14-17111

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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; et al.,

Intervenors-Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of California

No. 2:14-cv-00341-KJM-KJN
Kimberly J. Mueller, Judge

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INTRODUCTION

The sole issue in this appeal is whether plaintiff states are proper parties to challenge California laws that set uniform animal care standards for eggs sold in California. They are not, because Plaintiffs have not established any basis to assert standing on behalf of their citizens under the *parens patriae* doctrine. No plaintiff state in this case alleges that it produces eggs that it wishes to sell in California. Instead, each state seeks to pursue claims on behalf of private egg producers operating within its jurisdiction. Permitting the plaintiff states to pursue egg producers' private commercial grievances in this way would improperly expand the *parens patriae* doctrine beyond its recognized bounds.

To begin with, Plaintiffs have not alleged an injury in fact to the general populace they purport to represent *parens patriae*. To establish *parens patriae* standing, a state must allege more than an injury to an identifiable group of residents. Here, Plaintiffs have failed to meet that requirement because they assert, at most, claims that are limited to a small private group of residents: producers of shell eggs who wish to sell those eggs in California, and who allegedly must incur capital improvement costs to convert their hen cages in order to do so. Plaintiffs' brief argues that their suit seeks to protect their citizenry at large from higher egg prices, but their

allegations focus on purported increased costs to producers and include only bare (and contradictory) speculation that the claimed impacts on producers will touch their broader populations. In any event, this Court has previously recognized that no constitutional injury occurs when consumers face higher prices stemming from manufacturers' independent decisions to pass on higher costs to their consumers.

Plaintiffs have likewise failed to meet any of the other requirements for establishing standing under the *parens patriae* doctrine. Plaintiffs have failed to plead harm to their quasi-sovereign interests. Plaintiffs' complaint includes the conclusory allegations that the plaintiff states have "quasi-sovereign interests in protecting [their] citizens' economic health and constitutional rights as well as preserving [their] own rightful status within the federal system." But the complaint, which centers on asserted harm to those egg producers in Plaintiffs' jurisdictions who may wish to sell their eggs in California, includes no factual allegations sufficient to establish the kind of widespread harm to a state's economy necessary to establish *parens patriae* standing. Additionally, although states have a quasi-sovereign interest in not being discriminatorily denied their rightful status within the federal system, Plaintiffs have not—and cannot—plead that California's

Shell Egg Laws discriminate against Plaintiffs' citizenry, given that those laws apply equally to in-state and out-of-state egg producers.

Similarly, the plaintiff states have alleged no separate interest from the private egg producers whose interests they seek to pursue, and thus Plaintiffs are no more than nominal parties.

Furthermore, merely invoking the dormant Commerce Clause is not sufficient to show that a state's own sovereign interests are implicated in a lawsuit challenging laws that are claimed to impact a small number of private businesses. Thus, the district court correctly dismissed the First Amended Complaint on the basis of Plaintiffs' failure to establish standing under the *parens patriae* doctrine.

The district court also correctly concluded that Plaintiffs' claims are not justiciable. Because Plaintiffs' complaint does not allege that any egg producer within the plaintiff states has a concrete plan to sell eggs in California that are not compliant with the Shell Egg Laws, the harm Plaintiffs assert is both hypothetical and abstract. Plaintiffs therefore have failed to plead an actual controversy under the Declaratory Judgment Act.

Moreover, Plaintiffs are not entitled to leave to amend because doing so would be futile. As the district court concluded, Plaintiffs bring this suit on behalf of a small subset of producers, and any additional allegations

Plaintiffs could plead would all focus on that same identifiable group of private residents, a point Plaintiffs conceded below. This Court should affirm the district court's dismissal of the First Amended Complaint with prejudice.

JURISDICTIONAL STATEMENT

Defendants agree with Plaintiffs' jurisdictional statement contained in their opening brief at page 1.

STATEMENT OF ISSUES

1. Did the district court correctly dismiss Plaintiffs' First Amended Complaint for failure to allege a legally cognizable claim under the *parens patriae* doctrine where Plaintiffs do not allege injury to a sufficiently substantial segment of their populations, express a quasi-sovereign interest, or articulate an interest apart from private parties?

2. Did the district court correctly determine Plaintiffs' First Amended Complaint is not justiciable where Plaintiffs did not allege an injury in fact?

3. Was it an abuse of discretion for the district court to dismiss Plaintiffs' First Amended Complaint with prejudice where Plaintiffs cannot allege facts sufficient to establish standing under the *parens patriae* doctrine?

STATEMENT OF THE CASE

I. CALIFORNIA'S SHELL EGG LAWS

California Health and Safety Code section 25990[1] prohibits Californians from "tether[ing] or confin[ing] any covered animal, on a farm, for all or the majority of any day, in a manner that prevents such animal from: (a) Lying down, standing up, and fully extending his or her limbs; and (b) Turning around freely." AB 1437 in turn prohibits any *sale* of eggs in California, that were produced by egg-laying hens and without compliance with these provisions, regardless of their origin: "[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 Section 25990 et seq.]" § 25996.[2] In enacting AB 1437, the California Legislature cited findings made by the Pew Commission on Industrial Farm Production and the World Health

[1] All statutory references are to the California Health and Safety Code, unless otherwise noted.

[2] Sections 25990 through 25994 were added to the California Health and Safety Code by passage of Proposition 2 in the November 2008 general election. Appellees' Supplemental Excerpts of Record ("SER") 53-55. Enacted two years later, AB 1437 added Sections 25995 through 25997.1 to the California Health and Safety Code. 2010 Cal. Legis. Serv. ch. 51 (West).

Organization and stated, "It is the intent of the Legislature to protect California consumers from the deleterious, health, safety, and welfare effects of the sale and consumption of eggs derived from egg-laying hens that are exposed to significant stress and may result in increased exposure to disease pathogens including salmonella." § 25995.

For purposes of section 25990, and hence AB 1437, "'[e]gg-laying hen' means any female domesticated chicken, turkey, duck, goose, or guinea fowl kept for the purpose of egg production." § 25991(c). "'Enclosure' means any cage, crate, or other structure (including what is commonly described as . . . a 'battery cage' for egg-laying hens) used to confine a covered animal." § 25991(d).

The penalties are the same under both Proposition 2 and AB 1437: Any person who violates the law is guilty of a misdemeanor, and upon conviction is subject to a fine not greater than $1,000, or imprisonment in the county jail for 180 days or less, or both. §§ 25993 (Prop. 2), 25997 (AB 1437). Both laws went into effect on January 1, 2015. § 25996 (AB 1437); SER 55, § 5 (Prop. 2).

