No. 14-17111

In the
United States Court of Appeals for the Ninth Circuit

Missouri, ex rel.*, Chris Koster, Attorney General; Nebraska,* ex rel. *Doug Peterson, Attorney General; Oklahoma,* ex rel. *E. Scott Pruitt, Attorney General; Alabama,* ex rel. *Luther Strange, Attorney General; Kentucky,* ex rel. *Jack Conway, Attorney General; and Terry E. Branstad, Governor of the State of Iowa*,

Appellants,

v.

Kamala D. Harris, solely in her official capacity as Attorney General of California; Karen Ross, solely in her official capacity as Secretary of the California Department of Food and Agriculture,

Appellees,

Humane Society of the United States; Association of California Egg Farmers,

Intervenor-Defendants-Appellees.

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

BRIEF OF *AMICUS CURIAE* STATE OF UTAH IN SUPPORT OF APPLELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

OTHER WORKS CITED

STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

The case before this Court is a classic example of the several States exercising their inherent Police Powers with good intentions that nevertheless cause conflict between them. Like appellee States listed in the caption of this matter ("Plaintiff States"), Utah has a solemn duty to protect the health and welfare of its citizens, and an important interest to do so as an equal sovereign State in our federal system. Consequently, Utah, Plaintiff States and California raise legal questions regarding the proper scope of the *parens patriae* doctrine and the manner in which a State's Police Powers may be limited by the dormant Commerce Clause. Considered as a whole, the questions presented in the complaint below implicate the proper scope of a larger State's ability to exercise its Police Powers in a manner that may infringe on the Police Powers of other States. Utah, as Plaintiff States, has an interest in seeing that such important constitutional issues that directly affect it are properly considered and reviewed by the federal judiciary.

INTRODUCTION

California's regulatory scheme at issue addresses health and safety concerns of its egg industry and supply, principally by mandating that all eggs sold in California

[1] The State of Utah submits this brief pursuant to Federal Rule of Appellate Procedure 29(a). Fed. R. App. P. 29(a). Though not required under Rule 29, *Amicus* here also addresses both its interests and the reasons why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case. Finallly, this brief conforms to the formal requirements of Federal Rule of Appellate Procedure 29(c), (d).

originate from egg producers that have chicken cages of a large size, consequently requiring producers in other States which export eggs to California to comport with California regulations. If it were only Utah industry exporters to California who were affected, those industries could perhaps bring suit on their own, but that is not the case. Plaintiff States properly have an interest in their State industries, and in questioning whether regulations from other States impact such industries in constitutionally impermissible ways. Yet more fundamentally, Utah like Plaintiff States have an interest in whether California's regulations impact a sizeable portion of non-California citizens in such a manner that those citizens interests are served by actions like the instant one, where Plaintiff States test the constitutionality of California's egg producer requirements as they apply outside of California.

This case is of interest to Utah not only for the questions regarding the balanced or relational power of States presumed to be on equal footing in our federal system, but also, as recounted in the attached declaration and affidavit, important for the very real concrete effects California's egg producers' rules, embodied in AB 1427 and applied extraterritorially, have on the everyday lives of Utahns. *See generally* Declaration of Professors DeeVon Bailey and Heidi R. LeBlanc, appended as Exh. 1 hereto (hereinafter "Utah Professors' declaration" or "Profs.' Decl."), and Affidavit of Professor Dermot Hayes, appended as Exh. 2 hereto (hereinafter "Hayes affidavit" or "Hayes Aff.").

For instance, the Hayes affidavit attests to the economic impact of California's AB 1427 to States like Iowa—the largest egg exporter to California—which, while smaller in population, nevertheless have economies that are affected due to the extraterritorial effect of California's laws, to the consequence that both labor markets in such States likely face extremely higher costs in egg production and, by implication, consumer's of eggs in those States face economic consequences of higher priced eggs. Hayes Aff. ¶¶ 8, 10, 11. The egg industry's short term compliance with California regulations also necessarily leads to surplus bird slaughter to allow for more cage space per bird before investment in new housing can be affected, thereby driving up egg prices for the consumer, who will pay more for a formerly low cost protein source. *Id.* ¶¶ 11, 12. At least in the short term, and such a time frame will fluctuate due to cost of compliance rates, AB 1427 will drive up retail prices for eggs over 20 percent, and have a widely disproportionate effect on poorer consumers who depend now on the relatively low cost protein source. *Id.* ¶¶ 14, 17.

