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,
Plaintiff-Appellants,

v.

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

THE HUMANE SOCIETY OF THE UNITED STATES, and THE ASSOCIATION OF CALIFORNIA EGG FARMERS,
Defendant-Intervenors-Appellees.

BRIEF FOR DEFENDANT-INTERVENORS-APPELLEES THE HUMANE SOCIETY OF THE UNITED STATES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Defendant-Intervenor-Appellee The Humane Society of the United States certifies that it has no parent companies, subsidiaries or affiliates that have issued shares to the public in the United States or abroad.

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INTRODUCTION

In 2010, California's legislature overwhelmingly passed AB 1437, which prohibits the sale of shell eggs in California if they were produced by hens confined in cruel and unsanitary "battery cages." The law, which did not become effective until January 1, 2015, applies only to sales in California or contracts to sell in California. Of course that means that some out-of-state egg producers have to bring their production methods into line with California standards if they want to continue to sell in California. Those producers might have standing (though no viable legal claim) to challenge AB 1437, but they have not done so and are not parties to this action.

Instead this lawsuit was brought by political entities that purport to sue as "*parens patriae*," on behalf of all the citizens of their states. But the *parens patriae* doctrine requires allegations of real harm to a sufficiently substantial segment of the population, to ensure that the state is not attempting to litigate on behalf of particular, narrow economic interests that could represent themselves if they desired. The district court recognized that Appellants alleged only speculative and unripe harm to, at most, a small handful of egg producers, and dismissed this lawsuit for lack of jurisdiction.

Appellants offer no persuasive argument that the district court erred, or abused its discretion by denying leave to amend. Any burdens imposed by AB 1437 fall on a small, discrete, and at this point entirely hypothetical subset of egg producers, who may desire to sell eggs in California and to continue keeping hens in inhumane and unsanitary conditions. The overwhelming majority of citizens in these states are either unaffected by AB 1437 or benefit from it—to the extent the law may increase the local supply, and therefore decrease the price, of non-compliant eggs that can no longer be sold in California. The district court properly rejected Appellants' claim of alleged harm to a sufficiently substantial segment of

their populations because "[a] subset of plaintiffs' egg farmers is not tantamount to the citizenry of plaintiffs' states." ER 25. Appellants' arguments for standing on the basis of abstract "quasi-sovereign" interests are just a smoke screen for the interests of an undefined handful of egg farmers and would, if accepted, essentially nullify the limits on *parens patriae* standing and give politicians a roving license to litigate, in the name of the state, on behalf of narrow special economic interests. The district court heard oral argument and correctly recognized that Appellants could not amend their complaint to cure these defects. Its well-reasoned decision should not be disturbed.

STATEMENT OF JURISDICTION

Defendant-Intervenor-Appellee The Humane Society of the United States (hereinafter "HSUS") adopts the jurisdictional statement of Appellants.

STATEMENT OF THE ISSUES

1. Whether Plaintiff-Appellants have *parens patriae* standing to challenge two provisions of California law.

2. Whether Plaintiff-Appellants' challenges to the California laws are otherwise justiciable.

3. Whether the district court abused its discretion by dismissing Plaintiff-Appellants' complaint without leave to amend.

COUNTER-STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

Almost 95 percent of America's 292 million egg-laying hens are confined in battery cages—wire contraptions so small that the hens cannot spread or flap their wings, lie down, or even turn around. Instead, hens in battery cages stand night and day on painful, sloping wire mesh.

In 1999, the European Union started phasing out the cages after "conclud[ing] that the welfare conditions of hens kept in current battery cages . . .

are inadequate." Council Directive 1999/74, 1999 O.J. (L 202) 53 (EC), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1999:203:0053:0057:EN:PDF. India, Israel, New Zealand, Bhutan, and Taiwan have all since promised to ban battery cages. A report in the *Netherlands Journal of Agricultural Science*, which ranked twenty-two different hen housing systems, found that, on a zero-to-ten scale of animal welfare, battery cages rate as 0.0. RM De Mol *et al.*, *A Computer Model for Welfare Assessment of Poultry Production Systems for Laying Hens*, 54 Netherlands J. of Ag. Sci. 157 (2006).

Battery cages also breed dangerous pathogens. Eggs from battery hens are the leading cause of human *Salmonella* infection, which kills more Americans than any other foodborne illness. *See An HSUS Report: Food Safety and Cage Egg Production* 2, at http://www.humanesociety.org/assets/pdfs/farm/report_food_safety_eggs.pdf (last visited Mar. 25, 2014) (collecting studies). A 2007 European Food Safety Authority analysis found significantly higher *Salmonella* rates in operations that confine hens in cages. *See* European Food Safety Authority, *Report of the Task Force on Zoonoses Data Collection on the Analysis of the Baseline Study on the Prevalence of Salmonella in Holdings of Laying Hen Flocks of Gallus Gallus* (2007), *available at* http://www.efsa.europa.eu/en/efsajournal/pub/97r.htm. And more than a dozen other scientific studies have confirmed that traditional battery cage operations have the highest rate of *Salmonella* of any egg production system. *See An HSUS Report: Food Safety and Cage Egg Production*, *supra* (collecting studies).

In 2008, California voters addressed these concerns by passing Proposition 2 ("Prop 2")—a ballot initiative "to prohibit the cruel confinement of farm animals." Prop 2 requires that egg-laying hens in California be able to "fully spread [] both wings without touching the side of an enclosure or other egg-laying hens," and "turn [] in a complete circle without any impediment, including a tether, and

without touching the side of an enclosure." Cal. Health & Safety Code §§ 25991(b), (f), (i).

In 2010, California's Legislature passed AB 1437, ensuring the effectiveness of Prop 2 by requiring that, as of January 1, 2015, all eggs *sold* in the State come from Prop 2-compliant conditions—wherever the eggs were produced. Cal. Health & Safety Code § 25996.[1] As the Act's official findings explain, the Legislature passed AB 1437 "to protect California consumers from the deleterious, health, safety, and welfare effects of the sale and consumption of eggs derived from egg-laying hens that are exposed to significant stress and may result in increased exposure to disease and pathogens including salmonella." *Id.* § 25995(e) .