Plaintiffs also challenge a portion of a California Food and Agriculture regulation that provides that egg producers and handlers take steps in four specific categories: (1) *Salmonella* prevention measures regarding the

production, storage, and transportation of shell eggs in accordance with federal law; (2) a *Salmonella* environmental monitoring program, including testing for salmonella in "chick papers" (papers in which chicks are delivered); (3) a vaccination program; and (4) enclosures for egg-laying hens that meet the specified minimum number of square inches per bird set forth in the regulation. Cal. Code Regs. tit. 3, § 1350 ("Shell Egg Regulations" and collectively with AB 1437, "Shell Egg Laws"). Plaintiffs challenge the latter requirement. *E.g.*, ER 57-58. The regulation was promulgated pursuant to California Food and Agricultural Code section 27521(a). Cal. Code Regs. tit. 3, § 1350(a).

II. PROCEDURAL HISTORY

On February 3, 2014, the state of Missouri sued California Attorney General Kamala D. Harris alleging that the Shell Egg Laws violate the Commerce and Supremacy Clauses of the United States Constitution, and seeking declaratory and injunctive relief. SER 70-89. On March 5, 2014, Missouri filed its First Amended Complaint ("FAC"), which added the states of Nebraska, Oklahoma, Alabama, Kentucky, and Iowa as plaintiffs and the Secretary of the California Department of Food and Agriculture as a

defendant.[3] ER 35-60. The FAC also added additional factual allegations and an exhibit regarding egg production in each state. *Compare* ER 38-44 ¶¶ 11, 12, 18, 23, 28, 33, 37-41, 55, *and* SER 56-69, *with* SER 70-89.

On June 3, 2014, the court granted the Humane Society of the United States's and the Association of California Egg Farmers' motions to intervene. Dckt. 57; ER 11.

Defendants and Defendants-Intervenors moved to dismiss the FAC. Dkt. Nos. 27-2, 36, 45; ER 11. The district court granted the motions, dismissed the FAC with prejudice, and entered judgment on October 2, 2014. ER 9-34. Plaintiffs timely appealed. ER 1-8.

III. THE FIRST AMENDED COMPLAINT

In their FAC, Plaintiffs allege that the Shell Egg Laws violate the dormant Commerce Clause by imposing improper regulations on egg producers. ER 57 ¶¶ 97-99. Alternatively, Plaintiffs contend that the Federal Egg Products Inspection Act in 21 U.S.C. § 1032 preempts the Shell Egg Laws. ER 58 ¶ 104. Plaintiffs seek declaratory and injunctive relief under the Declaratory Judgment Act, 28 U.S.C. § 2201. ER 58 ¶¶ 101, 105.

[3] Missouri, Nebraska, Oklahoma, Alabama, and Kentucky bring this action by and through their respective state attorneys general. Iowa appears by and through its Governor, Terry E. Branstad.

According to the Complaint, egg producers in each of the plaintiff states face the "difficult choice" of either "incur[ring] massive capital improvement costs to build larger habitats for some or all of their egg-laying hens" or else "walk[ing] away from the largest egg market in the country." ER 37 ¶ 6; *see also* ER 47 ¶ 66 (alleging that complying with the Shell Egg Laws will increase the cost of producing eggs by at least 12%), 57 ¶ 99 (alleging egg producers must either "increase their production costs . . . or forgo the largest market in the United States and see the prices and profits plunge"). Plaintiffs allege "an incorrect choice spells doom for [the egg producers'] businesses." ER 56 ¶ 92. Because of this purported impact, egg producers within the plaintiff states are "the people most directly affected" by California's laws. ER 38 ¶ 7.

Plaintiffs also speculate that if their producers chose to sell eggs in California and incur increased production costs, this would "rais[e] the prices of eggs not just in California but in our own states as well." ER 57 ¶ 99.

Based on these allegations, Plaintiffs assert that they have standing to bring this suit as *parens patriae* because of 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 38-41 ¶¶ 10, 17, 22, 27, 32; *see also* ER 42 ¶ 36.

IV. THE DISTRICT COURT ORDER

By order filed October 2, 2014, the district court granted Defendants' and Defendants-Intervenors' motions to dismiss the FAC with prejudice. ER 10-34.

A. Standing Under the *Parens Patriae* Doctrine

The district court first considered whether Plaintiffs met the threshold requirement of "alleg[ing] injury in fact to the citizens they purport to represent as *parens patriae*." ER 24 (quoting *Table Bluff Reservation (Wiyot Tribe) v. Philip Morris, Inc.*, 256 F.3d 879, 885 (9th Cir. 2001)). The district court held that Plaintiffs' allegations that the egg farmers in their states may suffer an injury in the form of increased costs is not an injury to the *citizens* Plaintiffs purport to represent. ER 24. The court also noted that Plaintiffs' allegations acknowledge that AB 1437 applies only to egg producers and not Plaintiffs' residents in general. ER 24. With respect to Plaintiffs' argument that implementation of AB 1437 may result in an increase in the cost of eggs to consumers in their states, the district court noted that Plaintiffs also allege in another part of the FAC that choosing to forgo California's market would *decrease* the price of eggs in their states.

ER 24 (citing ER 54 ¶ 88). Nonetheless, the district court construed the FAC in Plaintiffs' favor and held that "even assuming plaintiffs' citizens may be faced with an increase in the cost of eggs," this would not establish an injury in fact because "no constitutional injury occurs when a manufacturer passes on higher costs in the form of price increases." ER 24 (quoting *Table Bluff Reservation*, 256 F.3d at 885).

Despite holding that Plaintiffs had failed to allege an injury in fact, the district court next considered whether Plaintiffs have sufficiently alleged interests apart from those of their respective private party residents. ER 25 (citing *Table Bluff Reservation*, 256 F.3d at 885). It found they have not, because "the allegations in the first amended complaint amount only to generalized grievances on behalf of plaintiffs' egg farmers and potential injuries the farmers face as a result of the shell egg laws." *Id*. Thus, the court held that Plaintiffs are "only nominal parties without real interests of their own." ER 26.