The California defendants' argument below focused much on the assertion that Plaintiff States sought merely to protect their domestic egg industries, an argument which district court largely adopted. *See, e.g.*, California Defendants' Mot. to Dismiss, Dkt. 36 at 13; *State of Missouri* et *al. v. Harris* et *al.*, No. 2:14-cv-00341, Dkt. No. 102, at 25 (C.D. Cal. Oct. 2, 2014) (hereinafter "Op." or "district court opinion"). Utah Professors' declaration certainly describes the importance of the egg industry to Utah's overall agricultural economy. Profs.' Decl. at 2-3. However, even more

importantly for *parens patriae* interests, the Utah Professors' declaration demonstrates that the economic extraterritorial reach of AB 1437 will have a negative effect on a significant number of Utah citizens as "the impact of increasing egg prices disproportionately affects low-income families because they spend a larger portion of their disposable income on food than other families [with more income]." *Id.* at 4.

With 12.7% or approximately 375,000 Utahns living below the poverty level, Utah has an interest in seeing that the constitutionality of AB 1437 is tested, as those low-income persons constitute a substantial portion of Utah's population and are private parties who, with their already meager means, cannot practically challenge the constitutionality of AB 1437 themselves. *Id.* at 4-5. To ensure that States have the ability to bring suit based on at risk significant citizen populations is one of the primary reasons for the *parens patriae* doctrine. Given that studies of low cost egg protein now suggest that consumption of eggs may also help reduce obesity, Utah has an additional interest in testing the constitutionality of AB 1437, as a substantial portion of its population, especially its low income population, could find obesity rates cut absent a substantial increase in egg prices. *Id.* at 5-6.

The district court and the California defendants below, as well as Plaintiff States, focused much of their discussion on the ability of State sovereigns to govern their own agricultural policy, on allegations that a larger, economically powerful State disproportionately dictates interstate commerce with its own agricultural policies, and on general federalism concerns regarding policy that each State should not expect that

their internal policies are dictated by another State where citizens of different States have no democratic representation. Indeed, California regulators have already inspected egg producers for compliance outside of California. *See* Exh. 3, Affidavit of Joseph M. Dart (attesting to California egg regulators inspection in Missouri at Rose Acre Farm, using California Code of Regulations Egg Inspection Safety Form pursuant to 1 C.C.R. § 1350). These are all vital concerns and they are concerns Utah has addressed above in discussion of how in our federal system the law balances the inherent Police Powers of the several States, who look out for the health and welfare of their own citizens, when the exercise of the several States' Police Powers come into conflict. This is where and how dormant Commerce Clause questions generally arise.

The district court erred in not recognizing this fact, and, more blatantly, not recognizing that the Plaintiff States sought to litigate these cognizable interests. The Plaintiff States should be allowed to maintain their suit not merely on the abstract assumption that they should be allowed to protect their agricultural industries from the extraterritorial effects of California's agriculture policy. Utah maintains Plaintiff States can bring challenging the extraterritorial effect of California's AB 1437 because when a single State's agricultural policies directly affect other States to their detriment, the effected States have the right to question the constitutionality the single State's policies. Utah contends Plaintiff States have the ability to do so in this case specifically because California has a significant effect on a substantial segment of non-

California citizens, namely those with lower income who are particularly vulnerable to market fluctuations in footstuffs that are healthy and low cost.

With these particular State interests in mind, Utah maintains that the district court gravely erred in concluding that amendment of the Plaintiff States' complaint was futile. The facts supporting Utah's *parens patriae* interests outlined above meet the pleading requirements for alleging standing, injuriy in fact and stating at least a dormant Commerce Clause claim. Further, the district court erred by reading the inferences derived from the allegations against rather than for the non-moving party, and by not allowing Plaintiff States to amend. This Court can easily correct this error and allow the important State interests a hearing on the merits or additional tests of evidence in support of the allegations of Plaintiff States after they are allowed to amend their complaint.

ARGUMENT

I. THE DISTRICT COURT SHOULD HAVE ALLOWED A SECOND AMENDED COMPLAINT[2] AND ERRED IN FINDING THAT AMENDMENT WOULD HAVE BEEN FUTILE

The district court erred because: 1) it did not "construe the the complaint in the non-movant's favor"; 2) it impermissibly speculated on the ultimate plausibility of the Plaintiffs States' allegations; and 3) did not presume that general allegations embrace those specific facts that are necessary to support the claim. *Bernhardt v. County of Los Angeles*, 279 F.3d 862, 867 (9th Cir. 2002). Each of these is addressed in turn below.

[2] There was a First Amended Complaint, but that amendment merely added parties and so had no substantive changes to the allegations of the Complaint.