II. PROCEEDINGS BELOW

In February 2014, nearly four years after the enactment of AB 1437, the State of Missouri filed the original complaint in this action. Dkt. No. 2. The complaint sought declaratory and injunctive relief on the grounds that AB 1437 and other California regulations related to the sale of eggs[2] either violate the

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[1] The law provides:

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

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

Commerce Clause of the United States Constitution or are preempted by the Federal Egg Products Inspection Act, 21 U.S.C. §§ 1031, *et seq*. The complaint was later amended to include additional plaintiff States and allegations about egg production, imports, and exports of eggs by a small group of producers in the added States. ER 35.

According to the First Amended Complaint ("FAC"), this case is about the "difficult choice" that "[e]gg producers in [the plaintiff States] face . . . regarding AB1437." ER 37. Either they can make the necessary—and allegedly costly—changes to their facilities to produce Prop 2-compliant eggs or they can stop selling their eggs in California. ER 37. Plaintiffs brought this action, the FAC claims, because these egg producers—"farmers in our states who must either comply with AB1437 or lose access to the largest market in the United States—have no representatives in California's Legislature and no voice in determining California's agricultural policy." ER 38.

Plaintiffs alleged that they have standing to file this action "as *parens patriae*" based on their "quasi-sovereign interests in protecting [their] citizens' economic health and constitutional rights as well as preserving [their] own rightful status within the federal system." ER 38. The allegations squarely focused on egg farmers, stating, for example, that "Missouri farmers produced nearly two billion eggs in 2012," ER 38; "Kentucky farmers produced approximately 1.037 billion eggs in 2012," ER 41; and "Iowa farmers produce over 14.4 billion eggs per year," ER 42. These egg producers, the Plaintiffs claimed, "depend on the California egg market." ER 44. The cost to these farmers "to retrofit existing housing or build new housing that complies with AB1437," the FAC alleged, "would be substantial." ER 42. And were the farmers to choose to forego the California market instead, they speculated that they would be left with no buyer for a significant portion of

their egg production, "potentially forcing some . . . producers out of business." ER 38.

Plaintiffs alleged the case was ripe for review based on the same harm to those same farmers. Plaintiffs claimed that "any of our farmers who continue to export their eggs to California will face criminal sanctions beginning January 1, 2015, unless they take action now to come into compliance," and "those farmers need to begin making the necessary capital improvements to their farms *now* if they are reach compliance." ER 55. In other words, "Plaintiffs' egg producers [were forced] to literally bet the farm on the outcome of this law suit." ER 55.

The district court granted motions by HSUS and the Association of California Egg Farmers ("ACEF") to intervene as defendants. Dkt. No. 57. All three Defendants filed motions to dismiss the case, contending the Plaintiffs lacked standing and failed to state a claim upon which relief could be granted. Dkt. Nos. 27-2, 36, 45. The State Defendants further argued that the Plaintiffs' claims were not ripe. Dkt. No. 36 at 8.

On October 1, 2014, the district court granted the motions and dismissed the action with prejudice. ER 34. The Court agreed that Plaintiffs lacked *parens patriae* standing because the action was brought "on behalf of only those egg farmers who have not brought their farming procedures into compliance with California's laws" and that "[a] subset of plaintiffs' egg farmers is not tantamount to the citizenry of plaintiffs' states" for purposes of *parens patriae* standing. ER 25. The Court further concluded that Plaintiffs' claims were not justiciable because the FAC did not show that Plaintiffs' residents faced any "imminent injury." ER 32. Nothing in the FAC indicated that any resident of the Appellants' states "intend[ed] to or [was] even capable of violating California's shell egg laws" or that "their claimed threat of prosecution [was] genuine." ER 31. Finally, the Court found that "[i]n light of the nature of the allegations in plaintiffs' first

amended complaint and the arguments made at hearing [on the motions to dismiss], leave to amend would be futile as plaintiffs lack standing to bring this action on behalf of each state's egg farmers." ER 34.

This appeal followed.

SUMMARY OF ARGUMENT

I. Appellants do not have *parens patriae* standing to challenge AB 1437. To qualify under that narrow doctrine, a state must (1) allege an 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 Reservation (Wiyot Tribe) v. Philip Morris, Inc.*, 256 F.3d 879, 885 (9th Cir. 2001) (internal citations omitted); *see Alfred L. Snapp & Son v. Puerto Rico*, 458 U.S. 592, 607 (1982). Appellants' allegations fail at every step. They allege only speculative, particularized harm to a handful of private egg producers who could easily sue on their own behalf, none of which even slightly implicates any interest of the Appellants themselves.

First, "more must be alleged than injury to an identifiable group of individual residents." *Snapp*, 458 U.S. at 607. But, as the district court rightly found, "a fair construction of the [First Amended Complaint] is that plaintiffs bring this action on behalf of only those egg farmers who have not brought their farming procedures into compliance with California's laws and regulations." ER 25. The whole case, the FAC explains, is about the "difficult choice" that egg farmers in the Appellants' states face—whether to abide by AB 1437 or stop selling eggs in California—and the costs either choice would impose on those farmers. ER 36-37. This small, identifiable group of Appellants' residents clearly do not constitute a "substantial segment" of their populations.

On appeal, Appellants imply that the district court took "too narrow a view of the interests at stake," citing cases in which courts considered all similarly

situated citizens when evaluating whether the plaintiff-States represented a substantial segment of their populations. ER 41-42. But the only similarly situated citizens affected by AB 1437 are a handful of egg farmers – and not even all egg farmers, but only those engaged in a particular form of production. And, even if the district court were required to consider alleged harms beyond those farmers, the Court considered all of the harms that the Appellants alleged; they simply failed to allege real harm to anyone other than the handful of egg farmers who might want to sell in California while continuing to use inhumane and unsanitary production methods.

Second, the Appellants also fail to "articulate an interest apart from the interests of particular private parties" that could sue on their own behalf. *Snapp*, 458 U.S. at 607. Appellants never explained to the district court or this Court why the egg farmers in their states could not fully address the alleged harms through private suits in their own names seeking precisely the same relief Appellants seek here.

