No. 14-17111

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE STATE OF MISSOURI, EX REL. CHRIS KOSTER, ATTORNEY GENERAL; THE STATE OF NEBRASKA, EX REL. JON BRUNING, ATTORNEY GENERAL; THE STATE OF OKLAHOMA, EX REL. E. SCOTT PRUITT, ATTORNEY GENERAL; THE STATE OF ALABAMA, EX REL. LUTHER STRANGE, ATTORNEY GENERAL; THE COMMONWEALTH OF KENTUCKY, EX REL. JACK CONWAY, ATTORNEY GENERAL; AND TERRY E. BRANSTAD, GOVERNOR OF THE STATE OF IOWA,

Plaintiffs/Appellants,

v.

KAMALA D. HARRIS, ATTORNEY GENERAL OF CALIFORNIA; AND KAREN ROSS, SECRETARY OF THE CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE,

Defendants/Appellees;

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

Defendant-Intervenors/Appellees.

ON APPEAL FROM THE U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA • HON. KIMBERLY J. MUELLER, DISTRICT JUDGE • CASE NO. 2:14-cv-00341-KJM-KJN

APPELLANTS' BRIEF

J. ANDREW HIRTH
Deputy General Counsel
Office of the Missouri Attorney General
P.O. Box 899 • Jefferson City, MO 65102
(573) 751-0818 • (573) 751-0774 (fax)
ANDY.HIRTH@AGO.MO.GOV

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JURISDICTIONAL STATEMENT

Appellants brought this action in the U.S. District Court for the Eastern District of California under 28 U.S.C. §§ 1331 and 1343(a)(3) and 42 U.S.C. §§ 1983 and 1988, challenging two impending provisions of California law as contrary to the United States Constitution.

On October 2, 2014, the district court entered a Final Judgment in accordance with its Order of the same day dismissing the Amended Complaint with prejudice and without leave to amend for want of subject-matter jurisdiction, concluding that Plaintiffs/Appellants lacked parens patriae standing to challenge the constitutionality of California Health and Safety Code § 25996 and California Code of Regulations, title 3, § 1350(d).

Plaintiffs/Appellants filed a timely notice of appeal on October 24, 2014 in compliance with FRAP 4(a)(1)(A). This Court has appellate jurisdiction under 28 U.S.C. § 1291 to review the final judgment of the district court.

STATEMENT OF THE ISSUES PRESENTED

1. Whether Appellants have parens patriae standing to challenge two provisions of California law enacted in violation of the Commerce and Supremacy Clauses of the United States Constitution.

2. Whether Appellants' Commerce and Supremacy Clause challenges to California legislation are ripe for review.

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

ADDENDUM

Pursuant to Circuit Rule 28.2-7, Appellants include an Addendum bound with this brief.

STATEMENT OF THE CASE

The States of Missouri, Iowa, Nebraska, Oklahoma, Kentucky, and Alabama ("Appellants" or "Plaintiff States") brought this action against the Attorney General of California ("CAG") and the Secretary of the California Department of Food and Agriculture ("CDFA") (collectively, "California") on March 5, 2014,[1] to declare unconstitutional and enjoin enforcement of two new provisions of California law governing the sale of shell eggs: Assembly Bill 1437 ("AB1437")[2] and CDFA Shell Egg Food Safety regulation 1350(d) ("1350")[3] (collectively, "Shell Egg Laws").

In our Amended Complaint, Appellants asserted the following facts:

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[1] Missouri filed its original complaint on February 3, 2014 as the sole plaintiff. [ER101]. Shortly thereafter, five other States sought to join the case. An Amended Complaint was filed on March 5, 2014 by the States of Missouri, Nebraska, Oklahoma, and Alabama; the Commonwealth of Kentucky; and Iowa Governor Terry E. Branstad. [ER102-03]. The only new allegations in the Amended Complaint related to the volume of egg production and sales in each of the five new Plaintiff States. [ER39-43].

[2] Cal. Health & Safety Code §§ 25996-97.

[3] Cal. Code Regs. tit. 3, §§1350(d)(1).

Californians consume more than nine billion eggs per year, nearly half of them produced by caged hens in other states.

The American egg industry comprises 280 million egg laying hens and produces nearly 80 billion eggs for human consumption every year. More than half of those eggs come from just five states: Iowa, Ohio, Indiana, Pennsylvania, and California. [ER70]. Despite its place among the top five producers, California is a net importer of eggs: in the 12-month period from July 1, 2012, through June 30, 2013, California's residents consumed over 9 billion eggs while the State's farmers produced only 5 billion. [ER44]. The other 4 billion eggs are imported from other states. [ER44].

Nearly a third of California's imports—about 1.3 billion eggs—come from Iowa, the nation's largest egg producer. [ER75]. Of those, 1 billion are shipped in their shells; the rest are cracked and packaged as liquid or powder. [ER75]. Missouri produces another 13% of California's imports—nearly 600 million eggs (415 million of them in their shells)—which accounts for one third of Missouri's total annual production. [ER75]. The precise number of eggs imported from Alabama, Nebraska,

Oklahoma, and Kentucky is unknown,[4] [ER44] but University of California Poultry Specialist Don Bell identifies Alabama, Nebraska, and Kentucky among the states whose eggs account for another 5.6% of total California imports. [ER44, 75].

The vast majority of eggs produced in the United States—approximately 90%—are laid by hens in conventional cage systems. [ER75]. The remaining 5% are laid by hens housed in a variety of cage-free environments. [ER75]. Conventional cage systems typically house between 4 and 7 birds per cage and provide about 67 square inches of space per bird. [ER36]. They have a number of advantages over cage-free housing systems, including better hygiene; cleaner eggs; lower mortality; a low risk of disease and parasitism; fewer problems with feather pecking and cannibalism because of the small group size in the cage; better foot health; and fewer problems with air quality (dust and

[4] The State of Nebraska is one of the top ten largest egg producers in the United States, with production totaling 2.723 billion eggs in 2012. [ER39]. The State of Alabama is one of the top fifteen largest egg producers in the United States, with production totaling 2.139 billion eggs in 2012. [ER40]. Kentucky farmers produced approximately 1.037 billion eggs in 2012 and generated approximately $116 million in revenue for the state. [ER41]. Oklahoma farmers produced more than 700 million eggs in 2012 and generated approximately $90 million in revenue for the state. [ER41].

ammonia). [ER67]. However, conventional cages also restrict hens' movement and prohibit some of their natural behavior. [ER67]. By contrast, cage-free housing systems permit hens significantly more space to move about and engage in a wider range of natural behaviors, but they are more expensive to operate, raising production costs at least 20% over those associated with conventional cage systems. [ER69].

California voters ban conventional cages from California egg farms.

In 2008, California voters approved a ballot initiative called "Proposition 2" that, starting January 1, 2015, would make it illegal in California to "tether or confine any covered animal [including egg-laying hens], on a farm, for all or the majority of any day, in a manner that prevents such animal from (a) Lying down, standing up, and fully extending his or her limbs; and (b) Turning around freely." [ER61]. Violation of Prop 2's prohibitions would constitute a misdemeanor punishable by up to a $1,000 fine and 180 days in county jail. [ER62]. Because Prop 2's mandate is described in terms of animal behavior rather than numerical dimensions, it is not clear how much more space Prop 2 requires; however, most experts agree that continuing to house 4-7 hens in industry-standard conventional cages systems providing 67

square inches per hen would not comply with Prop 2 and would have to be replaced.[5]

Economists predict that Prop 2 will force egg producers out of California by increasing in-state production costs.

Before Prop 2 was adopted, economists and animal welfare scholars at the University of California—Davis modeled the likely effects of the law on the California egg industry. [ER45]. One study concluded that building new cage-free housing or retrofitting existing facilities to be cage-free would cost in the range of $10 to $40 per bird. [ER69]. Housing California's 20 million egg-laying hens in compliance with Prop 2 would therefore require between $200 and $800 million in

[5] For example, CDFA commissioned a study by University of California—Davis animal welfare researcher Dr. Joy Mench, who used "kinematic analysis to evaluate the space required for Hy-Line W36 hens, the strain most commonly used in U.S. egg production, to stand up, lie down, fully extend their wings (i.e. extend both wings, a behavior called 'wing flapping'), and turn around freely." [ER63]. She found that wing flapping required the most floor space of all four behaviors—322 square inches of floor space. [ER64]. Because wing flapping is the rarest of the behaviors that must be accommodated under Prop 2, and because Prop 2 does not expressly require that every bird be able to flap its wings simultaneously, Dr. Mench concluded that the minimum floor space required per bird decreases as the number of birds per enclosure increases. [ER65]. For example, an enclosure housing one hen would require 322 square inches, an enclosure with ten hens would have to provide 134.2 square inches per bird, and an enclosure housing 10,000 hens would need only 87.3 square inches per bird. [ER66].

capital improvements. [ER69]. Another study calculated the necessary capital outlay at $385 million.[ER78]. In addition to these one-time capital investments, researchers estimated that the larger enclosures required by Prop 2 would raise ongoing production costs in California by at least 20% relative to out-of-state competitors. [ER75].

