No. 14-17111

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

THE STATE OF MISSOURI, EX REL. CHRIS KOSTER, ATTORNEY GENERAL ET AL.,
Plaintiffs-Appellants,

v.

KAMALA D. HARRIS, ATTORNEY GENERAL, IN HER OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF CALIFORNIA ET AL.
Defendants-Appellees,

HUMANE SOCIETY OF THE UNITED STATES;
ASSOCIATION OF CALIFORNIA EGG FARMERS,
Intervenor-Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of California, No. 2:14-cv-00341-KJM-KJN (Mueller, J.)

BRIEF FOR INTERVENOR-DEFENDANT-APPELLEE ASSOCIATION OF CALIFORNIA EGG FARMERS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Intervenor-Defendant-Appellee Association of California Egg Farmers ("ACEF") certifies that it has no parent company. ACEF is a non-stock non-profit corporation and no publicly held corporation owns 10% or more of ACEF.

/s/ Carl J. Nichols
Carl J. Nichols

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PRELIMINARY STATEMENT

This case involves an attempt by six States to second-guess California's choice as to which food products may be sold within its borders. In an effort to protect food safety for its citizens and promote animal welfare, California has adopted laws that regulate the sale in California of eggs produced from hens confined in cages that do not meet certain minimum space requirements. The district court dismissed the Plaintiff States' complaint without reaching the merits, concluding, *inter alia*, that they cannot satisfy the requirements of *parens partiae* standing—the only theory of standing that the Plaintiff States did or could plausibly invoke.

The district court's dismissal should be affirmed. The doctrine of *parens patriae* standing—a narrow departure from the general rule that a party must assert its own legal rights—is available only where a State sues on behalf of its citizens. The Supreme Court and this Court have thus made clear that *parens patriae* standing requires *both* a showing of injury to Plaintiff States' citizens at large and a cognizable quasi-sovereign interest. The Plaintiff States fail to satisfy either of these requirements.

The Plaintiff States allege, at most, that a few eggs producers within their borders may be (indirectly) affected by California's food safety laws. It is well established that such alleged harm is insufficient for *parens patriae* standing,

which requires that the claimed injury be suffered by more than "an identifiable group of individual residents." *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607 (1982) ("*Snapp*"). Indeed, Plaintiffs effectively disclaim the type of broad-based injury required for *parens patriae* standing, for they allege that California's law may well cause egg prices to *decrease* in their States. Such a drop in prices would benefit, not harm, the only group relevant for *parens patriae* purposes: the citizenry within the Plaintiff States' boundaries.

Plaintiffs' attempts to identify a quasi-sovereign interest—a separate requirement for *parens patriae* standing—fail for similar reasons. The Supreme Court has long made clear that systemic and broad-based interests—not narrow and private ones—qualify as "quasi-sovereign." *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923); *Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439 (1945); *Snapp*, 485 U.S. 592. Plaintiffs' solicitude for a handful of egg producers within their borders does not begin to satisfy that standard. Nor can Plaintiffs compensate for their failure to allege a quasi-sovereign interest by arguing (at 43) that California's food safety laws "exclude our citizens from the benefits that flow from … participation in the federal system." The only arguably "excluded" citizens are, at most, the few egg farmers located within the Plaintiff States' borders. But controlling Supreme Court precedent establishes that a State's quasi-sovereign

interest is limited to ensuring "that the benefits … are not denied *to its general population*." *Snapp*, 458 U.S. at 608 (emphasis added).

At heart, Plaintiffs ask this Court to expand the doctrine of *parens patriae* to encompass instances in which a State seeks to champion the cause of a favored few by serving as their nominal representative in litigation, regardless of any sovereign or quasi-sovereign interest of its own. No precedent permits such an expansion of *parens patriae* standing in any context, and certainly not here, where the Plaintiff States themselves conceded that the allegedly affected parties—i.e., Plaintiff States' few egg producers—"could file their own lawsuits" seeking to enjoin AB 1437 and § 1350. Dist. Ct. Dkt. No. 52, at 16.

STATEMENT OF JURISDICTION

Intervenor-Defendant-Appellee Association of California Egg Farmers agrees with Appellants' statement of jurisdiction.

STATEMENT OF THE CASE

A. The Enactment And Purpose Of AB 1437

In 2010, the California Legislature enacted state law AB 1437, concerning the sale of shell eggs in California. In particular, AB 1437 requires that, beginning on January 1, 2015, all shell eggs sold in California must be the product of hens that are allotted a minimum amount of space in their living enclosure:

> Commencing January 1, 2015, a shelled egg shall not be sold or contracted for sale for human consumption in California if the seller

> knows or should have known that the egg is the product of an egg-laying hen that was confined on a farm or place that is not in compliance with animal care standards set forth in Chapter 13.8 (commencing with Section 52990).

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

The California Legislature enacted AB 1437 to promote food safety. Cal. Health & Safety Code § 25995. The Legislature expressly found that "[e]gg-laying hens subjected to stress are more likely to have higher levels of pathogens in their intestines" and that such "conditions increase the likelihood that consumers will be exposed to higher levels of food-borne pathogens" such as Salmonella. *Id.* § 25995(c). It also noted that "Salmonella is the most commonly diagnosed food-borne illness in the United States." *Id.* § 25995(d). The Legislature thus declared its "intent" in enacting AB 1437 was to "protect California consumers from the deleterious, health, safety, and welfare effects of the sale and consumption of eggs derived from egg-laying hens that are exposed to significant stress and may result in increased exposure to disease pathogens including salmonella." *Id.* § 25995(e).

Furthermore, the Legislature recognized that—in addition to promoting food safety—AB 1437 also "protect[s] animal welfare." 2010 Stat. c. 51, § 1 (AB 1437) (codified at Cal. Health & Safety Code § 25997.1) (provisions added by AB 1437 are "in addition to … any *other* laws protecting animal welfare" (emphasis added)).