The district court held that Plaintiffs also lack standing because they failed to articulate quasi-sovereign interests. ER 26-28. The court distinguished the authorities relied upon by Plaintiffs on the basis that Plaintiffs have presented no allegations concerning the effects of California's Shell Egg Laws on plaintiff states' general populations beyond,

at the most, fluctuating egg prices and potential disruptions in supply (rather than, for instance, the total withdrawal of eggs from plaintiff states). ER 26-27. Again, the court held that Plaintiffs bring this action on behalf of their egg farmers, and not their residents in general. ER 28.

B. Justiciability

After concluding that Plaintiffs lack standing to pursue their claims in this action under the *parens patriae* doctrine, the district court also addressed whether Plaintiffs' claims are justiciable. ER 29-32. The district court held that while Plaintiffs' alleged harm focuses on potential harm their egg farmers will face, they "fail to articulate any concrete plan by their egg farmers to violate California's shell egg laws." ER 31. The FAC is devoid of any allegations indicating whether any egg farmers will or intend to continue to export their eggs to California. *Id*. "[T]hat plaintiffs' farmers would likely prefer exporting their eggs to California as they have done in the past or that their enclosures do not currently comply with California's shell egg laws does not amount to a 'concrete plan to violate the laws in question.'" *Id*. (quoting *Wolfson v. Brammer*, 616 F.3d 1045, 1058 (9th Cir. 2010)). The district court also held that Plaintiffs have not identified any threat to initiate proceedings against their egg farmers and, as the Shell Egg

Laws had not yet gone into effect, there was no history of past prosecution or enforcement. ER 32.

Additionally, the district court determined that to the extent Plaintiffs argue their claims are brought on behalf of the residents of their states in general, this argument does not make their claims any more justiciable, because Plaintiffs' alleged imminent injury is not an injury to their citizens, but rather a potential injury to their egg farmers based on their choices regarding AB 1437. ER 32.

C. Leave To Amend

The district court denied Plaintiffs leave to amend on the basis that amendment would be futile because Plaintiffs lack standing to bring this action on behalf of their egg farmers: "It is patently clear plaintiffs are bringing this action on behalf of a subset of each state's egg farmers and their purported right to participate in the laws that govern them, not on behalf of each state's population generally." ER 34.

SUMMARY OF ARGUMENT

The district court properly determined that Plaintiffs did not and cannot allege standing under the *parens patriae* doctrine. Plaintiffs have failed to even meet the threshold requirement of "alleg[ing] injury in fact to the citizens they purport to represent as *parens patriae*." *See Table Bluff*

Reservation, 256 F.3d at 885. They do not bring these claims on behalf of a "substantial segment" of their populations. *See id*. Plaintiffs also lack standing because they have failed to articulate an interest apart from the interests of private egg producers or express a quasi-sovereign interest. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982). Additionally, Plaintiffs' speculative allegations about choices that egg producers may have to make are not sufficient to satisfy the "actual controversy" requirement of the Declaratory Judgment Act. Accordingly, and because leave to amend would be futile, the district court properly dismissed the FAC with prejudice.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews de novo an order dismissing a complaint for lack of standing. *Table Bluff Reservation*, 256 F.3d at 881.

In a motion to dismiss challenging the adequacy of a complaint to support federal jurisdiction, the complaint is challenged based on the

allegations in the complaint.[4] *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). Courts accept as true all material allegations in the complaint and construe the complaint in the nonmovant's favor, but the burden of proof is on the party seeking to invoke the court's subject matter jurisdiction. *Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1121-22 (9th Cir. 2010). Moreover, "conclusory allegations of law and unwarranted inferences cannot defeat an otherwise proper motion to dismiss." *Schmier v. U.S. Court of Appeals for the Ninth Circuit*, 279 F.3d 817, 820 (9th Cir. 2002) (quotations omitted).

A district court's denial of leave to amend is reviewed for abuse of discretion. *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1041 (9th Cir. 2011). The district court does not abuse its discretion in denying leave to amend where the deficiencies of the complaint cannot be cured by amendment. *DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992).

[4] Thus the additional evidence and accompanying argument submitted by the State of Utah as amicus curiae in this case is doubly inappropriate and should be disregarded. *See Sanchez–Trujillo v. INS*, 801 F.2d 1571, 1581 n.9 (9th Cir. 1986) (amicus may not frame the issues for appeal).

II. THE DISTRICT COURT PROPERLY DISMISSED THE FIRST AMENDED COMPLAINT BECAUSE PLAINTIFFS LACK STANDING UNDER THE *PARENS PATRIAE* DOCTRINE TO CHALLENGE THE SHELL EGG LAWS.

Article III of the United States Constitution confines the power of the federal courts to deciding actual "Cases" or "Controversies." "One essential aspect of this requirement is that any party invoking the power of a federal court must demonstrate standing to do so." *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661 (2013). "[T]he irreducible constitutional minimum of standing contains three elements": (1) that the plaintiff have suffered an "injury in fact," (2) a casual connection between the injury and the challenged conduct, and (3) that it be likely that the injury will be redressed by a decision in the plaintiff's favor. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Plaintiffs bear the burden of establishing these elements. *Id*. at 561. The injury-in-fact requirement refers to an invasion of a legally protected interest that is both "concrete and particularized," and "actual or imminent, not conjectural or hypothetical." *Id*. at 560 (quotations omitted).

A state may bring an action on behalf of its citizens under the *parens patriae* doctrine when it "alleges injury to a sufficiently substantial segment of its population," articulates an interest apart from private parties, and

"expresses a quasi-sovereign interest." *Table Bluff Reservation*, 256 F.3d at 885. But a mere generalized interest in the proper application of law shared by the population at large does not satisfy the injury-in-fact requirement. *Lujan*, 504 U.S. at 573-76. The "threatened injury" must be "certainly impending." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1143 (2013) (quotations omitted). Thus, as a threshold matter, even where states claim *parens patriae* standing, they "must still allege injury in fact to the citizens they purport to represent as *parens patriae*." *Table Bluff Reservation*, 256 F.3d at 885.