Based on their calculations, the UC-Davis researchers concluded that the expected impact of Prop 2

> would be the almost complete elimination of egg production in California within the six-year adjustment period. Non-cage production costs are simply too far above the costs of the cage systems used in other states to allow California producers to compete with imported eggs in the conventional egg market.

[ER45]. Nonetheless, the researchers offered a ray of hope for the state's egg farmers:

> If a shift to non-cage production were to be imposed nationwide, the implications are different. We would expect consumer costs to rise substantially, by at least 25 percent, and perhaps much more. *Under this scenario, lower-cost eggs produced from caged hens would not be available to supply U.S. consumers*, unless it was possible to expand low-cost egg production in Canada or Mexico for shipments to U.S. markets. *Egg production in the United States would continue with reduced volumes, but consumers would pay more and consume fewer eggs because of the higher price*.

[ER69 (emphasis added)].

The California Legislature passes AB1437 to protect California's egg industry from interstate competition.

Faced with the negative impact Prop 2 would have on California's egg industry starting in 2015, the California Legislature in 2010 passed AB1437, which added three more sections (§§ 25995 through 25997) to the California Health and Safety Code. [ER46]. Section 25996 provides that,

> Commencing January 1, 2015, a shelled egg may not be sold or contracted to sell for human consumption in California if it is the product of an egg-laying hen that was confined on a farm or place that is not in compliance with animal care standards set forth in [§ 25990].

[ER46].

The stated purpose of AB1437 is "to protect California consumers from the deleterious, health, safety, and welfare effects of the sale and consumption of eggs derived from egg-laying hens that are exposed to significant stress that may result in increased exposure to disease pathogens including salmonella." § 25995(e); [ER72-73]. However, no scientific study conducted to date has found any correlation between cage size or stocking density and the incidence of salmonella in egg-

laying hens. [ER47]. Additionally, the most recent studies establish there is no correlation between cage size or stocking density and stress levels in egg-laying hens. [ER47].

The legislative history of AB1437 suggests that the bill's true purpose was not to protect public health but rather to protect California's egg farmers from the market effects of Prop 2 by "leveling the playing field" for out-of-state egg producers. [ER48]. An analysis by the California Assembly Committee on Appropriations following its May 13, 2009, committee hearings on AB1437 stated as follows:

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

[ER48 (emphasis added)].

After AB1437 passed both the California Assembly and the California Senate, the California Health and Human Services Agency ("CHHS") prepared an Enrolled Bill Report for the Governor. [ER48]. That report stated in pertinent part, "Supporters of Proposition 2

claimed that giving egg-laying hens more space may reduce this type of salmonellosis by reducing the intestinal infection with Salmonella Enteritidis via reducing the stress of intensive confinement. Scientific evidence does not definitively support his conclusion." [ER48]. Summarizing the arguments pro and con concerning AB1437 later in its report, CHHS further stated that one of the arguments against the enactment of the legislation is that there is "[n]o scientific evidence to support assertion of salmonella prevention." [ER48, 80].

Indeed, the California Department of Food and Agriculture ("CDFA") concedes in the Legal Impact section of its own Enrolled Bill Report for AB1437 that the bill's purported public health rationale is likely untenable. [ER49]. If AB1437 were to be challenged on Commerce Clause grounds, the CDFA warned, California

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

[ER49, 83 (emphasis added)].

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

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

[ER49-50, 81 (emphasis added)]. Later in the same report, CDFA warned the Governor that the danger in not signing the bill was competition, not contamination:

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

[ER50, 82 (emphasis added)].

In his singing statement, Governor Schwarzenegger made no mention of AB1437's purported public health rationale at all. [ER50]. The only purposes he cited for enacting the law were protecting California farmers from the market effects of Prop 2: "The voters' overwhelming approval of Proposition 2 demonstrated their strong support for the humane treatment of egg producing hens in California. By ensuring that all eggs sold in California meet the requirements of Proposition 2, this bill is good for both California egg producers and animal welfare." [ER50, 85].

CDFA promulgates additional cage-size regulations that may or may not be coterminous with Prop 2 and AB1437.

Amid the uncertainty concerning Prop 2 and AB1437's behavior-based cage-size requirements, CDFA promulgated additional regulations in 2013 "to assure that healthful and wholesome eggs of known quality are sold in California." 3 CA CCR § 1350; [ER46].

Section 1350 went into effect in two phases. In Phase I, California egg farmers must have implemented by July 1, 2013: (1) Salmonella Enteritidis preventions measures for the production, storage, and

transportation of shell eggs, (2) a Salmonella monitoring program that tests for the presence Salmonella Enteritidis at five points during an egg-laying hen's life cycle, and (3) a program for vaccinating hens against Salmonella on at least three occasions. 3 CA CCR § 1350(c)(1)-(3). Phase II establishes minimum cage-sizes for egg-laying hens based on the average floor space per bird. Effective January 1, 2015:

> . . . no egg handler or producer may sell or contract to sell a shelled egg for human consumption in California if it is the product of an egg-laying hen that was confined in an enclosure that fails to comply with the following standards. . . . An enclosure containing nine (9) or more egg-laying hens shall provide a minimum of 116 square inches of floor space per bird.

3 CA ADC § 1350(d)(1). It is not clear whether the square-inch requirements under §1350(d) are coextensive with the behavior-based requirements of AB1437. [ER46]. If egg farmers may satisfy AB1437 by complying with §1350, UC Davis agricultural economist Dr. Hoy Carmen estimates the cost of producing eggs will increase by at least 12%. [ER47, 77]. On the other hand, if AB1437 requires entirely cage-free production, Dr. Carmen predicts production costs will increase by more than 34%. [ER47, 77].

Appellants challenge California's attempt to regulate commercial conduct within our sovereign borders.

As the Shell Egg Laws' effective date approached, Appellants became concerned that "[our] econom[ies] and status within the federal system will be irreparably injured if the California Legislature—who were not elected by, and are not answerable to, the people of [our states]—is allowed to regulate and increase the cost of egg production in [our own territory]." [ER39]. To protect our legislative authority and preserve our position among our sister states as co-equal sovereigns, Appellants turned to the federal courts for judicial relief.

On March 5, 2014, Appellants filed a two-count Amended Complaint alleging the Shell Egg Laws violate the Commerce Clause of the United States Constitution because (a) they were enacted solely to protect California egg producers from out-of-state competitors, (b) they have the purpose and effect of discriminating against interstate commerce, and (c) they regulate commercial activity occurring entirely within the Plaintiff States. [ER57]. Anticipating that California would claim its Shell Egg Laws are permissible food safety measures (notwithstanding their facial economic-protectionist legislative history), Appellants alleged *in the alternative* that the Laws violate the

Supremacy Clause because regulations regarding the production of eggs to be sold through interstate commerce are expressly preempted by the Federal Egg Products Inspection Act, 21 U.S.C. § 1052(a). [ER51-53].

In late March and early April 2014, the Humane Society of the United States ("HSUS") and the Association of California Egg Farmers ("ACEF") moved to intervene and filed separate motions to dismiss. [ER104]. California filed its own motion to dismiss on April 9, 2014. [ER105]. The district court granted HSUS and ACEF leave to intervene on June 3, 2014. [ER107]. Three groups of amici curiae filed briefs with the court as well—two in support of the pending motions to dismiss, and one in opposition. [ER107-11].

The district court dismisses for lack of jurisdiction and denies Appellants leave to amend as futile.

On October 2, 2014, the district court dismissed our Amended Complaint on two jurisdictional grounds without reaching the merits of Appellants' dormant Commerce Clause or Supremacy Clause claims. [ER9-34]. First, the court concluded Appellants lacked standing to challenge the Shell Egg Laws because we had failed to allege the Laws would harm our citizens as a whole. [ER15]. Second, the court concluded our claims were not justiciable because we had failed to

allege a genuine threat of enforcement by California. [ER21-23]. The court further concluded that our pleading deficiencies could not be cured through amendment because Appellants brought this case only to protect our 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. In light of the nature of the allegations in plaintiffs' first amended complaint and the arguments made at hearing, leave to amend would be futile, as plaintiffs lack standing to bring this action on behalf of each state's egg farmers.