B. The Promulgation And Purpose of § 1350

As with AB 1437, § 1350 of title 3 of the California Code of Regulations—entitled "Shell Egg Food Safety"—was promulgated to "assure that healthful and wholesome eggs of known quantity are sold in California." Cal. Code Regs. tit. 3, § 1350(a) (citing Cal. Health & Safety Code § 27521(a)). To accomplish this purpose, § 1350 imposes several requirements on egg producers and handlers aimed at combating Salmonella. Among other things, egg producers and handlers must implement (1) Salmonella prevention measures regarding production, storage, and transportation of shell eggs, *id.* § 1350(c)(1); (2) a Salmonella monitoring program, *id.* § 1350(c)(2); and (3) a minimum vaccination program to protect against infection with Salmonella, *id.* § 1350(c)(3). And, in the subsection specifically challenged in this case, § 1350 prohibits egg handlers and producers from "sell[ing] or contract[ing] to sell a shelled egg for human consumption in California" if it is the product of a hen kept in an enclosure that does not provide a set minimum amount of space per hen:

> Commencing January 1, 2015, no egg handler or producer may sell or contract to sell a shelled egg for human consumption in California if it is the product of an egg-laying hen that was confined in an enclosure that fails to comply with the following standards. For purposes of this section, an enclosure means any cage, crate, or other structure used to confine egg-laying hens: (1) An enclosure containing nine (9) or more egg-laying hens shall provide a minimum of 116 square inches of floor space per bird. Enclosures containing eight (8) or fewer birds shall provide a minimum amount of floor space per bird [according to a specified formula].

Id. § 1350(d).[1]

The California Department of Food and Agriculture ("CDFA") has explained that § 1350 is "intend[ed] to address the problem of the occurrence of Salmonella *enteritidis* (SE) contamination of shell eggs during egg production." 2012 Dep't of Food & Agric., *Shell Egg Food Safety: Initial Statement of Reasons* 2 (July 2012), http://www.cdfa.ca.gov/ahfss/pdfs/regulations/Shell_Egg_Food_Safety_ISR_July_2012.pdf. The CDFA's Initial Statement of Reasons discussed in detail the threat posed by Salmonella to California's food safety, specifically highlighting the "ongoing concerns" with Salmonella in the wake of a May 2010 outbreak traceable to certain Iowa farms—an outbreak which had sickened

[1] Egg producers and handlers are exempted from all requirements set forth in § 1350 if the shell eggs are processed with certain treatments that achieve "5-log destruction" (i.e., more than 99.9%) of Salmonella—in other words, they are pasteurized. Moreover, the State "anticipate[d] that most flocks with less than 3,000 hens [would] not need to make enclosure modifications to meet the proposed enclosure standards." 2012 Dep't of Food & Agric., *Shell Egg Food Safety: Initial Statement of Reasons* 2 (July 2012), http://www.cdfa.ca.gov/ahfss/pdfs/regulations/Shell_Egg_Food_Safety_ISR_July_2012.pdf.

hundreds of people nationwide and led to the recall of "more than 500 million eggs." *Id.* at 2-3; *see generally id.* at 2-5.[2] Based on this and other evidence, CDFA "determined that there was a need for a state shell egg food safety regulatory program" and proposed what ultimately became § 1350. *Id.* at 3. The California Office of Administrative Law also concluded that "[t]he purpose of adding section 1350 … [was] to require egg producers and egg handlers to comply with food safety requirements in order to reduce the risk of Salmonella contamination in shell eggs sold for human consumption in California." *Notice of Approval of Regulatory Action* (May 6, 2013), *available at* http://www.cdfa.ca.gov/ahfss/pdfs/regulations/STD400ApprovedText.pdf.

C. District Court Proceedings

On February 3, 2014, the State of Missouri initiated this action. ER 101. On March 5, Missouri and five additional States—Nebraska, Oklahoma, Alabama, Kentucky, and Iowa—filed a First Amended Complaint. ER 102. Plaintiffs seek to invalidate and enjoin enforcement of both AB 1437 and § 1350(d), purportedly

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[2] Five years later, health concerns with poultry raised in the Plaintiff States continue to be an issue. *See, e.g.*, Strom, *Egg Farms Hit Hard as Bird Flu Affects Millions of Hens*, N.Y. Times (May 14, 2015), http://www.nytimes.com/2015/05/15/business/bird-flu-outbreak-chicken-farmers.html (noting that "[m]ore than 40 percent of [Iowa's] egg-laying hens are dead or dying [from avian flu]. Many are in … barns [that] house up to half a million birds in cages stacked to the rafters. The high density of these egg farms helps to explain why the flu … is decimating more birds in Iowa than in other states"); *id.* ("Nebraska [has just] reported its first suspected infection—on a farm of more than a million chickens.").

on the grounds that these provisions violate the U.S. Constitution's dormant Commerce Clause and are preempted by federal law. ER 35-60.

In the First Amended Complaint, the Plaintiff States allege that "the people most directly affected" by California's law are the "farmers in [their] states." ER 38. These egg producers, the Plaintiff States claim, "face a difficult choice": "Either they can incur massive capital improvement costs to build larger habitats for some or all of their egg-laying hens, or they can walk away from the largest egg market in the country." ER 37; *see also* ER 54 (same). In contrast, Plaintiffs do not allege any injury that will flow from AB 1437 or §1350(d) to their citizenry at large—i.e., their domestic consumers of egg products. To the contrary, the First Amended Complaint asserts that, "[w]ithout California consumers" purchasing eggs farmed in Missouri, "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[.]*" ER 54 (emphasis added).

The California state defendants, as well as Intervenors Association of California Egg Farmers and Humane Society of the United States, subsequently filed motions to dismiss Plaintiffs' complaint. ER 104-106. Each motion challenged the Plaintiff States' standing to bring this action and whether their claims were justiciable. Dist. Ct. Dkt. Nos. 27, 36, 45. In the alternative, each motion sought dismissal on the merits for failure to state viable dormant

Commerce Clause or preemption claims. In their opposition to these motions, Plaintiffs did not request leave to amend their complaint, either affirmatively or in the alternative.

The district court granted the motions and dismissed Plaintiffs' complaint with prejudice for lack of standing. ER 11. The ruling rested on two independent grounds. *First*, the court explained that Plaintiffs did not qualify for standing to sue on behalf of their residents under the *parens patriae* doctrine because they failed to adequately allege either "how the citizens of each state are in fact injured by AB 1437" or how they had a "quasi-sovereign interest" in AB 1437 and § 1350 "based on each state's egg consumers' economic well-being." ER 24, 28. At best, the district court concluded, Plaintiffs' complaint alleges that "the *egg farmers* in each state may suffer an injury" and that the six States had a quasi-sovereign interest "*in [their] egg farmers' businesses*," which was insufficient to support *parens patriae* standing. ER 24, 28 (emphases added); *see also* ER 26 ("The court concludes plaintiffs have not brought this action on behalf of their … residents in general, but rather on behalf of a discrete group of egg farmers whose businesses will allegedly be impacted by AB 1437.").