A. Plaintiffs Have Not Alleged an Injury In Fact That Impacts a Substantial Segment of Their Populations.

The Supreme Court has not specified "any definitive limits" on the segment of the population that must be adversely affected for a state to have *parens patriae* standing, but "more must be alleged than injury to an identifiable group of individual residents." *Alfred L. Snapp & Son, Inc.*, 458 U.S. at 607. The terms of the Shell Egg Laws only apply to the production of eggs that are sold in California. Even if producers of shell eggs in the plaintiff states are impacted by these California laws, this remains a small subset of the population in these states and Plaintiffs do not allege otherwise. Far from alleging an "injury to a sufficiently substantial segment of [their]

population" (*Alfred L. Snapp & Son, Inc.*, 458 U.S. at 607), Plaintiffs have not articulated anything beyond an economic complaint limited to their egg producers. *See generally* ER 35-59. While there is no set minimum for the population that has to be impacted, Plaintiffs' allegations of impact on a tiny subset is insufficient—even at the pleading stage. For example, as described in *Pennsylvania v. New Jersey*, a *parens patriae* suit against a state may not be brought "for taxes withheld from private parties." 426 U.S. 660, 656-66 (1976) (noting that "the critical distinction, articulated in Art. III, § 2, of the Constitution, between suits brought by 'Citizens' and those brought by 'States' would evaporate" if states were allowed to bring suits to redress private grievances); *see also Georgia v. Pa. R. Co.*, 324 U.S. 439, 443-44, 450 (1945) (complaint of conspiracy to fix rates for *all freight* to and from Georgia); *Pennsylvania v. West Virginia*, 262 U.S. 553, 592 (1923) (withdrawal of natural gas would injure "a substantial portion of the state's population"). The burden is on Plaintiffs to demonstrate standing, but they have failed to allege an injury to a "sufficiently substantial segment of [their] population[s]." *See Table Bluff Reservation*, 256 F.3d at 885 (quoting *Alfred L. Snapp & Son, Inc.*, 458 U.S. at 607) (affirming district court's dismissal of action).

In an attempt to establish both an injury to a substantial segment of their populations and, as discussed *infra* in Part II.B.1, that their claims were brought to advance the health and well being of their residents in general, Plaintiffs now emphasize their allegation speculating that the Shell Egg Laws "will result in our citizens paying higher prices for a certain commodity. [ER57]." Appellants' Brief ("AOB") 30. Specifically, Plaintiffs allege that their egg producers must either "increase their production costs—raising the prices of eggs not just in California but in our own states as well—or forgo the largest market in the United States and see the prices and profits plunge." ER 57 ¶ 99.

At the threshold, there are ripeness and other justiciability obstacles to accepting that the egg producers in Plaintiffs' states will choose to sell in California and that some of their alleged increased costs will lead to increased prices for non-Californians, rather than oversupply to non-Californians leading to *decreased* prices for them, as Plaintiffs previously emphasized. But even assuming there would be a price increase for non-Californians, the direct injury Plaintiffs claim to redress is to the egg producers and not the consuming public. As the district court recognized, Plaintiffs' other allegations make plain that they seek to avoid the claimed increased costs to producers. *See* AOB 32-33; ER 37 ¶ 6 (alleging Missouri

farmers must decide whether to invest in new hen houses or stop selling in California and risk going out of business), 42 ¶ 41 (alleging the cost to Iowa farmers to comply with AB 1437 would be "substantial"), 47 ¶ 66 (alleging that complying with the Shell Egg Laws will increase the cost of producing eggs by at least 12%); ER 28 (analyzing allegations in FAC and holding "[t]hese allegations fail to establish a quasi-sovereign interest in the economic well-being of plaintiffs' egg consumers but rather assert an interest in plaintiffs' egg farmers' businesses").

Further, even construing the FAC in Plaintiffs' favor on this point as the district court did (ER 24), an alleged increase in the price of eggs resulting from the claimed increased capital costs associated with complying with California's animal care standards is not a cognizable claim under the *parens patriae* doctrine. "[N]o constitutional injury occurs when a manufacturer passes on higher costs in the form of price increases." *Table Bluff Reservation*, 256 F.3d at 885. Plaintiffs contend that *Table Bluff* only applies to due process claims and that a constitutional injury *can* occur for purposes of the dormant Commerce Clause when a manufacturer passes on higher costs in the form of price increases. AOB 39-40. However, they cite no authority, and provide no reasoning, drawing such a distinction.

In reality, Plaintiffs are not attempting to protect a "substantial segment" of their population by filing this action; they are merely asserting a private grievance applicable to only a small, identifiable subset of their citizens—shell egg producers. This is not enough to establish *parens patriae* standing. "[L]eave to file will be denied where it appears that the suit brought in the name of the State is *in reality* for the benefit of particular individuals." *Georgia v. Pa. R. Co.*, 324 U.S. at 446 (emphasis added). Thus, Plaintiffs' failure to allege an injury in fact is by itself sufficient to affirm the district court's dismissal of the FAC.

B. Plaintiffs Have Not Alleged a Quasi-Sovereign Interest.

Even where a proper injury is alleged, and the court proceeds in examining the other requirements for *parens patriae* standing, it is "settled doctrine that a State has standing to sue only when its sovereign or quasi-sovereign interests are implicated and it is not merely litigating as a volunteer the personal claims of its citizens." *Pennsylvania v. New Jersey*, 426 U.S. at 665. Quasi-sovereign interests advanced by a state are "a set of interests that the State has in the well-being of its *populace*." *Alfred L. Snapp & Son, Inc.*, 458 U.S. at 602 (emphasis added). As a result, they risk being too vague to survive the standing requirements of Article III. *Id.* Thus, courts emphasize that "[a] quasi-sovereign interest must be

sufficiently concrete to create an actual controversy between the State and the defendant." *Id*.

Although the Supreme Court has not defined "quasi-sovereign" interests, it has noted that the characteristics of such an interest fall into two categories: "First, a State has a quasi-sovereign interest in the health and well-being—both physical and economic—of its residents in general. Second, a State has a quasi-sovereign interest in not being discriminatorily denied its rightful status within the federal system." *Id*. at 607. Accordingly, plaintiffs Missouri, Nebraska, Alabama, Kentucky, and Oklahoma allege that they have standing because of 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 38-41 ¶¶ 10, 17, 22, 27, 32. Governor Branstad of Iowa similarly alleges standing for his state on the basis that "Iowa has quasi-sovereign interests in regulating agricultural activity within its own borders and preserving Iowa's rightful status within the federal system." ER 42 ¶ 36. These conclusory allegations are insufficient to establish *parens patriae* standing because they are unsupported by any factual allegations that could demonstrate a quasi-sovereign interest under either standard. Thus,

Plaintiffs also lack standing because they have failed to articulate a quasi-sovereign interest. *See Alfred L. Snapp & Son, Inc.*, 458 U.S. at 607.