[ER34].

SUMMARY OF THE ARGUMENT

The judgment against Appellants should be reversed because the district court erred in ruling that Appellants lacked *parens patriae* standing and that our claims were not ripe for review. First, Appellants sufficiently alleged that the Shell Egg Laws harm the economic well-being of our citizens and exclude them from the benefits that flow from our participation in the federal system. Second, Appellants sufficiently alleged that our claims are ripe for review because the harm caused by the Shell Egg Laws had already begun to occur. Our farmers were forced to choose—well in advance of the Laws' effective date—between losing access to the nation's largest market or dramatically increasing their production costs, which would also raise price our consumers pay for eggs. In any event, Appellants claims are surely ripe for review *now that the Shell Egg Laws are in effect and being enforced*.

Even assuming Appellants had not sufficiently pleaded standing and ripeness, the district court abused its discretion by dismissing the First Amended Complaint *with prejudice* because leave to amend would not have been futile. The judgment should be reversed and the case remanded for further proceedings

ARGUMENT

I. The district court erred in dismissing the First Amended Complaint for lack of *parens patriae* standing because Appellants have sufficiently alleged injury-in-fact to our quasi-sovereign interests.

In three separately filed motions to dismiss, Appellees argued that Plaintiff States lacked *parens patriae* standing to challenge the Shell Egg Laws because we "allege only speculative harm to a handful of private egg producers who could sue on their own." [ER86-92]. The district court granted all three motions, concluding that

> plaintiffs have not brought this action on behalf of their interest in the physical or economic well-being of their residents in general, but rather on behalf of a discrete group of egg farmers whose businesses will allegedly be impacted by [the Shell Egg Laws]. Plaintiffs are therefore only nominal parties without real interests of their own.

[ER26]. The court's ruling was erroneous and should be reversed because Appellants sufficiently alleged injury-in-fact to our quasi-sovereign interests in (1) the economic well-being of our people, and (2) securing the benefits that should flow from Appellants' participation in our federal system of government.

A. Standard of Review

Standing is a question of law, which this Court reviews de novo. *Jewel v. Nat'l Sec. Agency*, 673 F.3d 902, 907 (9th Cir. 2011). "To invoke a federal court's subject-matter jurisdiction, a plaintiff needs to provide only 'a short and plain statement of the grounds for the court's jurisdiction.'" *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014) (quoting Fed.R.Civ.P. 8(a)(1)). "Accepting the plaintiff's allegations as true and drawing all reasonable inferences in the plaintiff's favor, the court determines whether the allegations are sufficient as a legal matter to invoke the court's jurisdiction." *Id.*

Though a plaintiff "must allege 'factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged,'" *Levitt v. Yelp! Inc.*, 765 F.3d 1123, 1135 (9th Cir. 2014) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)), "[s]pecific facts are not necessary; the statement need only 'give the defendant fair notice of what the ... claim is and the grounds upon which it rests.'" *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (per curiam) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)) (emphasis added). "General factual allegations of injury resulting from

the defendant's conduct may suffice, as [federal courts] 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim." *Jewel*, 673 F.3d at 907 (quoting *Lujan v. Nat'l Wildlife Fed.*, 497 U.S. 871, 889 (1990))(emphasis added).

"A court may not resolve genuinely disputed facts where the question of jurisdiction is dependent on the resolution of factual issues going to the merits." *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987). Rather, the court "assumes the truth of allegations in a complaint or habeas petition, unless controverted by undisputed facts in the record." *Id.* Dismissal is appropriate only "where it appears *beyond doubt* that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* "This standard, often cited in Rule 12(b)(6) motions, ... is equally applicable in motions challenging subject matter jurisdiction when such jurisdiction may be contingent upon factual matters in dispute." *Id.*

B. To establish parens patriae standing, a State must allege injury-in-fact to a quasi-sovereign interests.

Article III of the Constitution limits the judicial power of the United States to "Cases" and "Controversies." U.S. Const. Art. III, § 2. "The doctrine of standing gives meaning to these constitutional limits by identifying those disputes which are appropriately resolved through the judicial process." *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (internal quotations omitted). For a private party to establish the "irreducible constitutional minimum" required for Article III standing, she must plead three elements. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). First, she must allege "an 'injury-in-fact'—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent." *Id*. (internal citations omitted). Second, "the injury has to be fairly ... trace[able] to the challenged action of the defendant." *Id*. Third, "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" Id. "At bottom, the gist of the question of standing is whether petitioners have such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the

presentation of issues upon which the court so largely depends for illumination." *Massachusetts v. E.P.A.*, 549 U.S. 497, 517 (2007).

States, however, "are not normal litigants for the purposes of invoking federal jurisdiction." *Id.* at 518. Though States must still establish Article III standing by alleging an injury-in-fact to a legally protected interest, they "have interests and capabilities beyond those of an individual by virtue of their sovereignty." *Oregon v. Legal Servs. Corp.*, 552 F.3d 965, 970 (9th Cir. 2009). Given their unusual interests, States are "entitled to special solicitude" in a standing analysis. *Massachusetts,* 549 U.S. at 521. When the issue on appeal is whether a plaintiff has standing to sue, the Supreme Court has observed that "[i]t is of considerable relevance that the party seeking review here is a sovereign State and not, as it was in *Lujan*, a private individual." *Id.*

One of the ways—perhaps the chief way—in which States are afforded "special solicitude" is their capacity to bring legal action on behalf of their citizens as "*parens patriae*." *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 600 (1982) ("*Snapp*"). To establish *parens patriae* standing, a State must satisfy the same elements necessary for private party standing—injury-in-fact,

causation, and redressability. *Table Bluff Reservation (Wiyot Tribe) v. Philip Morris, Inc.*, 256 F.3d 879, 885 (9th Cir. 2001). What's different about *parens patriae* standing is the kind of interest at stake. Rather than alleging an injury to its own pecuniary interest (*e.g.*, damage to state property or breach of a state contract), a State suing in its capacity as *parens patriae* "must assert an injury to what has been characterized as a 'quasi-sovereign' interest." *Snapp*, 458 U.S. at 601.

A "judicial construct that does not lend itself to a simple or exact definition," *id.*, the term "quasi-sovereign interest" originated with Justice Holmes in *State of Ga. v. Tennessee Copper Co.,* 206 U.S. 230, 237 (1907). In that case, the State of Georgia brought and action to enjoin copper smelters in Tennessee from discharging sulfurous gases that were destroying forests, orchards, and crops in five Georgia counties. *Id.* Writing for the Court, Justice Holmes rejected the smelters' argument that Georgia lacked standing simply because the State did not own the affected lands itself:

> This is a suit by a state for an injury to it *in its capacity of quasi-sovereign*. In that capacity the state has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. …

> When the states by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining *quasi-sovereign interests*.

Tennessee Copper Co., 206 U.S. 230, 237 (1907) (emphasis added).

Justice Holmes did not define the term further, but subsequent cases have described quasi-sovereign interests as "a set of interests that the State has in the well-being of its populace." *Snapp*, 458 U.S. at 602 (1982). "Although the articulation of such interests is a matter for case-by-case development—neither an exhaustive formal definition nor a definitive list of qualifying interests can be presented in the abstract—certain characteristics of such interests are so far evident. These characteristics fall into two general categories." *Id*. at 607. "First, a State has a quasi-sovereign interest in the health and well-being—both physical and economic—of its residents in general." *Id*. "Second, a State has a quasi-sovereign interest in not being discriminatorily denied its rightful status within the federal system." *Id*.

In this case, Appellants alleged injury-in-fact to quasi-sovereign interests in both categories.

1. Appellants sufficiently alleged injury-in-fact to our quasi-sovereign interest in the economic well-being of our people.

The Supreme Court has "long recognized that a State's interests in the health and well-being of its residents extend beyond mere physical interests to economic and commercial interests." *Snapp*, 458 U.S. at 609. A State may establish *parens patriae* standing based on this quasi-sovereign interest by showing that unlawful conduct or the enforcement of an unconstitutional regulation "limits the opportunities of [its] people, shackles [its] industries, retards [its] development, and relegates [the State] to an inferior economic position among [its] sister States." *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 451, 65 S. Ct. 716, 723, 89 L. Ed. 1051 (1945). States often rely on this quasi-sovereign interest to establish parens patriae standing when alleging (a) violations of the "dormant" Commerce Clause, (b) economic isolation, or (c) discrimination against their citizens.

a. Dormant Commerce Clause claims usually implicate a State's quasi-sovereign interest in the economic well-being of its people.