Second, the district court concluded that the Plaintiff States failed to allege "'a genuine threat of imminent prosecution'" under California law, rendering their complaint "'too impermissibly speculative to present a justiciable controversy.'"

ER 30. Plaintiffs identified "nothing to indicate that any of their egg farmers will or intend to continue to export their eggs to California," that "the threat of prosecution of their egg farmers is imminent," or even that there is any "threat to initiate proceedings … against the egg farmers." ER 31-32.

The district court did not grant Plaintiffs leave to amend. ER 34. The court explained that Plaintiffs had failed to explain how their suit was being brought on behalf of their residents generally. ER 32-34 ("Plaintiffs' first amended complaint, their opposition papers and their arguments during the court's hearing all focus on how California's legislation affects or may affect each state's egg farmers."). Because it was "patently clear [P]laintiffs are bringing this action on behalf of a subset of each state's egg farmers …, not on behalf of each state's population generally," the court concluded that granting "leave to amend would be futile." ER 34. At no point did Plaintiffs file a motion requesting leave to amend their complaint, nor did they seek reconsideration of the district court's order.[3]

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[3] On March 3, 2015, the State of Utah filed in this Court an amicus brief in support of the Plaintiff States that attaches expert declarations and other materials that were neither submitted in the proceedings below nor considered by the district court. App. Ct. Dkt. No. 7. Similarly, on March 11, the American Farm Bureau Federation filed an amicus brief citing documents that were neither submitted nor considered below. App. Ct. Dkt. No. 12. These extraneous materials could not be considered in adjudicating this appeal even if they had been submitted by a party, much less where, as here, they are submitted only by amici. Fed. R. App. P. 10(a); Ninth Cir. R. 10-2; *Swan v. Peterson*, 6 F.3d 1373, 1383 (9th Cir. 1993) ("Generally, we do not consider on appeal an issue raised only by an amicus.").

SUMMARY OF THE ARGUMENT

I. The district court correctly rejected Plaintiffs' assertion of *parens patriae* standing on two independent grounds. *First*, the Plaintiff States have failed to allege that a substantial segment of their residents (as opposed to a handful of their egg producers) would suffer an injury-in-fact as a result of California's laws. If anything, they allege that their residents would actually benefit from the California laws, which the complaint recognizes may well cause egg prices to decrease in the Midwest. Even as to the egg farmers within their boundaries, moreover, the Plaintiff States do not adequately allege that those producers would suffer a sufficiently concrete injury-in-fact. Indeed, in the fifteen months since this case began, Plaintiffs have not identified even one specific producer who intends to sell its eggs in California but is effectively prevented from doing so by AB 1437 or § 1350.

Second, Plaintiffs have failed to identify a cognizable quasi-sovereign interest at stake in this case. Their primary argument—that the suit is aimed at protecting the health and well-being of their "residents"—misapprehends the relevant Supreme Court precedent. The Court has found a quasi-sovereign interest only under carefully limited circumstances: where the relevant laws had systemic and broad-based effects that effectively cut off a State's *general population* from engaging in economic activity within the State's borders. Here, the California laws

do not prohibit any conduct in Plaintiffs' States; at most, they may cause a temporary fluctuation in egg prices. To the extent California's laws might indirectly affect any conduct at all in Plaintiffs' States, it would be only the conduct of their egg producers, not their general population. Nor can Plaintiffs salvage their failure to allege facts supporting a quasi-sovereign interest with abstract claims about safeguarding their citizens' "benefits that flow from [Plaintiffs'] participation in the federal system." Those "citizens" are, again, just the few egg producers operating in Plaintiffs' states.

II. The district court was also correct to dismiss the Plaintiffs States' complaint without leave to amend and with prejudice. Despite multiple opportunities, including during the motion to dismiss briefing and at oral argument, the Plaintiff States never explained how they would amend their complaint to properly allege *parens patriae* standing. Even on appeal, they still fail to provide this Court with that information. Because the Plaintiff States never indicated how they would allege an injury to, or a quasi-sovereign interest that affected, their *residents* (as opposed to their egg producers), the district court appropriately concluded that granting leave to amend would be futile. And because Plaintiffs' inability to plead a viable theory of *parens patriae* standing would be dispositive in any court and under any set of allegations, the district court properly dismissed the complaint with prejudice.

STANDARD OF REVIEW

This Court reviews the district court's standing determinations de novo. *Table Bluff Reservation (Wiyot Tribe) v. Philip Morris, Inc.*, 256 F.3d 879, 881-882 (9th Cir. 2001).

This Court reviews a denial of leave to amend for abuse of discretion. *Sylvia Landfield Trust v. City of Los Angeles*, 729 F.3d 1189, 1196 (9th Cir. 2013). It is not an abuse of discretion to deny leave to amend where the court "could reasonably conclude that further amendment would be futile." *Id.* A denial of leave to amend that "'resulted from a factual finding'" is reversed only if that finding "'was illogical, implausible, or without support in inferences that may be drawn from facts in the record.'" *United States v. Corinthian Colleges*, 655 F.3d 984, 995 (9th Cir. 2011).

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT THE PLAINTIFF STATES HAVE FAILED TO ALLEGE FACTS ESTABLISHING *PARENS PATRIAE* STANDING

Plaintiffs rest their claim to standing on the narrow *parens patriae* doctrine. But they have identified no plausible error in either of the district court's independent bases for rejecting Plaintiffs' *parens patriae* theory: (1) their failure to allege an injury-in-fact affecting a "substantial segment" of their citizens (as opposed to, at most, a few private egg producers), *see* ER 24-26; and (2) their

inability to identify a sovereign or quasi-sovereign interest distinct from the private interests of their residents, *see* ER 26-43.

"Article III of the Constitution confines the judicial power of federal courts to deciding actual 'Cases' or 'Controversies.'" *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661 (2013). "One essential aspect of this requirement is that any person invoking the power of a federal court must demonstrate standing to do so." *Id.* "To establish Article III standing, an injury must be 'concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.'" *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013).

