here is no general consensus demonstrating the superiority of one housing situation over another regarding food safety and egg quality," and that "sound scientific data . . . does not exist").

That conclusion was consistent with the California Health and Human Services Agency's separate report, which similarly warned that "[s]cientific evidence does not definitively support th[e] conclusion" that "reducing the stress of intensive confinement" reduces salmonella or other "intestinal infection[s]." Calif. Health and Human Services Enrolled Bill Report on AB 1437, at 2 (Dkt. 13-11). Because the putative local benefits are wholly unsupported and the burden on interstate commerce is significant, AB1437 cannot pass muster under the *Pike* balancing test.

3. AB1437 violates the Due Process and Full Faith and Credit Clauses

The Due Process and Full Faith and Credit Clauses provide an additional basis for holding AB1437 unconstitutional. Many of the same federalism principles that substantiate the plaintiff States' *parens patriae* standing are reflected in those clauses.

As we have observed, the Due Process Clause recognizes that "one State's power to impose burdens on the interstate market[s]" is "not only subordinate to the federal power over interstate commerce, but is also

constrained by the need to respect the interests of other States." *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 571 (1996) (citations omitted). In other words, "[t]he sovereignty of each State . . . implie[s] a limitation on the sovereignty of all of its sister States—a limitation express or implicit in both the original scheme of the Constitution and the [Due Process Clause of the] Fourteenth Amendment." *World-Wide Volkswagen*, 444 U.S. at 293. And "it follows from these principles of state sovereignty and comity that a State may not impose economic sanctions on violators of its laws with the intent . . . to deter conduct that is lawful in other jurisdictions." *BMW*, 517 U.S. at 572-573.

The reason for this rule is plain. Citizens of States *other* than California are politically disenfranchised *within* California and therefore cannot fairly be subject to regulation by its laws within their own States. Here, States outside California permit egg producers to produce eggs using conventional cage systems. Yet AB1437 seeks to deter that otherwise lawful conduct by requiring noncompliant producers to pay fines if their eggs are sold in California. *See* Cal. Health & Safety Code § 25997. That is a plain violation of the interstate comity and federalism principles inherent in the Due Process Clause.

The same principles are reflected in the Full Faith and Credit Clause, which precludes "parochial entrenchment on the interests of other States" (*Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 272 (1980)) and invalidates a state law that "threatens the federal interest in national unity by unjustifiably infringing upon the legitimate interests of another State" (*Allstate Ins. Co. v. Hague*, 449 U.S. 302, 323 (1981) (Stevens, J., concurring)). Because the California legislature has sought to arrogate to itself the power to legislate with respect to animal care practices occurring entirely within other States, the law should be declared unconstitutional as a violation of these federalism principles.

CONCLUSION

The judgment of the district court should be reversed and the case remanded with instructions to issue a decision on the merits of the complaint with all possible haste.

March 11, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned counsel for plaintiffs-appellees certifies that this brief:

(i) complies with the type-volume limitation of Rule 29(d) because it contains 5,286 words, including footnotes and excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2007 and is set in Century Schoolbook font in a size equivalent to 14 points or larger.

/s/ *Michael B. Kimberly*

CERTIFICATE OF SERVICE

I certify that that on March 11, 2015, this en banc answering brief was served electronically via the Court's CM/ECF system upon all counsel of record.

/s/ *Michael B. Kimberly*