Even before Justice Holmes coined the term "quasi-sovereign interest," the Supreme Court had already recognized parens patriae standing in a dormant Commerce Clause case involving one State's pretextual use of public health laws to block goods from other states being sold within its borders. In *Louisiana v. Texas*, Louisiana brought an original action in the Supreme Court to enjoin a Texas quarantine that had the practical effect of embargoing all interstate commerce between New Orleans and the State of Texas. 176 U.S. 1, 4 (1900). In its demurrer for lack of subject-matter jurisdiction, Texas argued:

> this suit is in reality for and on behalf of certain individuals engaged in interstate commerce, and while the suit is attempted to be prosecuted for and in the name of the state of Louisiana, said state is in effect loaning its name to said individuals, and is only a nominal party, the real parties at interest being said individuals in the said city of New Orleans, who are engaged in interstate commerce.

Id. at 12 (1900). The Supreme Court disagreed with Texas, concluding that Louisiana had brought its claim on behalf of its citizens in general and not simply on behalf of the New Orleans merchants' who were unable to ship goods into Texas:

> . . . [T]he state of Louisiana presents herself in the attitude of parens patriae,… [alleging] that the state of Texas is intentionally absolutely interdicting interstate commerce as respects the state of Louisiana by means of unnecessary and unreasonable quarantine regulations. … [T]he cause of action must be regarded, not as involving any infringement of the powers of the state of Louisiana, or any special injury to her property, but as asserting that the state is entitled to seek relief in this way because the matters complained of affect her citizens at large.

Louisiana, 176 U.S. at 19 (emphasis added).[6]

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[6] Though the Supreme Court ultimately concluded it did not have jurisdiction, it was not because Louisiana lacked standing as parens patriae. Rather, jurisdiction was lacking because the Court held Texas was not the real party in interest. The Supreme Court's original jurisdiction is limited to controversies between States, and the Court concluded that Louisiana was really complaining about the misconduct of particular Texas officials:

> in order that a controversy between states, justiciable in this court, can be held to exist, something more must be put forward than that the citizens of one state are injured by the maladministration of the laws of another. … [A] controversy between states does not arise unless the action complained of is state action, and acts of state officers in abuse or excess of their powers cannot be laid hold of as in themselves committing one state to a distinct collision with a sister state.

Id. at 22.

Since *Louisiana v. Texas*, 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 Supreme Court also found *parens patriae* standing in *Pennsylvania v. West Virginia,* where two States alleged that a third had given its own citizens a right of first refusal to purchase natural gas produced in that state. 262 U.S. 553, 592 (1923). In that case, the Court held that Pennsylvania and Ohio had a "twofold interest" in challenging the West Virginia law. First, the States had standing "as the proprietor of various public institutions and schools whose supply of gas will be largely curtailed or cut off by the threatened interference with the interstate current." *Id.* at 591. But in addition to their pecuniary interests as purchasers of natural gas in their own right, Pennsylvania and Ohio had a separate interest "*as the representative of the consuming public whose supply will be similarly affected*." *Id.* at 591 (emphasis added). This latter interest in the economic well-being of their citizens was sufficient in itself to give both States *parens patriae* standing:

> The private consumers in each State ... constitute a substantial portion of the State's population. Their health, comfort and welfare are seriously jeopardized by the threatened withdrawal of the gas from the

> interstate stream. *This is a matter of grave public concern in which the State, as representative of the public, has an interest apart from that of the individuals affected.*

Id. at 592 (emphasis added); *see also Maryland v. Louisiana*, 451 U.S. 725, 737 (1981) (challenging Louisiana tax on the "first use" of previously untaxed natural gas coming into the State); *Louisiana,* 176 U.S. at 19 (Louisiana challenged Texas quarantine that prevented the shipment of goods from New Orleans to ports in Texas); *Connecticut v. Cahill*, 217 F.3d 93 (2nd Cir. 2000)(Connecticut challenged New York statute prohibiting non-residents from taking lobsters in certain waters).

In this case, as in *Pennsylvania*, Plaintiff States allege that our Sister State has enacted laws which impose substantial burdens on interstate commerce that will result in our citizens paying higher prices for a certain commodity. [ER57]. The district court attempted to distinguish our challenge to California's Shell Egg Laws from Pennsylvania's challenge to West Virginia's natural gas law in several ways:

> Pennsylvania concerned the total withdrawal of gas by West Virginia from the Pennsylvania market; gas was a vital commodity used and depended upon by millions

> of citizens. *Pennsylvania*, 262 U.S. at 553. To change to another fuel source would have cost more than $100 for each domestic consumer and more than $100 million in 1923 dollars between the plaintiff states of Pennsylvania and Ohio. *Id. However, Appellants here allege nothing to suggest eggs are a vital commodity necessary to preserve plaintiffs' citizens' health, comfort and welfare.* And even if Appellants had alleged such additional facts, Appellants further allege only potential "disruptions" in the supply of eggs, not the total withdrawal of this commodity from the plaintiff states.

[ER27 (emphasis added)]. For purposes of *parens patriae* standing, however, these are distinctions without a difference. The Supreme Court did not refer to natural gas as a "vital commodity" anywhere in *Pennsylvania*. Rather, it found that "the gas carried into Pennsylvania and Ohio … is *not negligible*, but amounts to *billions of cubic feet per year*." *Pennsylvania*, 262 U.S. at 590 (emphasis added). The volume of eggs Appellants ship into California is *not negligible* either, but amounts to *billions of eggs per year*. Indeed, *California imports more than a billion eggs from Iowa alone*, as well as one out of every three eggs produced in the state of Missouri.

[ER44].

Pennsylvania alleged that West Virginia's preferential sale of gas to its own citizens "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." *Id.* at 584-85. Appellants similarly alleged in this case that,

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

[ER53-54 (emphasis added)].

Pennsylvania alleged that "chang[ing] to other fuel would require an adjustment of heating and cooking appliances at an average cost of more than $100 for each domestic consumer, or an aggregate cost exceeding $30,000,000 in Pennsylvania." *Pennsylvania*, 262 U.S. at 590. In this case, Appellants alleged similar costs:

- "Missouri farmers produced nearly two billion eggs in 2012 and generated approximately $171 million in revenue for the state," [ER38].

- "Almost one third of eggs are sold in California," which based on the previous figure generates about $54 million in revenue for the state. [ER39].

- If they want to continue selling their eggs in California "Missouri farmers … must … invest over $120 million in new hen houses," which "will raise the cost of eggs in Missouri and make them too expensive to export to any state other than California." [ER37, 39].

- "the cost of producing eggs will increase by at least 12% [and possible by] more than 34%." [ER46].

- "Missouri's economy … will be irreparably injured if the California Legislature … is allowed to regulate and increase the cost of egg production in Missouri." [ER37].

- "Iowa is the number one state in egg production. Iowa farmers produce over 14.4 billion eggs per year." [ER42].

- "Approximately 9.1% of those eggs—1.07 billion eggs per year—are sold in California." [ER42].

- "Iowa farmers have more than 51 million egg-laying hens. … The cost to Iowa farmers to retrofit existing housing or build new housing that complies with [the Shell Egg Laws] would be substantial." ER42].

- The Shell Egg Laws "ha[ve] the effect of increasing the costs of egg production in Iowa, [and] will have a detrimental impact upon and cause irreparable harm to Iowa's economy." [ER42-43].

If there are material differences between the quantum of fact alleged by Pennsylvania and those alleged by Appellants—such that the former

had *parens patriae* standing while the latter do not—they are not found in the district court's dismissal order.

Finally, in *Great Atl. & Pac. Tea Co. v. Cottrell*, a Louisiana milk producer brought a dormant Commerce Clause challenge to invalidate a Mississippi regulation prohibiting the sale of milk produced in another State unless that other State permitted the sale of milk from Mississippi on a reciprocal basis. 424 U.S. 366, 367-69 (1976). In its defense, the State of Mississippi alleged that it was really *Louisiana* that was violating the Commerce Clause by refusing reciprocity with Mississippi in bad faith. *Id.* at 379. The Supreme Court rejected Mississippi's argument, holding:

> [T]o the extent, if any, that Louisiana is unconstitutionally burdening the flow of milk in interstate commerce by erecting and enforcing economic trade barriers to protect its own producers from competition under the guise of health regulations, the Commerce Clause itself creates the necessary reciprocity. ***Mississippi*** and its producers ***may pursue [a] constitutional remedy by suit in*** state or ***federal court challenging Louisiana's actions as violative of the Commerce Clause***.