Where, as here, a State seeks to bring an action "on behalf of its citizens" as *parens patriae*, several additional requirements apply. *Table Bluff Reservation (Wiyot Tribe) v. Philip Morris, Inc.*, 256 F.3d 879, 885 (9th Cir. 2001). It is "settled doctrine" that a State must do more than "litigat[e] as a volunteer the personal claims of its citizens." *Pennsylvania v. New Jersey*, 426 U.S. 660, 665 (1976). Instead, the State must (1) "'allege[] injury to a sufficiently substantial segment of its population,'" (2) "'articulate[] an interest apart from the interests of particular private parties,'" and (3) "'express[] a quasi-sovereign interest.'" *Table Bluff*, 256 F.3d at 885 (quoting *Alfred L. Snapp & Son, Inc. v. Puerto Rico ("Snapp")*, 458 U.S. 592, 607 (1982)); *accord Washington v. Chimei Innolux Corp.*, 659 F.3d 842, 847 (9th Cir. 2011).

Plaintiffs, of course, "ha[ve] the burden of establishing standing." *Table Bluff*, 256 F.3d at 882. In deciding whether the allegations set forth in the complaint state a sufficient basis for Article III jurisdiction, the Court "'accept[s] as true all well-pleaded allegations of material fact,'" but cannot accept "'allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.'" *Seven Arts Filmed Entm't Ltd. v. Content Media Corp.*, 733 F.3d 1251, 1254 (9th Cir. 2013). Instead, Plaintiffs' complaint must contain sufficient allegations to "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

A. Plaintiffs' Allegations Do Not Support The Inference That AB 1437 And § 1350 Will Cause An Injury-In-Fact To A Substantial Segment Of Their Population

The district court correctly held that the Plaintiff States lacked *parens patriae* standing because the injury alleged by them "does not affect the citizens plaintiffs purport to represent," but rather only a few egg producers located within the Plaintiff States' boundaries. ER 24.

1. Both the Supreme Court and this Court have recognized that *parens patriae* standing requires, *inter alia*, that the alleged injury affect more than "an identifiable group of individual residents." *Snapp*, 458 U.S. at 607; *Table Bluff*, 256 F.3d at 885 (same); *see also Connecticut v. Physicians Health Servs. of Conn.*,

Inc., 103 F. Supp. 2d 495, 504 (D. Conn. 2000) (no standing when "the State act[s] on behalf of individuals who could … obtain complete relief through a private suit"), *aff'd*, 287 F.3d 110 (2d Cir. 2002); 17 Wright, et al., *Federal Practice and Procedure* § 4047 (3d ed. 2007) ("Parens patriae standing is most likely to be recognized if there is a widespread injury to important interests of many individuals that cannot easily be calculated in monetary terms. More specifically individualized injury to primarily commercial or monetary interests is least likely to be recognized."). Accordingly, it is insufficient for a State to merely serve as a "nominal party" seeking to represent a small and identifiable subgroup. *Snapp*, 458 U.S. at 607.

The Plaintiff States' own theory of their case forecloses a finding of *parens patriae* standing here. The crux of their complaint is that, in their view, AB 1437 and § 1350 "require[] egg farmers in other states to comply with behavior-based enclosure standards identical to those in Prop[osition] 2 if they want to continue selling their eggs in California." ER 37. As a result, the Plaintiff States complain, "*[e]gg producers* in [their States] face a difficult choice": "Either they can incur massive capital improvement costs to build larger habitats for some or all of their egg laying hens, or they can walk away from the largest egg market in the country." *Id.* (emphasis added); *see also* ER 38 ("[T]he people most directly affected by California's extraterritorial regulation [are the] farmers in our states.").

But Plaintiffs do not (and could not) contend that this group of affected producers is sufficiently broad-based to itself qualify as a "substantial segment" of their population, as required to establish *parens patriae* standing. Indeed, Plaintiffs themselves have conceded that the affected egg producers may only "number in single or double digits" in one of their States. *See* Dist. Ct. Dkt. No. 54, at 17. And, as Plaintiffs also conceded below, even those few egg producers "could file their own lawsuits," Dist. Ct. Dkt. No. 52, at 16, if they were in fact harmed. *See Physicians Health Servs.*, 103 F. Supp. 2d at 504 (no *parens patriae* standing where private residents could "obtain complete relief through a private suit") (cited with approval in *Table Bluff*, 256 F.3d at 885). The district court was thus correct in concluding that Plaintiffs' assertion of their egg producers' interests does not qualify as an "'interest apart from the interests of particular private parties,'" a prerequisite for *parens patriae* standing. ER 25 (quoting *Oregon v. Legal Services Corp.*, 552 F.3d 965, 971 (9th Cir. 2009)).

2. In addition to failing to claim an injury sufficient to support *parens patriae* standing, *see supra* pp. 15-17; *infra* pp. 22-28, Plaintiffs' complaint does not even satisfy the threshold, irreducible requirements imposed by Article III standing in all cases, for it does not allege a cognizable injury-in-fact even for the *egg farmers* allegedly affected by California's law. In the fifteen months since they filed their amended complaint, Plaintiffs have yet to identify even one egg

producer that has the requisite "concrete plans" to export eggs into California but is effectively prevented from doing so by AB 1437 or § 1350. *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992)). Instead, Plaintiffs simply presume—as they did in the district court—that some producers that previously exported eggs into California will continue to do so. *See* Plaintiffs' Br. 32-33; Dist. Ct. Dkt. No. 54, at 13-14; *see also* Plaintiffs' Br. 49 n.8 (declining to provide the Court with specific evidence that their egg producers are selling their products in California).