Third, the Appellants cannot sufficiently express a quasi-sovereign interest that is harmed by AB 1437. Quasi-sovereign interests "consist of a set of interests that the State has in the well-being of its populace." *Snapp*, 458 U.S. at 602. But Appellants have not alleged any harm to the general economic health and well-being of their residents; they have alleged that a small group of private egg producers *might* choose to move to a somewhat higher cost, and higher value, production method in order to continue exporting to California. This alleged harm is nothing like the concrete harms to the Appellants' residents "in general" alleged in the cases on which Appellants rely. *See, e.g.*, *Pennsylvania v. West Virginia*, 262 U.S. 553, 584-85 (1923) (alleging the challenged law would affect "the health and comfort of *thousands of their people* who use the gas in their homes and are largely dependent thereon; and . . . will halt or curtail *many industries* which

seasonally use great quantities of the gas and wherein *thousands of persons are employed* and millions of taxable wealth are invested" (emphases added)). Nor is there anything in the FAC suggesting that AB 1437 has an impact on any substantial segment of the States' populations' abilities to enjoy the "benefits of the federal system."

II. The district court also properly dismissed Appellants' claims as non-justiciable because they have not alleged concrete, imminent harm to *anyone*. *See* ER 32. Appellants contend that "[i]t is reasonable to infer . . . that [their] farmers would continue to export a like number of eggs to California each year in the future unless prohibited from doing so." Opening Br. 51. But that is pure speculation insufficient to state a claim. Appellants never allege that any egg farmer actually has "concrete plans" to continue selling eggs in California (as opposed to anywhere else in the United States) or that those plans include violating California law; they allege no specific warning or threats of prosecution; and they allege no history of enforcement. And Appellants' contention that their egg farmers are injured *now* because they are supposedly forced to make a "difficult choice" is just as speculative and conclusory. For all that the FAC discloses, the handful of egg farmers who actually export to California from these states may have voluntarily shifted away from battery cages years ago and face no choice at all.

III. Finally, the district court did not abuse its discretion by granting the Defendants' and Intervenor-Defendants' motions to dismiss *without* leave to amend. Futility of amendment, standing alone, can justify the denial of a motion for leave to amend. The district court carefully reviewed the Appellants' pleadings and pressed hard on their arguments in a live hearing, and correctly recognized that any amendments Appellants might offer in this case "would be futile, as Appellants lack standing to bring this action on behalf of each state's egg farmers."

ER 34. In light of Appellants' failure, even now, to assert any additional facts to establish their standing in this case, Appellants have provided no reason why it was an abuse of discretion to dismiss this action without leave to amend.

STANDARD OF REVIEW

Whether parties have standing to sue is a question of law reviewed *de novo*. *S.D. Myers, Inc. v. City & County of San Francisco*, 253 F.3d 461, 474 (9th Cir. 2001). Justiciability is also reviewed *de novo*. *Porter v. Jones*, 319 F.3d 483, 489 (9th Cir. 2003). The denial of leave to amend is reviewed for abuse of discretion. *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (*en banc*).

On a motion to dismiss, all allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). But the court is not "required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Id.* (*citing Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994)); *see also Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009).

ARGUMENT

I. PLAINTIFFS LACK STANDING TO BRING THIS ACTION ON BEHALF OF A HANDFUL OF PRIVATE EGG FARMERS

The Constitution does not grant federal courts the power to resolve just any dispute brought before them, even a dispute brought by a sovereign state. Article III requires that "*any* person invoking the power of a federal court must demonstrate standing to do so," and "in the ordinary course, a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties." *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661, 2663 (2013) (emphasis added). This "fundamental restriction" on the

authority of federal courts applies to states as potential plaintiffs and is subject to only "certain, limited exceptions." *Id.* Invoking one of those limited exceptions, the Appellants supposedly bring this case not to protect their own sovereign or proprietary interests but "on behalf of their citizens" under the doctrine of *parens patriae*. Opening Br. 23.

To qualify under the narrow *parens patriae* doctrine, however, a state must (1) allege an 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 Reservation (Wiyot Tribe) v. Philip Morris, Inc.*, 256 F.3d 879, 885 (9th Cir. 2001) (internal citations omitted); *see Alfred L. Snapp & Son v. Puerto Rico*, 458 U.S. 592, 607 (1982). Appellants' allegations fail at every step. They allege only speculative, particularized harm to a handful of private egg producers who could easily sue on their own behalf, none of which even slightly implicates any interest of the Appellants themselves.

A. Appellants Have Not Alleged Injury to a "Substantial Segment" of Their Citizens

First, Appellants have not alleged harm to a sufficiently substantial segment of their citizens. While the Supreme Court has never articulated a magic number for how many of a state's citizens constitute a "sufficiently substantial segment," it has made clear that this limitation has teeth and that "more must be alleged than injury to an identifiable group of individual residents." *Snapp*, 458 U.S. at 607.

This Court has therefore correctly rejected claims of *parens patriae* standing where a sovereign alleged harm only to its "legal services providers." *Oregon v. Legal Servs. Corp.*, 552 F.3d 965, 972 (9th Cir. 2009). Other courts have rejected similar claims directed to discrete segments of citizens, such as a distinct subgroup of an Native American tribe, *Kickapoo Tribe of Okla. v. Lujan*, 728 F. Supp. 791, 795 (D.D.C. 1990); a particular individual's next of kin, *Kickapoo Traditional*

Tribe of Tex. v. Chacon, 46 F. Supp. 2d 644, 652 (W.D. Tex. 1999); or an identifiable group of students seeking to evade a school dress code, *Alabama & Coushatta Tribes of Tex. v. Trustees of Big Sandy Indep. Sch. Dist.*, 817 F. Supp. 1319, 1327 (E.D. Tex. 1993).

The district court rightly reached the same result here. As the Court found, "a fair construction of the [First Amended Complaint] is that plaintiffs bring this action on behalf of only those egg farmers who have not brought their farming procedures into compliance with California's laws and regulations." ER 25. From start to finish, the FAC asserts *only* these farmers' purported rights and potential harm to these farmers alone.

Indeed, the whole case, the FAC explains, is about the "difficult choice" that a subset of egg farmers in the Plaintiffs' states face in deciding whether to abide by AB 1437 or stop selling eggs in California. ER 37. Making the necessary changes, the FAC claims, would impose "massive capital improvement costs" on those particular farmers; foregoing the California egg market might force those farmers out of business. ER 37-38. In the same vein, the Appellants complain that some egg "farmers in our states" are being put to this choice without representation in the California Legislature or "a voice in determining California's agricultural policy." ER 38.