1. Plaintiffs have not alleged any injury to the health and well-being of their residents in general.

First, for the reasons discussed *supra* in Part II.A, Plaintiffs have not articulated a quasi-sovereign interest in "the health and well-being . . . of [their] residents in general." *See Alfred L. Snapp & Son, Inc.*, 458 U.S. at 607. Plaintiffs make only conclusory allegations that the Shell Egg Laws will harm (some of) their economies as a whole. Such unsupported statements cannot survive a motion to dismiss. *See Schmier*, 279 F.3d at 820 ("conclusory allegations of law and unwarranted inferences cannot defeat an otherwise proper motion to dismiss") (quotations omitted). And again, Plaintiffs make even these conclusory allegations always in the same breath as an allegation regarding claimed harm to egg producers specifically. *See, e.g.*, ER 39 ¶ 13 ("Missouri's economy and status within the federal system will be irreparably injured if the California Legislature . . . is allowed to regulate and increase the cost of egg production in Missouri"), 42-43 ¶¶ 42-43 ("As the number one egg producing state, Governor Branstad believes [that] California's AB 1437, which . . . has the effect of increasing the costs of egg production in Iowa, will have a detrimental impact upon and cause

irreparable harm to Iowa's economy."). Plaintiffs simply have not alleged, and cannot allege, facts to support broad harm to their economies as a whole.

Plaintiffs generally fail to appreciate the distinctions between the Shell Egg Laws and the laws at issue in the authorities they cite. In *Pennsylvania v. West Virginia*, the "health, comfort, and welfare" of the general public in each plaintiff state was "seriously jeopardized by the threatened withdrawal of the gas from the interstate stream" in favor of West Virginia's own in-state use. 262 U.S. at 592. Here, California is not depriving Plaintiffs of a natural resource in order to hoard it for its own citizens, let alone a resource, such as natural gas, with far-reaching implications for the health, comfort, and welfare of the general population. *See id*. ("The private consumers in each state not only include most of the inhabitants of many urban communities but constitute a substantial portion of the state's population. Their health, comfort, and welfare are seriously jeopardized by the threatened withdrawal of the gas from the interstate stream.").

In contrast, the present case involves a claim by the plaintiff states for their producers who wish to sell eggs in California on terms they prefer. As Plaintiffs' FAC illustrates, California does not have unique control over the hens and materials needed for egg production. *E.g.*, ER 42 ¶ 37 ("Iowa is the number one state in egg production."); *see Reeves, Inc. v. Stake*,

447 U.S. 429, 443-44 (1980) (distinguishing cement from natural resources). Indeed, Plaintiffs allege California is a net importer of eggs. AOB 4. Thus, Plaintiffs' egg producers may still produce and obtain eggs freely in their own states. Even as to the California market, the Shell Egg Laws do nothing more than regulate sales within the state and treat all egg producers the same. This is insufficient to establish the type of widespread harm to citizens' health and well-being alleged in the authorities cited by Plaintiffs. *See Georgia v. Pa. R. Co.*, 324 U.S. at 443-44, 450 (alleging conspiracy to fix rates for *all freight* to and from Georgia so as to discriminate against Georgia); *Louisiana v. Texas*, 176 U.S. 1, 22 (1900) (alleging health officer placed embargo on *all* interstate commerce between Louisiana and Texas to benefit Texas).

The fact that each domestic customer in *Pennsylvania v. West Virginia* would have had to spend more than $100 (in 1923) in order to change to another fuel source was not the only fact on which the Supreme Court based *parens patriae* standing in that action. 262 U.S. at 590; *see* AOB 30-31. And unlike *Table Bluff*, the cost to the consumers in *Pennsylvania v. West Virginia* was not an increased cost of doing business passed on to them from producers in the form of a price increase, but a certain, direct cost required to replace the commodity that West Virginia was completely withdrawing

from the market. Thus, *Pennsylvania v. West Virginia* does not stand for the proposition that a manufacturer passing on higher costs created by complying with a neutral regulation can create a constitutional injury, and therefore does not conflict with the holding in *Table Bluff*. *See* AOB 40 n.7. Furthermore, in the instant action, any alleged price increases occur only if egg producers in other states choose to sell in California and spread their allegedly increased costs outside of the California market. What was at issue in *Pennsylvania v. West Virginia* was a direct, concrete harm to the public at large, which made *parens patriae* standing appropriate.

Furthermore, the withdrawal of West Virginia's natural gas from the other states impacted more than just one industry: "[t]he lines long have been and now are supplying gas . . . to local utilities serving particular communities, to the people generally in many cities and towns for use in their homes, places of business, and offices, and, in seasons when there is an adequate supply, to industrial plants for use in their operation." 262 U.S. at 587-88. Even the plaintiff states' own use of natural gas impacted a substantial portion of each state's population: "Each state uses large amounts of the gas in her several institutions and schools. . . . A break or cessation in the supply will embarrass her greatly in the discharge of those duties and expose thousands of dependents and school children to serious

discomfort, if not more." *Id*. at 592. Plaintiffs' allegations, even assuming they are true, that their *egg farmers* must choose to incur the expense of bringing their entire operations into compliance with California's law or leave the California marketplace, are not similar allegations. *See* AOB 32-33. The difference between the instant action and *Pennsylvania v. West Virginia* is more than a mere difference "between the quantum of fact alleged by Pennsylvania and those alleged by Appellants." AOB 33. It is the difference between the type of harm cognizable as a claim for *parens patriae* standing and the type of harm that is only properly raised by individual plaintiffs.