Id. at 379-380 (emphasis added). In other words, *Cottrell* stands for the proposition that a State (*e.g.*, *Iowa*) has *parens patriae* standing to seek declaratory and injunctive relief against a Sister State (*e.g.*, *California*)

where the plaintiff State alleges that that the Sister State's purported "health regulations" (*e.g., § 1350(d)*) intentionally inhibit interstate commerce (*e.g.*, *by mandating out-of-state producers adopt new, significantly more expensive production methods*) in an effort to protect in-state producers (*e.g.*, *ACEF and its members*) from out-of-state competition (*e.g.*, *Iowa's egg farmers*).

b. Claims of economic isolation implicate a State's quasi-sovereign interest in the economic well-being of its people.

The Supreme Court has also found *parens patriae* standing where a State challenges conduct that effectively isolates its markets from other States by increasing the costs associating with selling goods across state lines. In *State of Georgia v. Pennsylvania R. Co.*, for example, Georgia alleged several railroad companies had conspired to restrain trade between Georgia and other States by fixing arbitrary and noncompetitive freight rates. 324 U.S. 439 (1945). In terms similar to those used in Appellants' Amended Complaint (and quoted as bullet points in the previous subsection of this brief), Georgia alleged that the consequences of the defendants' anti-competitive conduct were:

> (a) to deny to many of Georgia's products equal access with those of other States to the national market;

> (b) to limit in a general way the Georgia economy to staple agricultural products, to restrict and curtail opportunity in manufacturing, shipping and commerce, and to prevent the full and complete utilization of the natural wealth of the State;
>
> (c) to frustrate and counteract the measures taken by the State to promote a well-rounded agricultural program, encourage manufacture and shipping, provide full employment, and promote the general progress and welfare of its people; and
>
> (d) to hold the Georgia economy in a state of arrested development.

Id. at 444. The defendant railroads argued that Georgia did not have *parens patriae* standing because it was merely a nominal party suing to vindicate the interests of private plaintiffs that could have brought suit themselves. *Id*. at 445. The Supreme Court disagreed:

> *If the allegations of the bill are taken as true*, the economy of Georgia and the welfare of her citizens have seriously suffered as the result of this alleged conspiracy. Discriminatory rates are but one form of trade barriers. …They may stifle, impede, or cripple old industries and prevent the establishment of new ones. They may arrest the development of a State or put it at a decided disadvantage in competitive markets. … *Georgia as a representative of the public is complaining of a wrong, which if proven, limits the opportunities of her people, shackles her industries, retards her development, and relegates her to an inferior economic position among her sister States. These are matters of grave public concern in which Georgia has an interest*

> *apart from that of particular individuals who may be affected.*

Id. at 450-51 (emphasis added).

Like 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:

> Either [our farmers] can incur massive capital improvement costs to build larger habitats for some or all of their egg-laying hens, or they can walk away from the largest egg market in the country. For example, Missouri farmers—who export one third of their eggs to California each year—must now decide whether to invest over $120 million in new hen houses or stop selling in California.

[ER37].

Though it was required to accept all of Appellants' allegations as true and draw all reasonable inferences in our favor, *see Leite,* 749 F.3d at 1121, the district court *rejected* a number of allegations from the First Amended Complaint: "To the extent plaintiffs argue the implementation of AB 1437 may result in an increase in the cost of eggs, which may injure their citizens who are egg consumers, *this argument is without merit*." [ER24 (emphasis added)]. The district court also drew inferences in *Defendants'* favor. Citing a single

paragraph in the First Amended Complaint, in which Appellants alleged that the bottom could fall out of the Midwest egg market *if* all of our egg farmers choose not to sell any more eggs in California, the district court *speculated* that the Shell Egg Laws "may benefit plaintiffs' citizens rather than injure them." [ER24].

The district court's suggestion that a precipitous drop in egg prices would be *good* for Appellants' citizens is myopic. It ignores the long term consequences to consumers if the egg farmers in Appellants' States are forced out of business, which ultimately reduces competition and results in *higher* prices. In any event, "a State is entitled to assess its needs, and decide which concerns of its citizens warrant its protection and intervention." *Snapp*, 458 U.S. at 612 (Brennen, J. concurring) ("I know of nothing—except the Constitution or overriding federal law—that might lead a federal court to superimpose its judgment for that of a State with respect to the substantiality or legitimacy of a State's assertion of sovereign interest.")

"Even *assuming* plaintiffs' citizens may be faced with an increase in the cost of eggs," the district court concluded that "this speculative argument alone does not satisfy the requirement of showing an injury

in fact" because "'no *constitutional injury* occurs when a manufacturer passes on higher costs in the form of price increases.' " [ER24 (emphasis added)] The latter statement is a direct quote from *Table Bluff*, 256 F.3d at 885, but it has been cited out context in a way that implies a far broader holding than this Court could ever have intended.

In *Table Bluff*, several Native American tribes sued the nation's four largest cigarette manufacturers, alleging that the 1998 Master Settlement Agreement ("MSA") between the tobacco industry and 46 States violated tribe members' *due process rights* by increasing the price of cigarettes. 256 F.3d at 881-84. Rejecting the tribes' novel due process theory, the Ninth Circuit cited an Oklahoma district court decision holding that smokers "have no recognized property interest in paying a certain sum to a retailer to purchase a tobacco product." *Id.* at 885 (quoting *Hise v. Philip Morris Inc.*, 46 F. Supp. 2d 1201 (N.D. Okla. 1999)). Returned to its original context, the *only* "constitutional injury" this Court held not to "occur[] when a manufacturer passes on higher costs in the form of price increases," is an injury to the constitutional right to *due process,* not the constitutional right *to participate in*

interstate commerce.[7] Thus, district court's conclusion that an increase in the cost of eggs could never satisfy the injury in fact requirement was erroneous.

c. Claims of discrimination against a State's citizens implicate that State's quasi-sovereign interest in the economic well-being of its people.

Another line of cases vindicating States' quasi-sovereign interests in the well-being of their citizens involves claims of discrimination. In *Snapp*, for example, the Commonwealth of Puerto Rico alleged that defendant apple growers had discriminated against Puerto Rican workers in favor of foreign laborers. 458 U.S. at 607-08. The defendants moved to dismiss for lack of standing, arguing that fewer than 1,000 Puerto Rican workers had been denied employment, which "could not have a substantial direct or indirect effect on the Puerto Rican economy." *Id.* at 608. The district court agreed with the defendants

[7] The district court's broad reading of *Table Bluff*—which suggests that causing consumers to pay higher prices *never* results in a constitutional injury—undermines its attempt to distinguish the "potential disruption" of the egg market in this case from the "total withdrawal" of natural gas in *Pennsylvania*. [ER27]. If increasing the prices paid by consumers could *never* result in a constitutional injury, why would it matter that "chang[ing] to another fuel source would have cost more than $100 for each domestic consumer"? [ER27 (citing *Pennsylvania*, 262 U.S. at 553)].

that Puerto Rico, having a total populations of almost 3 million people, lacked standing to sue on behalf of fewer than 1,000 workers who had been denied employment. *Id.* at 609.

On writ of certiorari, the Supreme Court held that the trial court had taken "too narrow a view of the interests at stake." *Id.* at 609. Lamenting its long experience with the "the political, social, and moral damage of discrimination," the Court concluded that "a State has a substantial interest in assuring its residents that it will act to protect them from these evils." *Id.* at 609. "Just as we have long recognized that a State's interests in the health and well-being of its residents extend beyond mere physical interests to economic and commercial interests, *we recognize a similar state interest in securing residents from the harmful effects of discrimination*." *Id.* at 609 (emphasis added).

Despite the relatively small number of jobs at issue in *Snapp*, the Supreme Court refused "to draw any definitive limits on the proportion of the population of the State that must be adversely affected by the challenged behavior." 458 U.S. at 607; *see also Com. of Mass. v. Bull HN Info. Sys., Inc.*, 16 F. Supp. 2d 90, 98-99 (D. Mass. 1998) (holding State had parens patriae standing to sue private company for discriminating

against 50 employees on the basis of age); *People v. Peter & John's Pump House, Inc.*, 914 F. Supp. 809, 812 (N.D.N.Y. 1996)(parens patriae standing to sue night club for discriminating against eight African American patrons). "Although more must be alleged than injury to an identifiable group of individual residents, *the indirect effects of the injury must be considered as well* in determining whether the State has alleged injury to a *sufficiently substantial segment* of its population." *Id.*; *see also People v. 11 Cornwell Co.*, 695 F.2d 34, 36 (2d Cir. 1982) vacated sub nom. *People v. 11 Cornwell Co.*, 718 F.2d 22 (2d Cir. 1983) (including past victims of discrimination against developmentally disabled adults when analyzing whether discrimination against 8 potential residents of a group home constituted a sufficiently substantial segment of the population). "One helpful indication in determining whether an alleged injury to the health and welfare of its citizens suffices to give the State standing to sue as *parens patriae* is whether the injury is one that the State, if it could, would likely attempt to address through its sovereign lawmaking powers." *Id.* at 607.