This unblinking focus on an undefined portion of Appellants' egg farmers continues throughout the FAC. The parties are defined by the production output of each Appellants' egg farmers. *See, e.g.*, ER 38 ("Missouri farmers produced nearly two billion eggs in 2012"); ER 41 ("Kentucky farmers produced approximately 1.037 billion eggs in 2012"); ER 42 ("Iowa farmers produce over

14.4 billion eggs per year")[3]. The factual allegations recount some farmers' "depend[ence] on the California egg market," ER 44; the alleged costs they would incur to comply with AB 1437, *see* ER 47 ("the necessary capital improvements will cost Plaintiffs' farmers hundreds of millions of dollars"); and the ultimate potential harm should the farmers choose to stop exporting to California instead, *see, e.g.*, ER 54 ("Without California consumers, . . . supply [in Missouri] would outpace demand by half a billion eggs, . . . potentially forcing some Missouri producers out of business."). The immediate harms that allegedly made this case ripe for review are the same. *See, e.g.*, ER 55 (alleging potential criminal sanctions for egg farmers who violated the law).

This small, identifiable group of Appellants' residents clearly do not constitute a "substantial segment" of their populations. As the district court found, "[a] subset of plaintiffs' egg farmers is not tantamount to the citizenry of plaintiffs' states." ER 25. No facts are necessary to establish that point, but HSUS requested jurisdictional discovery if the court believed it to be necessary and filed affidavits—which plaintiffs did not contradict—establishing that egg production is highly concentrated and that at most a small handful of farmers in each Appellant state have sold eggs in California.[4] Dkt. Nos. 27-2; 27-4.

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[3] These figures are somewhat misleading because they apparently include *all* eggs produced in the respective states, without distinguishing between egg farmers who may already be in compliance with Prop 2 and those who are not, or between egg farmers who sell to markets in other states and those who send their eggs exclusively to California.

[4] Judicially recognizable records from the California Department of Food and Agriculture, for example, show that just one egg handler from each of Alabama, Nebraska, and Kentucky is registered to sell eggs in California, while no Oklahoman egg handlers are. *See* Exh. A to Declaration of Peter Brandt. Dkt. No. 27-4. Missouri has seven entities registered to sell shell eggs in California, but all are owned by just three companies. *Id.* And, although Iowa has 29 registrations,

On appeal, Appellants do not contend that they can establish standing purely on the basis of any alleged injuries by those egg farmers, even though those alleged injuries are the overwhelming focus of the FAC. Instead, Appellants merely imply that by focusing on the harms they themselves pled, the district court took "too narrow a view of the interests at stake." *See* Opening Br. 41-42 (quoting *Snapp*, 458 U.S. at 609). Citing cases in which states were permitted to sue certain public accommodations to enforce anti-discrimination laws, Appellants contend that "the indirect effects of the [alleged] injury" must also be considered to determine whether they have alleged injury to sufficiently substantial segments of their populations. *Id.* at 42 (emphasis omitted) (quoting *People v. Peter & John's Pump House, Inc.*, 914 F. Supp. 809, 812 (N.D.N.Y. 1996), and citing *People v. 11 Cornwell Co.*, 695 F.2d 34, 36 (2d Cir. 1982), *vacated on other grounds*, 718 F.2d 22 (2d Cir. 1983) (en banc)); *Massachusetts v. Bull HN Info. Sys., Inc.*, 16 F. Supp. 2d 90, 98-99 (D. Mass. 1998)).

These discrimination cases do not help Appellants' cause. The "indirect effects" considered in those cases (discrimination effects) are not analogous to those Appellants wish the district court had considered. In each cited case, although the defendants were accused of discriminating against a small number of persons, the courts rightly considered all similarly situated citizens when evaluating whether the states represented a substantial segment of their populations. *See 11 Cornwell*, 695 F.2d at 39 ("While the residence was to house eight to ten moderately retarded adults plus two 24-hour 'houseparents,' plainly the inability to establish this facility (or others like it, in event of similar conspiracies to discriminate) is to deprive any number of retarded persons of the opportunity to

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most belong to just a few businesses (*e.g.*, Centrum Valley has six registrations), or to producers of egg products or organic/cage-free eggs, which will not be affected by AB 1437. *Id.*

receive rehabilitation.");[5] *Bull HN Info. Sys.*, 16 F. Supp. 2d at 100 ("a court should consider not just the individuals directly affected by the defendant's conduct, but all similarly situated individuals"); *Pump House*, 914 F. Supp. at 813 ("In this case, … the alleged discrimination affects a larger population, and there is no accurate method to determine how many African Americans may have been denied access to the Club because of their race."). But the problem with Appellants' claim is not that the district court failed to consider all similarly situated citizens from their states. It is that the only similarly situated citizens affected by AB 1437 are certain egg farmers who do not amount to anything close to a substantial segment of Appellants' populations.

Even if the district court were required to consider alleged harms beyond those to the handful of egg farmers actually affected by AB 1437, the Court did not take an artificially narrow view of the alleged harms. It considered all of the harms that the Appellants alleged; Appellants simply failed to allege real harm to anyone other than the handful of egg farmers who might want to sell in California while continuing to use inhumane and unsanitary production methods.