2. Plaintiffs have failed to allege any discriminatory denial of their rightful status within the federal system.

Second, Plaintiffs' argument that they have a "quasi-sovereign interest in preserving [their] rightful place as co-equal sovereigns in our federal system" fails because as a matter of law their allegations cannot establish discrimination against their citizenry. AOB 44. "[A] State has a quasi-sovereign interest in not being discriminatorily denied its rightful status within the federal system" and thus "assuring that the benefits of the federal system are not denied to its general population." *Alfred L. Snapp & Son, Inc.*, 458 U.S. at 607-08. Plaintiffs claim they "have sued to vindicate our

citizens' rights under the Commerce Clause to buy and sell goods throughout the United States and to have a voice in creating the laws that govern our means of production." AOB 44. As the district court properly determined, these are arguments brought on behalf of a segment of one industry and not Plaintiffs' citizens as a whole, because "the only citizens who may be 'governed' by California's legislation are egg producers and handlers who intend to sell eggs in California." ER 33-34. Moreover, these allegations do not establish the type of invidious discrimination against Plaintiffs' residents that was sufficient to establish a quasi-sovereign interest in *Alfred L. Snapp & Son, Inc.*

In *Alfred L. Snapp & Son, Inc*., relied upon by Plaintiffs, Puerto Rico alleged that the named defendants, Virginia apple growers, discriminated against Puerto Ricans in favor of foreign laborers, and that Puerto Ricans were denied the benefits of access to domestic work opportunities that federal laws were designed to secure for United States workers. 458 U.S. at 608. The Supreme Court held that Puerto Rico had a separate state interest in "securing residents from the harmful effects of discrimination" beyond the workers' interests in employment. *Id*. at 609 ("[D]eliberate efforts to stigmatize the labor force as inferior carry a universal sting."). Additionally, Puerto Rico, which had a 18.5% unemployment rate, had "*parens patriae*

standing to pursue the interests of its residents in the Commonwealth's full and equal participation in the federal employment service scheme established pursuant to" federal laws that prohibited U.S. workers from being discriminated against in favor of foreign workers. *Id*. at 596, 599 n.7, 609. Here, Plaintiffs do not assert a quasi-sovereign interest in protecting their general populations from any invidious discrimination that violates federal law.

The Shell Egg Laws require that all eggs sold in California meet certain standards, regardless of origin. The law does not apply to Plaintiffs' general citizenry at all. Even as to eggs, there is no distinction between eggs produced in or out of state. A statute that treats intrastate and interstate products alike is not discriminatory. *Association des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 948 (9th Cir. 2013); *Pac. Nw. Venison Producers v. Smitch*, 20 F.3d 1008, 1012 (9th Cir. 1994).

Plaintiffs allege that the public health purposes of AB 1437 are pretextual and that the bill's true purpose was to protect California farmers from the market effects of Proposition 2. ER 47-50 ¶¶ 68-75; AOB 9-13.

But even if this were true,[5] it would be beside the point. "'[D]iscrimination' simply means differential treatment of in-state and out-of-state economic interests *that benefits the former and burdens the latter*." *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994) (emphasis added). Treating out-of-state producers the *same* as in-state producers is not discriminatory and certainly cannot create an injury in fact. A "statute that 'treats all private companies exactly the same' does not discriminate against interstate commerce." *Association des Eleveurs*, 729 F.3d at 948 (quoting *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 342 (2007)). Regardless of origin, all shell egg sales are treated exactly the same, which does not violate the dormant Commerce Clause. *See Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471-72 (1981) (state statute that regulates sales of milk containers "without regard to

[5] This claim is not supported by the legislative findings or the law. AB 1437 had two purposes: protection of farm animal welfare and protection of public health and safety through the prevention of salmonella. §§ 25995, 25996. Plaintiffs seem to argue the Shell Egg Regulations are discriminatory as well (*e.g.*, AOB 15), but the separate, nondiscriminatory purpose of the regulations is "[t]o assure that healthful and wholesome eggs" are sold in California. Cal. Food & Agric. Code § 27521(a). Plaintiffs do not offer any argument how the regulations do not meet this purpose or how they were intended to discriminate. AOB 13-14.

whether the milk, the containers, or the sellers are from outside the State" regulates "evenhandedly").

Many of the cases Plaintiffs rely on involved both discrimination and an impact on *all* commerce from a particular state. *See Georgia v. Pa. R. Co.*, 324 U.S. at 443-44, 450 (alleging conspiracy to fix rates for all freight to and from Georgia so as to discriminate against Georgia); *Louisiana v. Texas*, 176 U.S. at 22 (alleging health officer placed embargo on all interstate commerce between Louisiana and Texas to benefit Texas); AOB 27-28, 35-37. There are no allegations here of discrimination or an impact on all commerce from a particular state. Plaintiffs also rely on authorities that involve discrimination against a class of citizens and thus an impact on more than an identifiable group of residents. *See People v. 11 Cornwell Co.*, 695 F.2d 34, 39 (2d Cir. 1982) (defendant's discriminatory actions affected people with intellectual disabilities and community residents generally); *Massachusetts v. Bull HN Info. Sys., Inc.*, 16 F. Supp. 2d 90, 101 (D. Mass. 1998) (holding age discrimination impacted all older workers the way all Puerto Ricans were impacted in *Snapp*); *People v. Peter & John's Pump House, Inc.*, 914 F. Supp. 809, 813 (N.D.N.Y. 1996) ("[T]he 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."); AOB 41-42. Plaintiffs make no allegations of discrimination that apply to a class of their general populations. Additionally, Plaintiffs have not been relegated "to an inferior economic position among [their] Sister states." *See Georgia*, 324 U.S. at 451. AB 1437 prohibits sales of non-compliant eggs in California regardless of their origin. § 25996. Thus, eggs produced by farmers in the plaintiff states have "equal access with those of other States" to the national egg market. *See Georgia*, 324 U.S. at 444; *see also Alfred L. Snapp & Son, Inc.*, 458 U.S. at 607 ("[A] State has a quasi-sovereign interest in not being discriminatorily denied its rightful status within the federal system."). Likewise, there is no limitation on Plaintiffs' citizens access to any products and the Shell Egg Laws apply to sales of only one product. Plaintiffs have not alleged any viable claim of discrimination, and the cases they rely on do not suggest that any time some manufacturers' costs increase the state has standing to sue on behalf of those manufacturers. *Compare Georgia*, 324 U.S. at 443-44, 450-51 (explaining impact of discriminatory rates), *and id*. at 452 ("This is not a suit in which a State is a mere nominal plaintiff, individual shippers being the real complainants."), *with* AOB 35-37 (asserting that "[l]ike Georgia, Appellants brought this suit as representatives of the public and have complained of a wrong that, *if proven*, limits the opportunities of our

people" and then alleging costs to farmers). There is no alleged discriminatory denial of Plaintiffs' rightful status within the federal system that would give them a quasi-sovereign interest in challenging the validity of California's Shell Egg Laws.