2. Appellants sufficiently alleged that the Shell Egg Laws exclude our citizens from the benefits that flow from our participation in the federal system.

"Distinct from but related to the general well-being of its residents, the State has an interest in securing observance of the terms under which it participates in the federal system." *Snapp*, 458 U.S. at 601–02. "In the context of parens patriae actions, this means ensuring that the State and its residents are not excluded from the benefits that are to flow from participation in the federal system." *Id.* While it "must be more than a nominal party, . . . *a State does have an interest, independent of the benefits that might accrue to any particular individual, in assuring that the benefits of the federal system are not denied to its general population*." *Id.* at 608 (emphasis added).

In *Snapp*, Puerto Rico claimed parens patriae standing based on this second interest as well, alleging that its workers had been denied the benefits of access to domestic work opportunities under the Wagner-Peyser Act and the Immigration and Nationality Act of 1952, Puerto Rico sued to vindicate *Id.* at 607-08. The Supreme Court agreed:

> "[W]e find that Puerto Rico does have *parens patriae* standing to pursue the interests of its residents in the Commonwealth's full and equal participation in the federal employment service [program]. Unemployment

> among Puerto Rican residents is surely a legitimate object of the Commonwealth's concern. Just as it may address that problem through its own legislation, it may also seek to assure its residents that they will have the full benefit of federal laws designed to address this problem. . . . Indeed, the fact that the Commonwealth participates directly in the operation of the federal employment scheme makes even more compelling its parens patriae interest in assuring that the scheme operates to the full benefit of its residents.

Id. at 609-10.

As in *Snapp*, Appellants have alleged injury to our quasi-sovereign interest in preserving our rightful place as co-equal sovereigns in our federal system. Where Puerto Rico sued to vindicate its citizens' rights under the Wagner-Peyser Act to receive federal jobs benefits available to all Americans, 29 U.S.C. § 49 et seq., Appellants 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. As Justice Jackson once explained,

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by *the certainty that he will have free access to every market in the Nation*, that no home embargoes will withhold his export, *and no foreign state will by customs duties or regulations exclude them*. Likewise, *every consumer may look to the free competition from*

> *every producing area in the Nation* to protect him from exploitation by any. Such was the vision of the Founders.

H. P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 539, 69 S. Ct. 657, 665, 93 L. Ed. 865 (1949) (emphasis added).

The Commerce Clause has two distinct purposes, one more readily apparent than the other. At the most basic level, the Commerce Clause "subordinates each state's authority over interstate commerce to the federal power of regulation." *Am. Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 175-76 (S.D.N.Y. 1997). At the same time, the "it embodies *a principle of comity* that mandates *that one state not expand its regulatory powers in a manner that encroaches upon the sovereignty of its fellow states*." *Id.* at 176 (emphasis added). "The need to contain individual state overreaching . . . arises not from any disrespect for the plenary authority of each state over its own internal affairs but out of a recognition that *true protection of each state's respective authority is only possible when such limits are observed by all states*." *Id.*

The Supreme Court recognized the twin aspects of the Commerce Clause in *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568, 116 S. Ct. 1589, 1595, 134 L. Ed. 2d 809 (1996). In that case, the Court considered

whether a jury may consider a defendants' conduct outside the judicial forum when awarding punitive damages. *Id.* at 572-73. The Court held that a jury could not do so without violating the Due Process Clause. But it also suggested that the second aspect of the Commerce Clause also prohibited Alabama for imposing its own policy choices on conduct that occurs in another state:

> Alabama may insist that BMW adhere to a particular disclosure policy in that State. *Alabama does not have the power, however, to punish BMW for conduct that was lawful where it occurred* and that had no impact on Alabama or its residents. Nor may Alabama impose sanctions on BMW in order to deter conduct that is lawful in other jurisdictions.

Id. at 572-73. Under the Commerce Clause, reasoned the Court,

> *one State's power to impose burdens on the interstate market* for automobiles is not only subordinate to the federal power over interstate commerce, but *is also constrained by the need to respect the interests of other States*. We think it follows from these principles of state sovereignty and comity that *a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States.*

Gore, 517 U.S. at 571-72 (internal citations omitted); *see also Healy v. Beer Institute*, 491 U.S. 324, 335–336 (1989) (noting that the Constitution has a "special concern both with the maintenance of a

national economic union unfettered by state-imposed limitations on interstate commerce and with the autonomy of the individual States within their respective spheres").

While these decisions support Appellants' underlying dormant Commerce Clause claim—the merits of which are *not* presently before this Court—they also support Appellant's parens patrie standing to challenge the Shell Egg Laws. *Snapp* holds that a State may establish parens patriae standing by alleging an injury to its quasi-sovereign interest in "securing observance of the terms under which it participates in the federal system." *Am. Libraries Ass'n*, 969 F. Supp. at 175-76. One of those terms is the "*principle of comity* that mandates …one state not expand its regulatory powers in a manner that encroaches upon the sovereignty of its fellow states." *Id.* at 176 (emphasis added). Just as this principle prohibits Alabama from imposing sanctions for BMW's lawful conduct in Mississippi, it also prohibits California from imposing sanctions on Missouri farmers for their lawful conduct in Missouri.

Appellants have a quasi-sovereign interest in securing California's observance of the principles of comity embodied in the Commerce

Clause. We have a quasi-sovereign interest in ensuring that our residents are not excluded from the benefits of those principles. We have parens patriae standing to challenge the Shell Egg Laws.

II. The district court erred in dismissing the First Amended Complaint as non-justiciable.

The justiciability of Appellants' claims was challenged by Appellee California in its motion to dismiss. [ER89-90]. Granting California's motion, the court concluded that Appellants had not alleged a concrete plan by any of our farmers to violate the law, nor any genuine threat of prosecution. [ER31]. And since the laws had not yet gone into effect at the time of the dismissal, "[t]he court can thus make no reasonable inference that any of the states or their producers would suffer prosecution." *Id.*

The district court's ruling was erroneous and should be reversed. Appellants sufficiently alleged that our egg farmers have exported nearly two billion eggs to California in each of the last several years and would continue to do so after January 1, 2015 but for the fear of prosecution under the Shell Egg Laws.

A. Standard of Review

The issue of justicability under Article III is reviewed de novo by the court of appeals. *Renee v. Duncan*, 686 F.3d 1002, 1010 (9th Cir. 2012).

B. Appellants' challenge to the Shell Egg Laws was ripe for review when we filed our First Amended Complaint.

When Appellants filed the Amended Complaint,[8] we were only required to allege facts that would support the reasonable conclusion that direct injury would be sustained as a result of the operation and enforcement of AB1437 and §1350 in order to obtain relief from the court. When "plaintiffs seek to establish standing to challenge a law or regulation that is not presently being enforced against them, they must demonstrate a realistic danger of sustaining a direct injury as a result

[8] The Shell Egg Laws became effective on January 1, 2015, after the district court dismissed the First Amended Complaint with prejudice. Consequently, the Record on Appeal does not include any reference to the injuries Appellants have sustained since the Laws went into effect. If this Court determines the allegations in the First Amended Complaint were not ripe at the time this case was filed, it should grant Appellants the opportunity to file a Second Amended Complaint alleging these additional injuries.

of the statute's operation or enforcement." *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1154 (9th Cir. 2000) (internal quotations omitted). Appellants did not need to wait until actual injuries occurred and were entitled to obtain relief which would prevent injuries or prosecution from happening. "[O]ne does not have to await the consummation of threatened injury to obtain preventive relief." *Pennsylvania*, 262 U.S. at 593 (emphasis added).

Entitlement to relief before prosecution is specifically available for conduct arguably involving a constitutional interest. "When the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he should not be required to await and undergo a criminal prosecution as the sole means of seeking relief." *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 298 (1979) (internal quotations omitted). "If the injury is certainly impending, that is enough." *Pennsylvania*, 262 U.S. at 593 (emphasis added).