Appellants claim the lower court failed to consider their allegations that there might be indirect effects on egg prices in their states as a result of egg farmers choosing to comply with AB 1437. *See* Opening Br. 30 (citing ER 57). But Appellants never alleged that egg prices *would* rise in their states. Their

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[5] The *11 Cromwell* Court also reasoned that the discrimination against the mentally retarded adults in that case affected other "members of the community itself, including the very neighbors who conspired [to discriminate against the mentally retarded adults]." *Id.* at 39 (citing Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1, 33-34 (1959)). But that turned on the court's view of the specific harm that flows from segregation. *See* Wechsler, *supra*, at 34 (stating "the question posed by state-enforced segregation is … the denial by the state of freedom to associate, a denial that impinges in the same way on any groups or races that may be involved"). No analogous harm is present here.

allegations about egg prices were framed in the alternative: *Either* farmers would comply with AB 1437, which allegedly would cause egg prices to rise in Plaintiffs' states, *or* egg farmers would forego the California egg market, in which case egg prices would fall in their states—*benefiting* egg consumers' economic interests—as the additional eggs that could not be sold in California are instead sold locally. *See, e.g.*, ER 37-38 ("The first option will raise the cost of eggs in Missouri. . . . The second option will flood Missouri's own markets with a half-billion surplus eggs that would otherwise have been exported to California, causing Missouri prices to fall." (emphasis omitted)); *see also* ER 24 ("[T]he allegations in plaintiffs' complaint point to a potential decrease in the cost of eggs, which may benefit plaintiffs' citizens rather than injure them."). [6] In addition to the fact that Appellants only allege harm to a small subset of egg farmers, such a concededly ambiguous effect on the price of eggs cannot establish Article III standing because it is not a concrete, personal harm traceable to the challenged conduct and redressable by a decision on the merits.

More importantly, the potential harm with respect to pricing alleged by Appellants is, once again, a potential harm to particular egg farmers—not to other citizens. Complying with AB 1437, they claim, would force egg farmers to "sell . . . eggs in their own states at higher prices than their competitors," ER 54, and "make [their eggs] too expensive to export to any state other than California," ER 37. Foregoing the California market, on the other hand, would "caus[e] the

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[6] Appellants also label the suggestion that decreased egg prices would benefit egg consumers as "myopic," because if such decreased prices forced too many egg farmers out of business, egg prices might eventually rise to supracompetitive levels. *See* Opening Br. 38. It is difficult to imagine a more speculative allegation about the future supply and demand of eggs in plaintiffs' states. Appellants provide no reason to believe that AB 1437 will create an egg monopoly in any of Appellants' states. And they never even made such an allegation to the district court.

price of eggs—as well as egg farmers' margins—to fall throughout the Midwest and potentially forc[e] some . . . producers out of business." ER 54. These are not harms to consumers, but to the same small group of producers. AB 1437 does not prevent anyone from producing eggs in Iowa for sale in Iowa however they wish, so consumers in these states will still be able to spend less by purchasing eggs from battery cage producers if that is what they want. If some producers choose to switch to more humane and healthy methods and raise their prices accordingly, that just means consumers in these states will have more choice. If the producers do not switch, then egg prices outside of California would be expected to *fall*—as Appellants acknowledge.

Finally, even if Appellants did have a plausible theory that AB 1437 could raise all egg prices in the Midwest (they do not), the district court properly concluded that "no constitutional injury occurs when a manufacturer passes on higher costs in the form of price increases." ER 24 (quoting *Table Bluff*, 256 F.3d at 885). Appellants attempt to cabin *Table Bluff*'s holding to cases alleging due process violations. *See* Opening Br. 39-40. But the Court's observation in *Table Bluff* is no more than a specific application of well-settled law that "when . . . a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*," standing is "substantially more difficult to establish." *Lujan*, 504 U.S. at 562. And this Court has applied the exact same rule to claims arising under the Commerce Clause. *See San Diego County Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1130 (9th Cir. 1996) ("Although the Crime Control Act may tend to restrict supply, nothing in the Act directs manufacturers or dealers to raise the price of regulated weapons. Under *Lujan*, plaintiffs' injury does not satisfy the requirements of Article III because it is 'th[e] result [of] the independent action of some third party not before the court.'" (quoting *Lujan*, 504 U.S. at 560) (alterations in original)).

B. Appellants Fail to Articulate an Interest Apart from the Interests of Particular Private Parties

Appellants also fail to "articulate an interest apart from the interests of particular private parties, *i.e.*, [that Appellants are] more than . . . nominal part[ies]." *Snapp*, 458 U.S. at 607. One indication of whether a state meets this requirement is whether the citizens allegedly harmed by the defendant's conduct could effectively obtain relief by suing on their own behalf. *See, e.g.*, *Missouri v. Illinois*, 180 U.S. 208, 241 (1901) ("the nature of the injury complained of is such that an adequate remedy can only be found . . . at the suit of the state of Missouri"); *Maryland v. Louisiana*, 451 U.S. 725, 739 (1981) (finding it impractical to expect Maryland's citizens to litigate the challenged Louisiana tax "given that the amounts paid by each consumer are likely to be relatively small"); *see also Bull HN*, 16 F. Supp. 2d at 101 ("if individuals could obtain complete relief through a private suit . . . the state [is no] more than a nominal party in a private dispute"); *Connecticut v. Physicians Health Servs. of Conn., Inc.*, 103 F. Supp. 2d 495, 504 n.8 (D. Conn. 2000) (same).

Appellants never explained to the district court or this Court why the egg farmers in their states could not fully address the alleged harms through private suits in their own names. The companies Appellants seek to represent are sophisticated commercial entities. They are perfectly capable of protecting their own interests and, *if* Appellants' allegations were true, would have every incentive to do so. *See, e.g.*, *NuCal Foods, Inc. v. Quality Egg LLC*, 918 F. Supp.2d 1023 (E.D. Cal. 2013) (action between two egg industry companies over eggs contaminated with *Salmonella* which allegedly sickened 62,000 people).

If the actual egg producers had decided to sue, the relief available in such suits, if they prevailed, would be co-extensive to the relief Appellants seek here. *Compare* ER 58-59 (seeking declaratory and injunctive relief), *with Nat'l Audubon*

Soc'y, Inc. v. Davis, 307 F.3d 835, 847 (9th Cir. 2002) ("private individuals may sue state officials for prospective relief against ongoing violations of federal law" (citing *Ex parte Young*, 209 U.S. 123 (1908)).

C. Appellants Have Not Sufficiently Alleged Harm to a Quasi-Sovereign Interest

For similar reasons, the States cannot sufficiently express a quasi-sovereign interest that is harmed by AB 1437. Quasi-sovereign interests "consist of a set of interests that the State has in the well-being of its populace." *Snapp*, 458 U.S. at 602. They fall into two general categories: "First, a State has a quasi-sovereign interest in the health and well-being—both physical and economic—of its residents in general." *Id.* at 607. "Second, a State has a quasi-sovereign interest in not being discriminatorily denied its rightful status within the federal system." *Id.* In either case, "a quasi-sovereign interest must be sufficiently concrete to create an actual controversy between the State and the defendant." *Id.* at 602.