3. Merely alleging a claim under the dormant Commerce Clause is insufficient to establish a quasi-sovereign interest.

Plaintiffs seem to argue that any alleged dormant Commerce Clause violation is sufficient to establish a quasi-sovereign interest because *Alfred L. Snapp & Son, Inc*. notes that "the State has an interest in securing observance of the terms under which it participates in the federal system." AOB 47; *see Alfred L. Snapp & Son, Inc*., 458 U.S. at 607-08. But *Alfred L. Snapp & Son, Inc*. does not stand for that proposition, nor do Plaintiffs cite any case that does. Indeed, *Alfred L. Snapp & Son, Inc*. explains that "[i]n the context of *parens patriae* actions, [securing observance of the terms under which a state participates in the federal system] means ensuring that the State and its residents are not excluded from the benefits that are to flow from participation in the federal system." 458 U.S. at 608. As discussed *supra* in Part II.B.2, all egg producers are treated equally under the Shell Egg Laws and no one is "excluded from the benefits that are to flow from participation in the federal system."

Plaintiffs also suggest, without support, that "[d]ormant Commerce Clause claims usually implicate a State's quasi-sovereign interest in the economic well-being of its people." AOB 27; *see also* AOB 29 (arguing "the Supreme Court has generally found that a State has *parens patriae* standing when suing to invalidate a Sister State's laws under the 'dormant' aspect of the Commerce Clause"). The cases they reply upon are inapposite.

In *Great Atlantic & Pacific Tea Co., Inc. v. Cottrell*, 424 U.S. 366, 367-69 (1975), cited by Plaintiffs (AOB 34), a Louisiana milk producer filed an action against Mississippi's State Health Officer challenging the Mississippi State Board of Health's denial of the producer's application to sell in Mississippi because of the lack of a reciprocity agreement between the two states. Standing was not at issue in the case, and no state was a party to the action. The Mississippi State Health Officer's argument that its state's reciprocity requirement promoted trade between the states was characterized as "draw[ing] upon Mississippi's allegations that Louisiana is itself violating the Commerce Clause by refusing to admit milk produced in Mississippi." 424 U.S. at 379.

The Supreme Court responded in part with dicta saying that "to the extent, if any, that Louisiana is unconstitutionally burdening the flow of milk in interstate commerce . . . Mississippi *and its producers* may pursue their

constitutional remedy by suit in state or federal court challenging Louisiana's actions as violative of the Commerce Clause." *Id*. at 379-80 (emphasis added). This of course was not a statement about what is sufficient to establish a state's *parens patriae* standing, but rather a statement that the remedy for one constitutional violation is not another violation. Indeed, by stating that "Mississippi *and its producers*" could bring this hypothetical action, the Supreme Court was not considering, let alone ruling on, whether the state of Mississippi itself (which was not even before the Court) could be a proper plaintiff.[6]

Applying the *parens patriae* doctrine as Plaintiffs argue would essentially allow a wholesale bypass of the basic federal court standing requirement. *Cf. Pennsylvania v. New Jersey*, 426 U.S. at 665-66 ("For if, by the simple expedient of bringing an action in the name of a State, this Court's original jurisdiction could be invoked to resolve what are, after all, suits to redress private grievances, our docket would be inundated. And, more important, the critical distinction, articulated in Art. III, § 2, of the Constitution, between suits brought by 'Citizens' and those brought by 'States' would evaporate.").

[6] Even if it had, the hypothetical lawsuit the Court was referencing contemplated actual allegations of discrimination, unlike the instant action.

To the extent that Plaintiffs cite to any cases establishing *parens patriae* standing that also invoke the Commerce Clause, this shows only that the two concepts are not mutually exclusive. Ordinarily, dormant Commerce Clause challenges such as this one are raised by the impacted private parties or an association thereof. *See, e.g.*, *Healy v. Beer Inst.*, 491 U.S. 324 (1989); *Association des Eleveurs*, 729 F.3d 937; *Nat'l Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144 (9th Cir. 2012).

C. Plaintiffs Have Not Alleged an Interest Apart From Private Citizens.

In order to maintain a lawsuit based on the *parens patriae* doctrine, a state must also "articulate an interest apart from the interests of particular private parties, *i.e.*, the State must be more than a nominal party." *Alfred L. Snapp & Son, Inc.*, 458 U.S. at 607. A state may not rely on the claims of third parties or seek to litigate "abstract questions of wide public significance amounting to generalized grievances." *Oregon v. Legal Services Corp.*, 552 F.3d 965, 971 (9th Cir. 2009) (quoting *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982)). Therefore, each of Plaintiffs' quasi-sovereign interest theories also fails because they do not allege an interest apart from private parties. *See Alfred L. Snapp & Son, Inc.*, 458 U.S. at 608 (after

describing categories of quasi-sovereign interests, stating, "[o]nce again, we caution that the State must be more than a nominal party"). The district court correctly recognized that Plaintiffs have brought this action "on behalf of a discrete group of egg farmers whose businesses will allegedly be impacted by AB 1437." ER 26. But interests of private parties do not become quasi-sovereign interests simply by virtue of being pursued by a state. *Alfred L. Snapp & Son, Inc.*, 458 U.S. at 602. "In such situations, the State is no more than a nominal party." *Id*.

Oregon v. Legal Services Corp. is instructive. In that case, the defendant was a private nonprofit corporation established by the United States to provide federal funds to local legal assistance programs. Oregon alleged that the restrictions placed by the defendant on the use of its federal funding, which conflicted with Oregon guidelines, "'effectively infringe[d] on Oregon's sovereignty in violation of the Tenth Amendment and principles of federalism established in the structure of the United States Constitution, and exceed[ed] federal authority under the Spending Clause.'" 552 F.3d at 967-68, 971. Additionally, Oregon alleged that the defendant used its restrictions to coerce Oregon's legal services providers to comply with federal regulations over state regulations because they could not survive without defendant's federal funding. *Id*. at 972. The Ninth Circuit

ruled that these factual allegations did not establish an interest apart from the interests of Oregon's legal services providers. *Id*. at 974. Similarly, Plaintiffs themselves are not regulated by the Shell Egg Laws, they are still free to enact their own laws, and they cannot allege an interest apart from their egg producers. *See id*. at 972-74. Thus, Plaintiffs have failed to allege an interest apart from their private citizens sufficient to allow them to establish standing under the *parens patriae* doctrine.

III. THE DISTRICT COURT PROPERLY DISMISSED THE FIRST AMENDED COMPLAINT BECAUSE PLAINTIFFS FAILED TO PLEAD AN ACTUAL CONTROVERSY.