The facts alleged by Appellants at the time of filing the First Amended Complaint are sufficient to establish a realistic danger of

direct injury resulting from the enforcement of AB1437 and §1350. Specifically, Appellants alleged that our farmers have a history of exporting nearly 2 billion shell eggs to California each of the last several years—including 10% of Iowa's annual production and one third of Missouri's. It is reasonable to infer from their prior course of dealing that our farmers would continue to export a like number of eggs to California each year in the future unless prohibited from doing so. [ER44]. Over 90% of the eggs Appellants' farmers ship to California are laid by hens housed in conventional cages that do not comply with AB1437 and §1350. [ER74, 76].

Starting January 1, 2015, Appellants' farmers must *label* any eggs they export to California as "California Shell Egg Food Safety Compliant" or "CA SEFS Compliant." Cal. Code Regs. tit. 3, § 1354. They cannot simply continue selling non-compliant eggs and wait to see whether the law is enforced, because the labeling requirement imposes an affirmative duty on the farmer to certify that the eggs are compliant. Even assuming there were no genuine threat of prosecution of for violating the minimum cage-size provisions of the Shell Egg Laws, Appellants farms must either comply, lie, or walk away. If they comply,

they lose profits. If they walk away, they lose profits. If the they lie, they are defrauding the State of California. The present injury is having to make the choice. The district court erred in ruling that such an injury was not clearly impending.

III. The district court abused its discretion by dismissing the First Amended Complaint with prejudice and committed legal error in concluding that it would have been futile to grant Appellants leave to amend.

The parties never briefed whether amending the complaint would be futile. The district court made its futility determination sua sponte after concluding, "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." [ER33-34]. "In light of the nature of the allegations in plaintiffs' first amended complaint and the arguments made at hearing," the court explained in its dismissal order, "leave to amend would be futile, as plaintiffs lack standing to bring this action on behalf of each state's egg farmers." [ER33-34].

A. Standard of Review

"The trial court's denial of leave to amend a complaint is reviewed for an abuse of discretion," *United States v. Corinthian Colleges*, 655 F.3d 984, 995 (9th Cir. 2011), "but whether the denial rests on an accurate view of law is reviewed de novo." *Gordon v. City of Oakland*, 627 F.3d 1092, 1094–95 (9th Cir.2010). "The standard for granting leave to amend is generous." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 701 (9th Cir.1990) (noting that leave to amend should be granted when a court can "conceive of facts" that would render the plaintiff's claim viable). "[A] district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." *United Bhd. of Carpenters & Joiners of Am. v. Bldg. & Const. Trades Dep't, AFL-CIO*, -----F.3d-----, No. 12-36049, 2014 WL 5437926, at *9 (9th Cir. Oct. 28, 2014). "Dismissal without leave to amend is improper unless it is clear, upon de novo review, that the complaint could not be saved by any amendment." *Krainski v. Nevada ex rel. Bd. of Regents of Nevada Sys. of Higher Educ.*, 616 F.3d 963, 972 (9th Cir. 2010).

B. It is an abuse of discretion for a district court to dismiss with prejudice a case over which it lacks subject-matter jurisdiction.

Once the district court determined that subject-matter jurisdiction was lacking, it was an abuse of discretion to dismiss this case *with prejudice*.

"The dismissal of the action with prejudice constitutes a final judgment *on the merits*." *Int'l Union of Operating Engineers-Employers Const. Indus. Pension, Welfare & Training Trust Funds v. Karr*, 994 F.2d 1426, 1429 (9th Cir. 1993) (emphasis added); *Hall v. Labatt*, 101 F.3d 705 (9th Cir. 1996) ("a dismissal with prejudice is '[a]n adjudication on the merits, and final disposition, barring the right to bring or maintain an action on the same claim or cause'") (quoting Black's Law Dictionary 421 (West 5th ed. 1979)). Yet, "[i]f a case is not ripe for adjudication, a federal court lacks jurisdiction to hear it under Article III and must dismiss the case *without reaching its merits*." *Cagle v. Abacus Mortgage, Inc.*, No. 2:13-CV-02157-RSM, 2014 WL 4402136, at *5 (W.D. Wash. Sept. 5, 2014)(citing *Portland Police Ass'n v. City of Portland*, 658 F.2d 1272, 1274 (9th Cir.1981)(emphasis added). It therefore follows that where a plaintiff "lack[s] standing, the district

court lack[s] subject matter jurisdiction to address the merits of his claim and should … dismiss[ ] it without prejudice." *Wasson v. Brown*, 316 F. App'x 663, 664 (9th Cir. 2009) (emphasis added).

This Court has repeatedly admonished lower courts that dismissals for lack of subject matter jurisdiction should be *without prejudice*. *Kelly v. Fleetwood Enterprises, Inc.*, 377 F.3d 1034, 1036 (9th Cir. 2004) ("because the district court lacked subject matter jurisdiction, the claims should have been dismissed without prejudice").[9] The only

[9] *See also 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); *Davenport v. McHugh*, 372 F. App'x 820 (9th Cir. 2010) ("Because the district court lacked subject matter jurisdiction, Davenport's action should have been dismissed without prejudice."); *Levi v. State Bar of California*, 391 F. App'x 633, 634 (9th Cir. 2010) ("dismissals for lack of subject matter jurisdiction … should be dismissed without prejudice"); *Kendall v. Dep't of Veterans Affairs*, 360 F. App'x 902, 903 (9th Cir. 2009) ("because the district court lacked subject matter jurisdiction, Kendall's claims concerning the denials of benefits should have been dismissed without prejudice"); *City of Oakland, Cal. v. Hotels.com LP*, 572 F.3d 958, 962 (Aug. 20, 2009) ("we affirm the dismissal for lack of subject matter jurisdiction but remand so that the dismissal is without prejudice"); *Townsend v. Whole Foods Mkt.*, 324 F. App'x 673 (9th Cir. 2009) (internal citation omitted) ("dismissals for lack of subject matter jurisdiction … should be dismissed without prejudice."); *Siler v. Dillingham Ship Repair*, 288 F. App'x 400, 401 (9th Cir. 2008) ("a dismissal for lack of subject matter jurisdiction is not an adjudication on the merits"); *Marcum v. Grant*

exception to this general rule appears to be those cases in which sovereign immunity presents an absolute bar to the jurisdiction of any court. *See, e.g., Craan v. U.S. Army Corps of Engineers*, 337 F. App'x 682, 683 (9th Cir. 2009) ("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. Here, however, the bar of sovereign immunity is absolute: no other court has the power to hear the case, nor can the [the plaintiffs] redraft their claims to avoid the exceptions to the FTCA."); *Frigard v. United States*, 862 F.2d 201, 204 (9th Cir. 1988) (same). This case does not present an issue of sovereign immunity. Therefore, the district court committed a per se abuse of discretion when is dismissed Plaintiffs' Amendment Complaint with prejudice.

Cnty., 234 F. App'x 527, 528 (9th Cir. 2007) (remanding because dismissal for lack of jurisdiction should have been without prejudice).

C. The district court erroneously concluded that granting leave to amend would be futile.

Appellants should be granted leave to amend their complaint because it is not clear that the complaint cannot be perfected by inclusion of additional allegations. "The court considers five factors in assessing the propriety of leave to amend—bad faith, undue delay, prejudice to the opposing party, futility of amendment, and whether the plaintiff has previously amended the complaint." *Johnson v. Buckley*, 356 F.3d 1067, 1077 (9th Cir. 2004). Futility alone has been recognized by this court as a reasonable ground for dismissal with prejudice, but only after the district court has afforded the plaintiff ample opportunity to state its claims. *See, e.g.*, *Sylvia Landfield Trust v. City of Los Angeles*, 729 F.3d 1189, 1196 (9th Cir. 2013) (affirming the district court's denial of leave to amend for futility where the plaintiff had been permitted to amend its complaint twice before, and its proposed third amended complaint still failed to state any claims).

Although the complaint has been amended once in this case, it was amended by stipulation of the parties *before* California had filed its motion to dismiss and before either HSUS or ACEF had even requested leave to intervene. Moreover, the only amendments to our original

complaint were allegations specific to the five additional plaintiffs—for whom the "Amended Complaint" was the original. More importantly, the district court in *Sylvia Landfield Trust* determined that leave to amend would be futile only after its review of plaintiff's proposed Third Amended Complaint showed no likelihood of ever stating a claim. *Id.* It was an abuse of discretion to deny Appellants the same opportunity to cure the purported deficiencies.

The district court further abused its discretion by citing the suspected motivation of Appellants as a factor in determining the futility of their claim. The district court drew an inference that Appellants brought this case only to vindicate the interests of egg farmers in their respective states, and cited "the nature of the allegations" as a basis for the futility of amendment. [ER34]. At the motion to dismiss stage, any dispute as to Appellants' motivation – an issue of fact – should have been resolved in Appellants' favor. The only question properly before the district court was whether Appellants could allege any set of facts that, if true, would establish standing and ripeness.