Plaintiffs' speculative theory of standing is insufficient. The Supreme Court has made clear that a "vague desire" to repeat past conduct or "'some day' intentions" to act are "insufficient to satisfy the requirement of imminent injury." *Summers*, 555 U.S. at 496.[4] Similarly, to the extent that the Plaintiff States rely on a "statistical probability" that some eggs may have been (or will be) shipped from certain unidentified egg producers in the Plaintiff States into California after AB 1437 became effective in January 1, 2015, the Supreme Court has rejected such a "novel" argument as "a mockery of [the Court's] prior [standing] cases." *Id.* at 497-498 (injury-in-fact for organizational standing not satisfied by "statistical

[4] Indeed, the Respondents in *Summers* had a stronger standing argument than Plaintiffs do here because the *Summers* Respondents were able to identify specific individuals who claimed to be adversely affected by the government's actions. *See* 555 U.S. at 495.

probability" that "some" of Sierra Club's 700,000 members nationwide would visit the land at issue). As the Supreme Court has held time and again, "'[s]tanding … is not "an ingenious academic exercise in the conceivable"'"; it "'requires … a factual showing of perceptible harm.'" *Id.* at 499. Given "the difficulty of verifying the facts upon which such probabilistic standing depends," parties who invoke derivative standing must actually "identify [individuals] who have suffered the requisite harm." *Id.* Plaintiffs have still failed to satisfy that requirement—despite multiple opportunities to do so in their filings before the district court, at oral argument before the district court, and in their opening brief on appeal.

3. None of Plaintiffs' counter-arguments has merit. On appeal, Plaintiffs' principal response to the district court's holding that they cannot bring this suit on behalf of the egg producers located within their borders is to pivot to a novel type of "injury in fact": What they now call the "injury-in-fact *to a quasi-sovereign interest*." *E.g.*, Plaintiffs' Br. 22 (emphasis added). But this Court has made clear that a State's burden to show a "quasi-sovereign" interest is separate from—and in addition to—the requirement to establish an injury-in-fact: "*[B]efore* proving that they could satisfy [the *parens patriae*] requirements, the [States] still must allege injury in fact to the citizens they purport to represent as *parens patriae*." *Table Bluff*, 256 F.3d at 885. This is for good reason: Without a threshold injury-in-fact requirement, *parens patriae* would impermissibly

authorize lawsuits aimed at mere generalized grievances that cause no independently cognizable harm to the residents the State purports to represent. *Hollingsworth*, 133 S. Ct. at 2662 ("We have repeatedly held that … a 'generalized grievance,' no matter how sincere, is insufficient to confer standing."). Plaintiffs' attempt to read the injury-in-fact requirement out of the analysis is not only inconsistent with the framework established by this Court in *Table Bluff* and foundational principles of Article III standing; it is also at war with the tenet that, as a "judicially created exception" to individual standing, the *parens patriae* doctrine must be "narrowly construed." *Estados Unidos Mexicanos v. DeCoster*, 229 F.3d 332, 335 (1st Cir. 2000).

Nor is there merit to the Plaintiff States' attempt (at 35-40) to recast their egg producers' grievances about "economic isolation" as asserting a diffused injury that affects their citizenry at large. At most, Plaintiffs' complaint involves vague and generalized statements to the effect that their suit "protects [their] citizens' economic health and constitutional rights." *E.g.*, ER 38. But the "citizens" to which the complaint refers are, again, the limited number of egg farmers whose interests the Plaintiff States purport to pursue. They do not allege any negative impact on any other segment of their population, and certainly not to their citizens as a whole.

To the contrary, as the district court correctly noted, Plaintiffs' factual allegations "point to a potential *decrease* in the cost of eggs, which may benefit plaintiffs' citizens rather than injure them." ER 24 (citation omitted). Plaintiffs' attempt to denigrate (at 38) this finding as "myopic" "speculation" ignores that the assertion comes directly from paragraph 88 of their own First Amended Complaint:

> Without California consumers, Missouri farmers would produce a surplus of 540 million eggs per year. 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.

ER 54 (emphasis added).

Finally, Plaintiffs contend (at 38) that their predicted drop in Midwest egg prices will eventually force egg producers out of business, potentially "result[] in higher prices" for consumers, and thereby negatively affect their citizens. It is well-established that "'[a]llegations of *possible* future injury are not sufficient'" to meet the Article III injury-in-fact requirement; the "'threatened injury must be *certainly impending* to constitute injury in fact.'" *Clapper*, 133 S. Ct. at 1147 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)) (emphases added). While AB 1437 and § 1350 might discourage out-of-state egg producers from selling eggs in California, which might lead to an increase in competition in egg sales in the Midwest, which might lead some producers to go out of business,

which might ultimately result in higher Midwest egg prices, there is no "certain[ty]" that all four events in this long hypothetical chain will occur. It would have been neither appropriate nor permissible for the district court to let Plaintiffs proceed as *parens patriae* based on such an incredibly speculative theory of harm.

B. Plaintiffs Have Failed To Allege That AB 1437 And § 1350 Implicate A Cognizable Quasi-Sovereign Interest

On the separate issue of whether the challenged laws implicate a "quasi-sovereign interest," Plaintiffs assert (at 22-48) two basic theories: an interest in the health and well-being of their residents and an interest in ensuring that the benefits of the federal system are not denied to their residents. The district court correctly concluded that neither interest is implicated here. ER 26-29.

1. Plaintiffs argue (at 26) that they alleged a quasi-sovereign interest "in the health and well-being of [their] residents." But the narrow and private interests Plaintiffs represent are wholly unlike the systemic and broad-based interests at issue in cases like *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923), *Georgia v. Pennsylvania Railroad Co.*, 324 U.S. 439 (1945), or *Snapp*, 485 U.S. 592.

Pennsylvania v. West Virginia involved a West Virginia law that would have "largely curtail[ed] or cut off the supply of natural gas" available to Pennsylvania and Ohio, 262 U.S. at 581, causing millions of those States' residents to face shortages of the fuel they needed for basic life necessities, *id.* at 590. Natural gas

was at the time "the fuel with which food is cooked and water heated" and "with which hundreds of schoolhouses [were] heated." *Id.* Thus, the potential interruption in the flow of natural gas was "a matter of grave public concern in which the State, as the representative of the public, ha[d] an interest apart from that of the individuals affected." *Id.* at 592. In contrast, AB 1437 and § 1350 do not block the Plaintiff States' general population access to anything in any way; at most, Plaintiffs' residents *might* experience a fluctuation in egg prices.[5]

Plaintiffs (at 32-33) attempt to analogize this case to *Pennsylvania v. West Virginia* by arguing that their (unidentified) egg producers must spend a substantial amount of money to produce eggs to sell in California. But this argument again misses the point: the inquiry is whether the injury sought to be vindicated by the Plaintiff States is suffered by their *residents*, not a handful of private parties. *See Maryland v. Louisiana*, 451 U.S. 725, 736-737, 739 (1981) (cognizable injury to consumers where state natural gas tax was initially "imposed on the [natural gas]