Appellants contend they have sufficiently alleged harm to quasi-sovereign interests of each type. Opening Br. 25. They have not.

1. *Appellants Have Not Alleged A Cognizable Harm to Their Quasi-Sovereign Interest in the Health and Well-Being of Their Residents in General*

Courts have long recognized that states may assert a quasi-sovereign interest in the economic "health and well-being . . . of its residents *in general*." *Snapp*, 458 U.S. at 602 (emphasis added). As the Supreme Court has explained, a state has a quasi-sovereign interest "apart from particular individuals who may be affected," in "complaining of a wrong [that], if proven, limits the opportunities of her people, shackles her industries, retards her development, and relegates her to an inferior economic position among her sister States." *Georgia v. Pa. R.R. Co.*, 324 U.S. 439, 451 (1945).

But, as detailed above, Appellants have not alleged any harm to the economic health and well-being of their residents "in general." They have alleged that a small group of private egg producers *might* choose to move to a somewhat higher cost, and higher value, production method in order to continue exporting to California. AB 1437 would not limit the opportunities of Appellants' other citizens or relegate Appellants to an inferior economic position among their sister states. As the district court put it, "far from 'shackling' plaintiffs' industries, plaintiffs have alleged nothing to suggest California's shell egg laws will detrimentally affect anyone outside of an identifiable group of egg farmers." ER 27. And that small group of individual farmers will bear somewhat higher costs only because, having chosen to do business *in California*, they must use the same production methods required of anyone who wants to sell eggs in California.

On appeal, Appellants strain mightily to fit the alleged harms to these egg farmers into quasi-sovereign interests recognized in prior cases. Those efforts fail.

First, Appellants contend that "the Supreme Court has generally found that a state has *parens patriae* standing when suing to invalidate a Sister State's law under the 'dormant' aspect of the Commerce Clause." Opening Br. 29. But a state—no more than any other litigant—may not invoke the judicial power of federal courts on a bare assertion that the defendant has violated the Constitution. *See Nevada v. Burford*, 918 F.2d 854, 856-57 (9th Cir. 1990) ("[A]n asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court.").

Neither *Louisiana v. Texas*, 176 U.S. 1 (1900), nor *Great Atlantic & Pacific Tea Co. v. Contrell*, 424 U.S. 366 (1976), is to the contrary. The dictum that Appellants cite from *Louisiana* says nothing more than that Louisiana "*assert[ed]* that the State [wa]s entitled to seek relief . . . because the matters complained of affect her citizens at large." *Id.* at 19 (emphasis added). The Court never passed

on the validity of that assertion before, as Appellants concede, it dismissed Louisiana's complaint on other grounds. *See* Opening Br. 28 n.6. *Great Atlantic & Pacific Tea Co.*—a case in which a regulated company sued to vindicate its rights under the dormant Commerce Clause—is no more help. The passage on which Appellants rely holds that Mississippi could not justify a violation of the dormant Commerce Clause by pointing to a reciprocal violation by Louisiana. *See* 424 U.S. at 379 (the challenged law was not a legitimate means of addressing "allegations that Louisiana is itself violating the Commerce Clause by refusing to admit milk produced in Mississippi"). The Court's passing suggestion that the proper means of redress was for "Mississippi *and its [milk] producers*" to bring suit "in state or federal courts" says nothing about Article III standing at all, much less Mississippi's *parens patriae* standing to advance such a claim in federal court without those producers. *Id.* (emphasis added).

Thus, contrary to the Appellants' suggestion, it is not enough that they have asserted a dormant Commerce Clause violation. They must allege that the violation somehow harms their residents "in general" in a concrete way. In *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923), for example, Pennsylvania challenged a West Virginia law that required natural gas producers in the state to meet the needs of all local customers before shipping gas interstate. The law allegedly would have cut off the supply of natural gas coming into Pennsylvania. *Id.* at 594. And the resulting harm to Pennsylvania's residents was widespread. *See id.* at 584-85 ("[I]t will imperil the health and comfort of *thousands of their people* who use the gas in their homes and are largely dependent thereon; and . . . will halt or curtail *many industries* which seasonally use great quantities of the gas and wherein *thousands of persons are employed* and millions of taxable wealth are invested." (emphases added)). "In Pennsylvania the gas [wa]s used by 300,000 domestic consumers caring for 1,500,000 people, and in Ohio by 725,000 domestic

consumers caring for 3,625,000 people." *Id.* at 590; *see also Maryland v. Louisiana*, 451 U.S. 725, 739 (1981) (Louisiana's "first use" tax on natural gas imported from Louisiana into the plaintiffs' states would affect "a great many" consumers "in each of the plaintiff States," increasing their costs "aggregating millions of dollars per year."). Appellants' allegation that AB 1437 might prevent a handful of egg farmers from shipping eggs *out* of their states presents no analogous harm to the well-being of egg consumers, or residents in general, *in* their states.

Appellants' reliance on cases alleging economic isolation or discrimination fails for the same reason. In *Georgia v. Pennsylvania Railway Co.*, the State alleged a conspiracy to charge significantly higher rates for transportation of all freight by railroad "to and from Georgia," the consequences of which ran "far beyond the claim of damage to individual shippers." 324 U.S. at 452. "[M]any of Georgia's products" were denied equal access to national markets; "opportunit[ies] in manufacturing, shipping and commerce" of all kinds were curtailed; and the State's efforts to "promote the general progress and welfare of its people" were frustrated. *Id.* at 444. In *Snapp*, the defendants' alleged discrimination against Puerto Ricans on the basis of their nationality imposed cognizable harm on *all* Puerto Ricans. *See* 458 U.S. at 609 ("[D]eliberate efforts to stigmatize the labor force as inferior carry a *universal sting*." (emphasis added)). Appellants' attempt to compare such harms to the hypothetical impact of AB 1437 on a subset of their egg farmers is absurd.[7]

[7] Proposed *Amici* Utah advances Appellants no closer to meeting their burden of showing harm to their "residents in general." *Snapp*, 458 U.S. at 602. Dkt. 7 at 4. Even if true, Utah's assertion that "AB 1437 will have a negative effect on a significant number of Utah citizens" has no bearing on the impact on citizens in states that are actually parties to this case. Notably, Utah never argues that what holds for Utah and its citizens necessarily holds for citizens of Appellant states.