CONCLUSION

For the reasons stated above, this Court should reverse the district court's judgment and order dismissing the Amended Complaint with prejudice, and remand for further proceedings. In the alternative, this Court should reverse the district court's judgment and order dismissing the Amended Complaint with prejudice, and remand with instructions to grant the Plaintiffs leave to amend the complaint.

March 4, 2015

Respectfully submitted,

CHRIS KOSTER
Attorney General

By: */s/ J. Andrew Hirth*
J. ANDREW HIRTH, #MO57807
Deputy General Counsel
P.O. Box 899
Jefferson City, MO 65102
(573) 751-0818
(573) 751-0774 (facsimile)
andy.hirth@ago.mo.gov
Counsel for Missouri
Lead Counsel for Appellants

DOUG PETERSON
Attorney General of Nebraska

/s/ Blake Johnson
Dave Bydalek
Chief Deputy Attorney General
Blake Johnson
Assistant Attorney General
2115 State Capitol
Lincoln, NE 68509
(402) 471 – 1912
blake.johnson@nebraska.gov
Attorneys for Plaintiff
State of Nebraska

JACK CONWAY
Attorney General of Kentucky

/s/ Sean J. Riley
Deputy Attorney General
(*pro hac vice*)
700 Capital Avenue, Suite 118
Frankfort, KY 40601
(502) 696-5300
sean.riley@ag.ky.gov
Attorneys for Plaintiff
Commonwealth of Kentucky

E. SCOTT PRUITT, OBA#15828
Oklahoma Attorney General

/s/ P. Clayton Eubanks
Tom Bates , OBA# 15672
First Assistant Attorney General
P. Clayton Eubanks, OBA #16648
Deputy Solicitor General
(*pro hac vice*)
313 NE 21st Street
Oklahoma City, OK 73105
(405) 522-8992
clayton.eubanks@oag.ok.gov
Attorneys for Plaintiff
State of Oklahoma

TERRY E. BRANSTAD
Governor of the State of Iowa

THOMAS J. MILLER
Attorney General of Iowa

/s/ Jacob J. Larson
DAVID R. SHERIDAN
Assistant Attorney General
JACOB J. LARSON, AT0009804
Assistant Attorney General
(*pro hac vice*)
Lucas State Office Building
321 E. 12th St., Ground Flr.
Des Moines, Iowa 50319
Phone: (515) 281-5351
Fax: (515) 242-6072
E-mail: jacob.larson@iowa.gov
Attorneys for Plaintiff
Terry E. Branstad,
Governor of the State of Iowa

LUTHER STRANGE
Attorney General of Alabama

/s/ Robert D. Tambling
ROBERT D. TAMBLING
Chief, Environmental Section
(*pro hac vice*)
501 Washington Avenue
Montgomery, Alabama 36104
334-242-7445
rtambling@ago.state.al.us
Attorneys for Plaintiff
State of Alabama

STATEMENT OF RELATED CASES

Appellants are not aware of any related cases pending before this Court.

CERTIFICATE OF COMPLIANCE

I certify that pursuant to F.R.A.P. 32(a)(7)(C) and Ninth Circuit Rules 28-4 and 32-1, this brief is proportionally spaced in 14 point Century Schoolbook and contains 11,847 words, exclusive of those parts of the brief exempted by Rule 32 (a) (7)(B)(iii). I have relied on Microsoft Word's calculation feature to calculate the word limit.

March 4, 2015

/s/ J. Andrew Hirth
J. ANDREW HIRTH

PROOF OF SERVICE

I am employed in the Office of the Attorney General of the State of Missouri. I am over the age of 18 and not a party to this action. My business address is: Attorney General's Office, Supreme Court Building, P.O. Box 899, Jefferson City, MO 65102.

On March 4, 2015, I electronically filed the foregoing document described as APPELLANTS' BRIEF, with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit via the appellate CM/ECF system.

I certify that the following participants in this case are registered as CM/ECF users and will receive electronic service accomplished by the appellate CM/ECF system. I also certify that those listed will receive the exact same document filed with the CM/ECF system by electronic service via email and USPS.

SUSAN K. SMITH
Deputy Attorney General
300 SOUTH SPRING STREET, SUITE 1702
Los Angeles, California 90013
(213) 897-2105
(213) 897- 1071 (fax)
susan.smith@doj.ca.gov
Counsel for California

BRUCE A. WAGMAN
SCHIFF HARDIN LLP
One Market, Spear Street Tower, Thirty-Second Floor
San Francisco, CA 94105
(415) 901-8700
(415) 901-8701 (fax)
bwagman@schiffhardin.com
Counsel for HSUS

CARL J. NICHOLS
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 663-6000
(202) 663-6363 (fax)
carl.nichols@wilmerhale.com
Counsel for ACEF

March 4, 2015

/s/ J. Andrew Hirth
J. ANDREW HIRTH

ADDEND OF PERTINENT LAW

In accordance with F.R.A.P. 28 and Ninth Circuit Rule 28-2.7, pertinent provisions of the U.S. Constitution, the California Code of Health and Safety, and CDFA regulations are set forth verbatim below.

U.S. Constitution Art. I, § 8

The Congress shall have Power . . .

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes….

U.S. Constitution Art. III, § 2

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; –to all Cases affecting Ambassadors, other public Ministers and Consuls; –to all Cases of admiralty and maritime Jurisdiction; –to Controversies to which the United States shall be a Party; –to Controversies between two or more States; –between a State and Citizens of another State; –between Citizens of different States; –between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

U.S. Constitution Art. VI

…

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Proposition 2
(Cal. Health & Safety Code § 25990)

§ 25990. Prohibitions

In addition to other applicable provisions of law, a person shall not tether or confine 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
(Cal. Health & Safety Code §§ 25996-97)

§ 25996. Prohibition on sale or contract for sale of shelled eggs for human consumption for failure to comply with animal care standards

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

§ 25997. Violation; punishment

Any person who violates this chapter is guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not to exceed one thousand dollars ($1,000) or by imprisonment in the county jail for a period not to exceed 180 days or by both that fine and imprisonment.

CDFA Shell Egg Food Safety Rule 1350
(Cal. Code Regs. tit. 3, §1350)

§ 1350. Shell Egg Food Safety.

(a) In accordance with Food and Agricultural Code section 27521(a), to assure that healthful and wholesome eggs of known quality are sold in California, commencing July 1, 2013, any egg producer or egg handler as defined in sections 27510 and 27510.1 of the Food and Agricultural Code, shall ensure all flocks with a hatching date after July 1, 2013 comply with the requirements of this section.

(b) Registered egg producers or egg handlers whose shell eggs are processed with a treatment such as pasteurization to ensure safety, shall be exempt from the requirements of this section. A “treatment” or “treated” means a technology or process that achieves at least a 5-log destruction of SE for shell eggs as defined in 21 CFR section 118.3.

(c) Registered egg producers or handlers with 3,000 or more laying hens shall incorporate all of the provisions specified in subsections (c)(1), (2), and (3) in their facility operations:

(1) Implement Salmonella enterica serotype Enteritidis (SE) prevention measures in accordance with the Food and Drug Administration, Department of Health and Human Services' requirements for the production, storage, and transportation of shell eggs as specified in 21 CFR Part 118;

(2) Implement a SE environmental monitoring program which includes testing for SE in "chick papers," (the papers in which chicks are delivered) and the house environment when the pullets are 14-16 weeks of age, 40-45 weeks of age, 4-6 weeks post-molt, and pre-depopulation; and

(3) Implement and maintain a vaccination program to protect against infection with SE which includes at a minimum two attenuated live vaccinations and one killed or inactivated vaccination, or a demonstrated equivalent SE vaccination program approved by the Department.

(d) Commencing January 1, 2015, no egg handler or producer may sell or contract to sell a shelled egg for human consumption in California if it is the product of an egg-laying hen that was confined in an enclosure that fails to comply with the following standards. For purposes of this section, an enclosure means any cage, crate, or other structure used to confine egg-laying hens:

(1) An enclosure containing nine (9) or more egg-laying hens shall provide a minimum of 116 square inches of floor space per bird. Enclosures containing eight (8) or fewer birds shall provide a minimum amount of floor space per bird as follows, using formula 322+[(n-1) x 87.3]/n, where "n" equals the number of birds:

Number of Birds	Square Inches per Bird
1	322
2	205
3	166
4	146
5	135
6	127
7	121
8	117

(2) The enclosure shall provide access to drinking water and feed trough(s) without restriction.