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[5] Plaintiffs also purport to find support in *Louisiana v. Texas*, 176 U.S. 1 (1900), *Connecticut v. Cahill*, 217 F.3d 93 (2d Cir. 2000), and *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366 (1976). Plaintiffs' Br. 30, 34. But those cases, too, involved the type of flat prohibitions or broad-based injury that are absent here, as Plaintiffs themselves appear to recognize. *See id.* at 27 (*Louisiana* involved a law that "had the practical effect of embargoing *all interstate commerce* between New Orleans and the State of Texas" (emphasis added)); *id.* at 30 (*Cahill* involved a state statute "*prohibiting* non-residents from taking lobsters in certain waters" (emphasis added)); *id.* at 34 (*Great Atlantic* involved a "Mississippi regulation *prohibiting* the sale of milk produced in another State" (emphasis added)).

pipeline companies[,]" but was "clearly intended to be passed on to the ultimate consumer," the law included a specific provision "forbid[ding] the Tax from being passed on … to any third party other than the [ultimate] purchaser" and "the pipeline companies" had in fact "passed the cost … to their customers").

Georgia v. Pennsylvania Railroad is similarly inapposite. There, the State of Georgia alleged a price-fixing conspiracy that resulted in freight rates that were 39% higher for Georgia shippers than for their out-of-state competitors. 324 U.S. at 444, 450-451. The Supreme Court held that Georgia had *parens patriae* standing because that systemic, economy-wide discrimination—which struck at the heart of the instrumentalities of interstate commerce—"shackle[d] [Georgia's] industries" and risked "retard[ing] her development." *Id.* at 451. In contrast, even under Plaintiffs' theory, AB 1437 and § 1350 would at most indirectly affect only egg producers. Neither provision affects, much less "shackles" or "retards," any other industry, let alone the Plaintiff States' overall economies. *See* ER 26. And while Plaintiffs accuse the district court of improperly "reject[ing]" allegations in the complaint related to their *Pennsylvania Railroad* analogy, the district court correctly concluded that Plaintiffs merely allege that "AB 1437 applies … to egg

producers, not plaintiffs' residents in general." ER 24 (citing ER 36,45); *see also supra* pp. 15-17.[6]

Finally, there is no merit to Plaintiffs' attempt to analogize this case to *Snapp* on the ground that, like the plaintiffs in *Snapp*, they allege "discrimination" against their citizens. Plaintiffs' Br. 40. In *Snapp*, plaintiffs had alleged that the Virginia apple industry had discriminated against workers from Puerto Rico in an "invidious" manner along "ethnic lines." *Snapp*, 458 U.S. at 609. The complaint alleged that of 2,318 Puerto Rican workers who had been recruited as "temporary farm laborers to pick the [apple] crop," "fewer than 30" had actually received long-term employment because the Virginia growers "refused to employ" them. *Id.* at 597 (internal quotation marks omitted). The *Snapp* Court characterized the

[6] Plaintiffs also assert (at 39-40) that the district court read *Table Bluff* too broadly when the court concluded that there is no constitutional standing simply because "'a manufacturer passes on higher costs in the form of price increases.'" In fact, the quotation from *Table Bluff* is just one example of the well-established principle that, for purposes of Article III standing, the alleged injury must be fairly traceable to the conduct at issue. *See, e.g., San Diego Cnty. Gun Rights Committee v. Reno*, 98 F.3d 1121, 1130 (9th Cir. 1996) (no standing to challenge gun control law where "[a]lthough the Crime Control Act may tend to restrict supply [of weapons], nothing in the Act directs manufacturers or dealers to raise the price of regulated weapons"); *see also Grocery Mfrs. Ass'n v. EPA*, 693 F.3d 169, 176 (D.C. Cir. 2012) ("The case or controversy limitation of Article III still requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court." (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41 (1976)).

Virginia growers' conduct as "'deliberate efforts to stigmatize the [Puerto Rican] labor force as inferior.'" *Id.* at 609 (alteration omitted).

Here, in contrast, the Plaintiff States do not allege discrimination due to race, ethnicity, or a general belief in the "inferior[ity]" of their residents. *See* ER 35-60; Plaintiffs' Br. 40-42. Indeed, it only underscores the weakness of their case that the Plaintiff States are reduced to arguing (at 40-42) that AB 1437 and § 1350—which simply require that *all* eggs sold in California, regardless of their place of origin, be the product of hens that are allotted a minimum amount of living space—are the equivalent of systemic discrimination against temporary workers on the basis of ethnicity.[7]

2. As a fallback, Plaintiffs argue (at 43-47) that AB 1437 and § 1350 implicate their interests in "'assuring that the benefits of the federal system are not denied to [their] general population'" by "'expand[ing] its regulatory powers in a manner that encroaches upon the sovereignty of its fellow states.'" But Plaintiffs themselves have conceded that AB 1437 "places no restrictions on the treatment of

[7] Plaintiff also cite (at 41-42) three cases from other jurisdictions, *Commonwealth of Massachusetts v. Bull HN Information Systems, Inc.*, 16 F. Supp. 2d 90, 98-99 (D. Mass. 1998), *People of New York v. Peter & John's Pump House, Inc.*, 914 F. Supp. 809, 812 (N.D.N.Y. 1996), and *People v. 11 Cornwell Co.*, 695 F.2d 34, 36 (2d Cir. 1982), *vacated*, 718F.2d 22 (1983). These cases are irrelevant for the same reason that makes *Snapp*'s discussion of discrimination inapposite here: They involved invidious discrimination, either on the basis of age (*Commonwealth of Massachusetts*), race (*Peter & John's Pump House*), or mental disability (*11 Cornwell Co.*).

animals in California—*or anywhere else for that matter*." Dist. Ct. Dkt. No. 46, at 6 (emphasis added). In Plaintiffs' own words, California law "does not require egg producers to house hens in any particular way nor prohibit them from housing hens in any particular way. It merely proscribes the sale *in California* of a subset of otherwise indistinguishable goods based on production methods that are already illegal *in California*." *Id.* This concession alone defeats any theory of standing based on Plaintiffs' anti-encroachment rationale, for indirect upstream pricing impacts on parties' commercial decisions do not encroach on other States' sovereign prerogatives. *See Osborn v. Ozlin*, 310 U.S. 53, 62 (1940).