"The mere existence of a statute . . . is not sufficient to create a 'case or controversy' within the meaning of Article III, and is thus insufficient to satisfy the 'actual controversy' requirement of the Declaratory Judgment Act.'" *Western Mining Council v. Watt*, 643 F.2d 618, 627 (9th Cir. 1981) (citations omitted). In this case in particular, the justiciability analysis merges with the question of standing. *See Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138-39 (9th Cir. 2000) (explaining that "in many cases, ripeness coincides squarely with standing's injury in fact prong"). "Whether the question is viewed as one of standing or ripeness, the Constitution mandates that prior to [a court's] exercise of jurisdiction there

exist a constitutional 'case or controversy,' that the issues presented are 'definite and concrete, not hypothetical or abstract.'" *Id*. at 1139.

Here, Plaintiffs' FAC attempts to pursue the claimed grievances of private parties but only presents them in the abstract. In particular, Plaintiffs do not articulate any concrete plan by their egg farmers to sell eggs in California that are not compliant with the Shell Egg Laws. ER 31; *see Sacks v. Office of Foreign Assets Control*, 466 F.3d 764, 773 (9th Cir. 2006) (quoting *Thomas*, 220 F.3d at 1139) (courts "look to whether the plaintiffs have articulated a 'concrete plan' to violate the law in question"). By pleading that egg producers in their jurisdictions have a *choice* to make, rather than the specifics of any decision made by an actual egg producer, Plaintiffs have not stated a justiciable claim. *Compare* AOB 51-52 (stating that egg producers must "comply, lie, or walk away" and "[t]he present injury is having to make the choice"), *with San Diego County Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1129 (9th Cir. 1996) (facing a difficult choice of whether or not to engage in conduct prohibited under the law was inadequate to establish injury in fact). This defect underscores Plaintiffs' lack of standing to pursue the interests and private grievances of egg producers in their jurisdictions. *See Oregon*, 552 F.3d at 971 (state may not rely on the claims of third parties or seek to litigate "abstract questions of

wide public significance amounting to generalized grievances" under *parens patriae* doctrine) (quoting *Valley Forge Christian Coll.*, 454 U.S. at 475); *see also Valley Forge Christian Coll.*, 454 U.S. at 473 (noting that Article III "tends to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context").

IV. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING PLAINTIFFS LEAVE TO AMEND.

The district court did not abuse its discretion in denying Plaintiffs leave to amend because Plaintiffs cannot allege facts sufficient to establish standing under the *parens patriae* doctrine. As a threshold matter, Plaintiffs cannot "allege injury in fact to the citizens they purport to represent as *parens patriae*." *Table Bluff Reservation*, 256 F.3d at 885. The Shell Egg Laws do not apply to out-of-state consumers but to egg producers who choose to sell their products in California, and Plaintiffs' allegation that the Shell Egg Laws could cause price increases in their states, even if such increases ever materialized, could not create standing under the *parens patriae* doctrine. *See id*. Indeed, when asked if the allegations in the pleadings were framed in terms of harm to the industry rather than in terms of harm to Plaintiffs' citizens, Plaintiffs responded that "all of the

quantifiable things that we *could* allege in the complaint will affect the production of eggs . . . ." SER 5:16-18 (emphasis added). Plaintiffs have no possibility of making any additional allegations that would confer standing on them. Plaintiffs have also already amended their complaint to state additional factual allegations. *Compare* ER 38-44 ¶¶ 11, 12, 18, 23, 28, 33, 37-41, 55, *and* SER 56-69, *with* SER 70-89. Thus, further amendment would be futile, and the district court did not abuse its discretion in dismissing the FAC with prejudice. *See DeSoto*, 957 F.2d at 658 ("A district court does not err in denying leave to amend where the amendment would be futile.").

Further, Plaintiffs incorrectly contend that all dismissals for lack of subject matter jurisdiction must be without prejudice. AOB 54. Because Plaintiffs' lack of standing under the *parens patriae* doctrine is not a curable defect and there is no competent court in which Plaintiffs could reassert their claims, dismissal with prejudice was proper. *See Frigard v. U.S.*, 862 F.2d 201, 204 (9th Cir. 1988) ("Ordinarily, a case dismissed for lack of subject matter jurisdiction should be dismissed without prejudice so that a plaintiff may reassert his claims in a competent court."); *see also Lake Wash. Sch. Dist. No. 414 v. Office of Superintendent of Pub. Instruction*, 634 F.3d 1065, 1069 (9th Cir. 2011) (affirming district court's dismissal of complaint with

prejudice for lack of standing); *Schmier*, 279 F.3d at 824 (affirming district court's dismissal of complaint with prejudice for failure to allege a cognizable injury under the standing doctrine). The cases cited by Plaintiffs are inapposite as they involve claims that could have been properly reasserted or should have been brought in state court. *See, e.g.*, *City of Oakland v. Hotels.com LP*, 572 F.3d 958, 962 (9th Cir. 2009) (failure to exhaust administrative remedies is a curable defect); *Kelly v. Fleetwood Enters., Inc.*, 377 F.3d 1034, 1040 (9th Cir. 2004) (federal court lacked subject matter jurisdiction because plaintiffs' claims did not meet the amount in controversy requirement).[7]

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court affirm the decision of the district court.

[7] The other cases cited by Plaintiffs (AOB 55 n.9) are unpublished and not precedent. 9th Cir. R. 36.3(a).

Dated: June 1, 2015

Respectfully Submitted,

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14-17111

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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; et al.,

Intervenors-Defendants-Appellees.

STATEMENT OF RELATED CASES

To the best of our knowledge, there are no related cases.

Dated: June 1, 2015

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE
PURSUANT TO FED.R.APP.P 32(a)(7)(C) AND CIRCUIT RULE 32-1
FOR 14-17111

I certify that: (check (x) appropriate option(s))

[X] 1. Pursuant to Fed.R.App.P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached **opening/answering/reply/cross-appeal** brief is

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[ ] 2. The attached brief is **not** subject to the type-volume limitations of Fed.R.App.P. 32(a(7)(B) because

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June 1, 2015
Dated

/s/ Stephanie F. Zook
Stephanie F. Zook
Deputy Attorney General

CERTIFICATE OF SERVICE

Case Name: **State of Missouri, et al. v. Kamala D. Harris, et al. (APPEAL)** No. **14-17111**

I hereby certify that on June 1, 2015, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

APPELLEES' ANSWERING BRIEF

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

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 1, 2015, at Sacramento, California.

Tursun Bier	/s/ Tursun Bier
Declarant	Signature

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