2. *Appellants Have Not Sufficiently Alleged Harm to Their Quasi-Sovereign Interest in Preserving Their Place in the Federal System*

Relying again on *Snapp*, Appellants contend that they "have alleged injury to [their] quasi-sovereign interest in preserving [their] rightful place as co-equal sovereigns in our federal system." Opening Br. 44. But the Appellants' reading of *Snapp* is woefully incomplete.

While it is true that a state has an "interest in securing observance of the terms under which it participates in the federal system," a state may not rely on this abstract interest to become a nominal party in a private dispute. *Snapp*, 458 U.S. at 607-08. "In the context of *parens patriae* actions," this means only that a state has a quasi-sovereign interest "in assuring that *the benefits* of the federal system are not denied to *its general population*." *Id.* at 608 (emphasis added). First, there is nothing in the FAC suggesting that AB 1437 has an impact on any state's or any substantial segment of the population's abilities to enjoy the "benefits of the federal system," and simply stating that conclusion does not make it so. *See Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001) (*citing Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994)) (court is not "required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences"); *see also Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009). Second, Appellants' tour through the history of

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And even if Utah's assertion that low-income families spend more money on food were true and could be extrapolated to low-income families in Appellant states, Utah does not even allege how much of such families' budgets is spent on eggs. Utah does not argue that eggs are the only low cost form of protein low income families would have access to even if AB 1437 did result in higher egg prices. And, of course, Appellants themselves explain that it is at least as likely that AB 1437 will cause egg prices to *fall* outside of California. These claims are, at best, sheer speculation and, indisputably, irrelevant to the examination of the actual Appellant states' Article III standing.

the dormant Commerce Clause—which they acknowledge is not directly relevant here—demonstrates only that they seek to assure some undeveloped "benefits of the federal system" to which they claim *their egg farmers* are entitled. *See* Opening Br. 47 (claiming a quasi-sovereign interest in preventing California from "imposing sanctions on Missouri farmers for their lawful conduct in Missouri"). These cursory arguments, applied to a subgroup of a small subset of the state's population, are inadequate to meet the threshold for this type of standing.

II. APPELLANTS' CLAIMS ARE NOT JUSTICIABLE BECAUSE THEIR EGG FARMERS FACE NO GENUINE THREAT OF IMMINENT PROSECUTION

The district court also properly dismissed Appellants' claims as non-justiciable because they have not alleged concrete, imminent harm to *anyone*. *See* ER 32. This Court has "repeatedly admonished . . . that '[t]he mere existence of a statute, which may or may not ever be applied to plaintiffs, is not sufficient to create a case or controversy within the meaning of Article III.'" *San Diego County Gun Rights Comm.*, 98 F.3d at 1126. Rather, "[w]hether framed as an issue of standing or ripeness," plaintiffs seeking pre-enforcement review of a criminal statute must establish "a *genuine* threat of *imminent* prosecution" to satisfy Article III's case-or-controversy requirement." *Wolfson v. Brammer*, 616 F.3d 1045, 1058 (9th Cir. 2010); *see also Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341-42 & n.5 (2014). This separate burden applies even if the Appellants can otherwise establish a right to pursue this action under the *parens patriae* doctrine. *See Table Bluff*, 256 F.3d at 885 ("[T]he Tribes still must allege injury in fact to the citizens they purport to represent as *parens patriae*."). As the district court properly found, Appellants failed to meet that burden here.

When evaluating whether a genuine threat of prosecution exists, this Court considers "(1) whether the plaintiff has articulated a concrete plan to violate the law in question; (2) whether the prosecuting authorities have communicated a

specific warning or threat to initiate proceedings; and (3) the history of past prosecution or enforcement under the challenged statute." *Wolfson*, 616 F.3d at 1058. Appellants have alleged no concrete plans to violate the law, no specific warning or threats of prosecution, and no history of enforcement.

Instead, Appellants contend merely that based on their farmers' past history of exporting shell eggs into California, "[i]t is reasonable to infer . . . that [their] farmers would continue to export a like number of eggs to California each year in the future unless prohibited from doing so." Opening Br. 51. But that falls far short of the type of "concrete plan[s] to violate the law" this Court has required. *See San Diego County Gun Rights Comm.*, 98 F.3d at 1127 ("The complaint does not specify any particular time or date on which plaintiffs intend to violate the Act."). Indeed, it is rank conjecture insufficient to state a claim. *See, e.g. Crete Carrier Corp. v. Envtl. Prot. Agency*, 363 F.3d 490, 494 (D.C. Cir. 2004) ("Speculative and unsupported assumptions regarding the future actions of third-party market participants are insufficient to establish Article III standing."); *United Transp. Union v. ICC*, 891 F.2d 908, 912 (D.C. Cir. 1989) ("[W]e may reject as overly speculative those links which are predictions of future events (especially future actions taken by third parties).").

Appellants never allege that any egg farmer actually has "concrete plans" to continue selling eggs in California (as opposed to anywhere else in the United States) or that those plans include violating California law. Indeed, as third parties, who are not themselves selling any eggs or subject to AB 1437, it is not at all clear that Appellants would be competent to make those allegations.

Alternatively, Appellants contend that even if there is no genuine threat of imminent prosecution under AB 1437, their egg farmers are injured *now* because they are forced to choose whether to make costly upgrades to comply with the law,

violate the law, or walk away from the California market. *See* Opening Br. 51-52 ("The present injury is having to make the choice.").

First, Appellants' allegations about a hypothetical "difficult choice" faced by unnamed egg farmers are hardly less conjectural than their allegation that the same hypothetical egg farmer may face future prosecution for the results of that choice. For all that the FAC discloses, the handful of egg farmers who actually export to California from these states may have voluntarily shifted away from battery cages years ago and face no choices at all. Nor is it clear that such a hypothetical choice would be a difficult one. The amended complaint does not allege nor support any reasonable inference that abandoning battery cages will actually result in a net financial loss to egg producers, after accounting for the increased prices that the healthier, more humanely produced, Prop 2-compliant eggs can yield in the market. Missing from the FAC is any allegation that selling battery cage eggs is always a more profitable endeavor than selling eggs from hens kept in Prop-2 compliant conditions. Nor can that inference be reasonably drawn from the FAC. Article III does not permit adjudication of a purely hypothetical controversy.