Moreover, *Snapp*—the only *parens patriae* case that Plaintiffs cite in support of this argument—makes clear that the quasi-sovereign interest in preserving access to "the benefits of the federal system" applies only when a State acts to ensure "that the benefits … are not denied *to its general population*." 458 U.S. at 608 (emphasis added). Accordingly, Puerto Rico had *parens patriae* standing to protect its residents generally from unemployment by ensuring they had "the full benefit of federal laws designed to address this problem." *Id.* at 609-610; *see also id.* at 599 & n.7 (recognizing "the serious dimensions of the unemployment problem in Puerto Rico and the general condition of its economy"). Here, in contrast, the Plaintiff States' complaint purports to protect only egg producers—not their general population. *See supra* pp. 15-17; *Snapp*, 458 U.S. at

602 ("Interests of private parties are obviously not in themselves sovereign interests, and they do not become such simply by virtue of the State's aiding in their achievement."). There is accordingly no merit to Plaintiffs' theory that dormant Commerce Clause cases somehow warrant a more sweeping theory of *parens patriae* standing than other cases: the linchpin of a quasi-sovereign interest is that the conduct at issue must cause diffused harm to a wide swath of the Plaintiff States' population, regardless of whether the case involves allegations of extraterritorial regulation of (or even discrimination against) *individual* interests located within the borders of the Plaintiff States.[8]

II. THE DISTRICT COURT CORRECTLY DENIED LEAVE TO AMEND AND DISMISSED THIS ACTION WITH PREJUDICE

A. The District Court Did Not Err In Dismissing Without Granting Leave To Amend

Plaintiffs claim (at 57-58) that the district court erred in dismissing the case without granting them leave to amend their complaint (for the second time, *see* Dist. Ct. Dkt. Nos. 11, 13) to add new standing allegations. That is a puzzling

[8] In asking this Court to create a special *parens patriae* rule for dormant Commerce Clause cases, Plaintiffs cite several dormant Commerce Clause decisions that have nothing to do with *parens patriae*. Plaintiffs' Br. 43-48 (citing *BMW of North America v. Gore*, 517 U.S. 559, 572-573 (1996); *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 526-529 (1949); *American Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 163-164 (S.D.N.Y. 1997)).

criticism, given that Plaintiffs neither asked for leave to amend in their oppositions to the motions to dismiss, nor filed a separate motion for leave to amend, nor sought reconsideration after the district court dismissed their complaint. It is difficult to see how the district court can be faulted for denying relief that the Plaintiffs never properly requested.

In any event, the district court correctly determined that any such amendment would have been futile. It is well-established that "'[f]utility alone can justify the denial of a motion to amend.'" *Johnson v. Buckley*, 356 F.3d 1067, 1077 (9th Cir. 2004); ER 32-33. In the district court, Plaintiffs identified no allegations that they wished to add and that would cure the fundamental flaw in their standing theory: the fact that AB 1437 and § 1350 at most implicate "'the interests of particular private parties.'" *Table Bluff*, 256 F.3d at 885. Even Plaintiffs' opening brief in this Court is completely silent regarding what allegations Plaintiffs wish to add to a second amended Complaint that would properly allege *parens patriae* standing.[9]

There is also no merit to Plaintiffs' claim (at 58) that the district court improperly "infer[red]" that the purpose of this suit is to "vindicate the interests of

[9] Plaintiffs cannot attempt to cure this omission on reply. *See Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999) ("While this explanation may or may not be persuasive, as an argument raised for the first time in a *reply* brief, it is not an argument that we may consider here.").

the egg farmers in their respective states." If that is, as Plaintiffs claim (*see id.*), a factual determination, it is not a basis for finding an abuse of discretion here unless it "was illogical, implausible, or without support in inferences that may be drawn from the facts in the record." *United States v. Corinthian Colleges*, 655 F.3d 984, 995 (9th Cir. 2011) (denial of leave to amend that "resulted from a factual finding" is reversed only if that finding "was illogical, implausible, or without support in inferences that may be drawn from facts in the record").[10] And the district court certainly did not abuse its discretion in reaching that conclusion: the district court described at length the basis for that determination, and noted that Plaintiffs' "opposition papers and their arguments during the court's hearing all focus[ed] on how California's legislation affects or may affect each state's *egg farmers*." ER 33 (emphasis added); *see also* ER 32-34. The district court's reasoned analysis bears no resemblance to the cursory, unexplained denials that this Court has found insufficient in past cases. *See, e.g.*, *Carolina Cas. Ins. Co. v. Team Equip., Inc.*, 741 F.3d 1082, 1085-1086 (9th Cir. 2014); *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (en banc).

[10] Plaintiffs incorrectly cite the standard of review applicable to motions to dismiss. Plaintiffs' Br. 58. In fact, factual determinations underpinning denials of leave to amend are reviewed for abuse of discretion. *See Corinthian Colleges*, 655 F.3d at 995.

B. Dismissal With Prejudice Was Appropriate Because The Defects In Plaintiffs' *Parens Patriae* Theory Would Be Fatal In Any Court And Under Any Set Of Allegations

Plaintiffs contend that the district court "abused its discretion" in dismissing their First Amended Complaint "with prejudice" because, they argue, dismissals for lack of standing must always be without prejudice. Plaintiffs' Br. 52; *see id.* at 54-56. But as Plaintiffs themselves recognize, it is proper to dismiss a case for lack of subject matter jurisdiction *with* prejudice where "'no other court has the power to hear the case, nor can [the plaintiffs] redraft their claims to avoid the [jurisdictional defect].'" Plaintiffs' Br. 56 (quoting *Craan v. United States Army Corps of Engineers*, 337 F. App'x 682, 683 (9th Cir. 2009) (unpublished)); *see also Frigard v. United States*, 862 F.2d 201, 204 (9th Cir. 1988) (per curiam) (same).[11] Accordingly, this Court has affirmed dismissals with prejudice where plaintiffs lacked standing because their injury was incurably speculative or inherently untraceable to the defendant's conduct. *See Graham v. FEMA*, 149 F.3d 997, 1001-1002, 1007-1008 (9th Cir. 1998), *abrogated on other grounds by Levin v. Commerce Energy, Inc.*, 560 U.S. 413 (2010); *Physicians for Integrity in Med. Research, Inc. v. Hamburg*, 556 F. App'x 621, 621 (9th Cir. 2014) (unpublished).[12]

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[11] This rule is not—as Plaintiffs contend—an "exception" limited to "sovereign immunity" cases. Plaintiffs' Br. 56. It is the linchpin of the prejudice inquiry in all cases involving dismissals for lack of subject matter jurisdiction.

[12] *See also, e.g.*, *Textile Productions, Inc. v. Mead Corp.*, 134 F.3d 1481, 1485 (Fed. Cir. 1998) ("The district court correctly dismissed the infringement claim

With the prejudice inquiry properly framed, the two published cases relied upon by Plaintiffs provide them with no support. In *Kelly v. Fleetwood Enterprises, Inc.*, 377 F.3d 1034 (9th Cir. 2004), plaintiffs had failed to satisfy the applicable amount-in-controversy requirement. *Id.* at 1036. But the plaintiffs would have faced no such hurdle if they reasserted their claims in state court. Similarly, in *City of Oakland v. Hotels.com LP*, 572 F.3d 958 (9th Cir. 2009), the city of Oakland had failed to exhaust administrative remedies as required by the applicable statute. *Id.* at 962. But nothing prevented it from bringing a new action after exhausting those remedies.[13] In neither case were plaintiffs precluded from "reassert[ing] [their] claims in a competent court." *Frigard*, 862 F.2d at 204.

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with prejudice because Textile had its chance to show standing and failed."); *University of Pittsburgh v. Varian Med. Sys., Inc.*, 569 F.3d 1328, 1333 (Fed. Cir. 2009) (explaining that *Textile Productions*' with-prejudice rule applies where "it [is] unlikely that the standing defect could be cured").

[13] Plaintiffs also rely (at 55 n.9) on at least seven unpublished decisions. To the extent these cases are even relevant, *see* Ninth Cir. R. 36-3(a), they are easily distinguished on the same basis as *Kelly* and *Hotels.com*. *See Wasson v. Brown*, 316 F. App'x 663, 664 (9th Cir. 2009) (unpublished) (alleged injury not sufficiently "'present or immediate'" but no indication it might not become such in the future); *Farren v. Option One Mortg. Corp.*, 467 F. App'x 692, 693 (9th Cir. 2012) (unpublished) (defect was lack of diversity jurisdiction; claims could be litigated in state court); *Levi v. State Bar of Cal.*, 391 F. App'x 633, 634 (9th Cir. 2010) (unpublished) (dismissal under *Rooker-Feldman* doctrine; state remedies could be available); *Kendall v. Department of Veterans Affairs*, 360 F. App'x 902, 903 (9th Cir. 2009) (unpublished) (dismissal of action challenging Department of Veteran Affairs ("VA")' denial of benefit; VA denials of benefits are generally reviewable in the Court of Appeals of Veterans Claims and the Federal Circuit); *Townsend v. Whole Foods Mkt.*, 324 F. App'x 673 (9th Cir. 2009) (unpublished)

Here, in contrast, the defects in Plaintiffs' *parens patriae* theory would be fatal in any court and under any set of allegations. Plaintiffs' only possible basis for standing is as *parens patriae*, but that theory will always fail—for all the reasons discussed above, *see supra* pp. 15-28, and, in future cases, also as a matter of collateral estoppel, *see, e.g.*, *Reischel v. Manufacturers & Traders Trust Co.*, 222 F. App'x 521, 523-524 (7th Cir. 2007) ("[A] dismissal based on justiciability grounds does not bar later litigation of the merits," but "does have res judicata effects *as to the justiciability issue itself*." (emphasis added)); *Maupin v. Yamamoto*, 2000 WL 1861830, at *4 (W.D. Va. Dec. 19, 2000) (same); 18 Wright, et al., *Federal Practice and Procedure* § 4402 (2d ed. 2002) (same). Thus, "no other court has the power to hear the case." *Frigard*, 862 F.2d at 204.[14] Nor can Plaintiffs "redraft their claims" to "avoid" the deficiencies in their *parens patriae* argument; as explained above, any amendment would be futile. *See supra* pp. 28-

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(dismissal under *Rooker-Feldman* doctrine; state remedies could be available); *Siler v. Dillingham Ship Repair*, 288 F. App'x 400, 401 (9th Cir. 2008) (unpublished) (defect was lack of diversity jurisdiction; claims could be litigated in state court); *Marcum v. Grant Cnty.*, 234 F. App'x 527, 528 (9th Cir. 2007) (unpublished) (dismissal under *Rooker-Feldman* doctrine; state remedies could be available).

[14] Plaintiffs' observation (at 54) that, where standing is absent, a federal court may not adjudicate "the merits" is correct but unavailing. As noted, dismissal of Plaintiffs' claims on *parens patriae* standing grounds will preclude relitigation of that issue in future cases. Because *parens patriae* standing is the *only* basis on which the Plaintiff States can bring their claims, *see supra*, the consequence of the district court's judgment is that it will bar relitigation of their claims in any other forum.

30. The district court was therefore correct in dismissing Plaintiffs' complaint with prejudice.[15]

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: June 1, 2015

Respectfully submitted,

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[15] If this Court nonetheless determines that dismissal without prejudice was the better course, the appropriate remedy would be limited to "affirm[ing] with instructions to the district court to enter an order of dismissal without prejudice." *Kelly*, 377 F.3d at 1036, 1040; *see also Farren*, 467 F. App'x at 693 (same); *Crotwell v. Hockman-Lewis Ltd.*, 734 F.2d 767, 769 (11th Cir. 1984) ("Rather than remanding the case for entry of an order without prejudice, we hereby modify the district court's order by substituting the words 'without prejudice,' for the words 'with prejudice,' and affirm the judgment of the court as modified.").

STATEMENT OF RELATED CASES

Intervenor-Defendant-Appellee Association of California Egg Farmers certifies it is not aware of any related cases pending before this Court or any other court.

/s/ Carl J. Nichols
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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(a)(7)(B), the brief contains 8,593 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman font. As permitted by Fed. R. App. P. 32(a)(7)(B), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

/s/ Carl J. Nichols
CARL J. NICHOLS

June 1, 2015

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of June 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Carl J. Nichols
CARL J. NICHOLS