Second, if the present injury Appellants allege is the "chilling effect" the California law imposes on egg farmers' future plans, this Court has already held that, outside the First Amendment context, such an effect cannot serve as a basis for Article III standing. *See San Diego County Gun Rights Comm.*, 98 F.3d at 1129 ("Certainly, plaintiffs face a difficult choice whether or not to engage in conduct prohibited under the Act . . . [but] allegations of a subjective chill are not an adequate substitute for a claim of specific present objective harm." (internal quotations and alterations omitted)). If the present injury is the potential cost of preventing a future prosecution, that also is insufficient. Parties "cannot manufacture standing merely by inflicting harm on themselves based on their fears

of hypothetical future harm that is not certainly impending." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1151 (2013).

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY DENYING LEAVE TO AMEND

The district court correctly granted the Defendants' and Intervenor-Defendants' motions to dismiss *without* leave to amend. A district court's "denial of leave to amend a complaint is reviewed for an abuse of discretion." *United States v. Corinthian Colls.*, 655 F.3d 984, 995 (9th Cir. 2011). Under that standard, this Court will affirm unless the district court resolved the motion based on "a factual finding that was illogical, implausible, or without support in inferences that may be drawn from the facts in the record," or it applied an incorrect rule of law. *Id.* In this case, the district court did neither.

As the district court properly recognized, valid reasons for denying leave to amend include "undue delay, bad faith, prejudice, and futility." ER 32-33 (quoting *Cal. Architectural Bldg. Prods., Inc. v. Franciscan Ceramics*, 818 F.2d 1466, 1472 (9th Cir. 1988)). Futility of amendment, standing alone, can justify the denial of a motion for leave to amend. *See, e.g.*, *United States ex rel. Lee v. SmithKline Beecham, Inc.*, 245 F.3d 1048, 1052 (9th Cir. 2001); *Bonin v. Calderon*, 59 F.3d 815, 846 (9th Cir. 1995); *Outdoor Sys., Inc. v. City of Mesa*, 997 F.2d 604, 614 (9th Cir. 1993); *Allen v. Beverly Hills*, 911 F.2d 367, 373-74 (9th Cir. 1990) (denying leave to amend because "it was not factually possible for [the] plaintiff to amend the complaint so as to satisfy the standing requirement"); *see also Sisseton-Wahpeton Sioux Tribe of Lake Traverse Indian Reservation, N. Dakota & S. Dakota v. United States*, 90 F.3d 351, 355-56 (9th Cir. 1996) (dismissing *parens patriae* case without leave to amend on futility grounds). The district court carefully reviewed the Appellants' pleadings and pressed hard on their arguments in a live hearing, and correctly recognized that any amendments Appellants might

offer in this case "would be futile, as plaintiffs lack standing to bring this action on behalf of each state's egg farmers." ER 34.

Appellants do not contend that they *could* assert any additional facts to establish their standing in this case. Appellants contend that futility can only serve as a ground for denying leave to amend, by itself, "after the district court has afforded the plaintiff ample opportunity to state its claims." Opening Br. 57 (citing *Sylvia Landfield Trust v. City of Los Angeles*, 729 F.3d 1189, 1196 (9th Cir. 2013)). But the Court's brief discussion in *Sylvia Landfield Trust* says no such thing. Although the Court noted that plaintiffs had been permitted to amend their complaint multiple times, it did not hold such opportunities were necessary. *Id*. at 1196. Nor do this Court's other cases establish such a categorical rule. *See, e.g.*, *Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1058 (9th Cir. 2011) ("The district court's discretion to deny leave to amend is *particularly* broad where plaintiff has previously amended the complaint." (emphasis added)); *see also Goolsby v. Carrasco*, No. 1:09-cv-01650 JLT (PC), 2010 WL 3943642 at *4 (E.D. Cal. Oct. 1 2010) (case dismissed with prejudice despite no amendments to the complaint); *Sisseton-Wahpeton Sioux Tribe*, 90 F.3d at 355-56 (dismissing *parens patriae* case without leave to amend on futility grounds). And Appellants have provided no reason why it was an abuse of discretion to deny them that opportunity on the facts of this case, when Appellants still have never articulated anything that they might plead which would establish standing.

Finally, in a last ditch attempt to save their case, Appellants argue that the district court "further abused its discretion" by denying leave to amend based on an adverse inference that Appellants "brought this case only to vindicate the interests of egg farmers in their respective states." Opening Br. 58. But it should be clear by now that such an inference is far from "illogical [or] implausible." Indeed,

based on everything Appellants had expressed to the district court, it was (and remains) the only plausible inference the district court could draw.[8]

CONCLUSION

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

Respectfully submitted,

s/ Bruce A. Wagman

[8] Appellants also contend that the district court erred by dismissing their complaint "with prejudice." *See* Opening Br. 54-56. Even if true, however, Appellants' own authorities demonstrate that it was still within the district court's authority to deny plaintiffs leave to amend their complaint. *See, e.g., Farren v. Option One Mortgage Corp.*, 467 F. App'x 692, 693 (9th Cir. 2012) (district court properly denied motion to amend as futile but should have dismissed without prejudice since dismissal was based on lack of subject matter jurisdiction). The proper remedy for such an error is to affirm with instructions to enter an order of dismissal without prejudice. *See Kelly v. Fleetwood Enters., Inc.*, 377 F.3d 1034, 1040 (9th Cir. 2004).

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STATEMENT OF RELATED CASES

Appellees are unaware of any related cases pending in this Court that are related to this appeal, as defined and required by Circuit Rule 28.2.6.

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, Brief for Appellees is proportionately spaced, has a typeface of 14 point and contains 9,331 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

s/ Bruce A. Wagman
Bruce A. Wagman

CERTIFICATE OF SERVICE

I, Bruce A. Wagman, hereby certify that I electronically filed the foregoing Brief for Appellees with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 1, 2015, which will send notice of such filing to all registered CM/ECF users.

s/ Bruce A. Wagman
Bruce A. Wagman