A. Legal Standards: Article III, *Parens Patriae* Standing and the Federal Rules of Civil Procedure

The district court initially laid out most of the applicable analysis for both Article III standing and case or controversy requirements for Plaintiffs to allege injury-in-fact at complaint stage. U.S. Const. III; Op. at 13. It observed:

> Whether a party has sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy is what has been traditionally referred to as the question of standing to sue. […] A plaintiff must demonstrate standing for each claim he seeks to press and separately for each form of relief sought. […] [T]he Supreme Court [has] defined irreducible constitutional minimum of standing. First, there must be an invasion of plaintiffs' legally protected interest, an injury-in-fact, which is both concrete and particularized and actual and imminent; second, there must be a causal connection between the injury and the challenged conduct; and third, it must be likely that the injury will be redressed by a decision in plaintiffs' favor.

Op. at 13 (quotation marks and original brakets omitted) (citing *Sierra Club v. Morton*, 405 U.S. 727, 731-32 (1972); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 335 (1992); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-1 (1992)).

With respect to other standing requirements, the district court took particular pains to describe what is necessary for a State to maintain standing under the doctrine of *parens patriae*, noting the unremarkable proposition that "a State cannot establish standing if it is 'only a nominal party without a real interest of its own.'" Op. at 13 (quoting *Alfred L. Snapp & Son, Inc. v. Puerto Rico,* ex rel*., Barez*, 458 U.S. 592, 600 (1982)). "Rather, to have such standing the State must assert an injury to what has been characterized as a 'quasi-sovereign' interest, which is a jusdicial construct that

does not lend itself to a simple or exact definition." *Snapp*, 458 U.S. at 601. "Although the Supreme Court has never clearly defined what constitutes a quasi-sovereign interest, it does not include 'sovereign interests, proprietary interest or private interest pursued by the State as a nominal party.'" *Dep't of Fair Emp't & Hous. v. Lucent Techs. Inc.*, 642 F.3d 728, 737 n.2 (9th Cir. 2011) (quoting *Snapp*, 458 U.S. at 602). *Table Bluff Reservation (Wiyot Tribe) v. Philip Morris, Inc.*, 256 F.3d 879, (9th Cir. 2001).

Finally, Rule 12(b)(1) of the Federal Rules of Civil Procedure allows parties to move to dismiss on the ground that a plaintiff lacks standing. Fed. R. Civ. P. 12(b)(1). "On a motion to dismiss for lack of standing, a district court must accept as true all material allegations in the complaint, and must construe the complaint in the nonmovant's favor. []The Court **may not speculate as to the plausibility of the plaintiff's allegations**." *Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1121 (9th Cir. 2010) (emphasis added) (citing *Bernhardt v. County of Los Angeles*, 279 F.3d 862, 867 (9th Cir. 2002)). "We need not, and do not, speculate as to the plausibility of plaintiff's allegations. We consider only the facts alleged in the complaint and in any documents appended thereto. A plaintiff needs only to plead general factual allegations of injury in order to survive a motion to dismiss, for we presume that general allegations embrace those specific facts that are necessary to support the claim." *Bernhardt*, 279 F.3d at 867 (internal quotation marks, bracket and citations omitted). Finally, this Court reviews de novo as a legal determation the district court's

standing analysis, including whether the district court properly treated the complainant's allegations in accord with the presumptions recited above. *Jewel v. National Sec. Agency*, 673 F.3d 902, 907 (9th Cir. 2011).

B. Application

The district court abused its discretion when it preemptively declared that for reasons of futility it would not allow Plaintiff States to file an amended complaint in this matter despite having no such amended complaint before it for consideration. Federal Rule of Civil Procedure 15 allows a party to amend its complaint with either: (1) opposing party's written consent or (2) the court's leave. Fed. R. Civ. P. 15(a)(2). Rule 15 further directs the court to "freely give leave [to amend] when justice so requires." *Id.* Furthermore, this Court has held that this policy should be applied with "extreme liberality." *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990).

Under Ninth Circuit jurisprudence, five factors are taken into consideration by a court when assessing the propriety of allowing leave to amend a complaint: "bad faith, undue delay, prejudice to the opposing party, futility of amendment, and whether the plaintiff has previously amended the complaint." *Desertrain v. City of Los Angeles*, 754 F.3d 1147, 1154 (9th Cir. 2014) (quoting *Johnson v. Buckley*, 356 F.3d 1067, 1077 (9th Cir. 2004)). Here, the District Court barred any future amendments only on the basis that it would be "futile." *State of Missouri* et *al. v. Harris* et *al.*, No. 2:14-cv-00341, Dkt. No. 102, at 25 (C.D. Cal. Oct. 2, 2014) (hereinafter "Op." or "district

court opinion").

"A proposed amendment is futile only if no set of facts can be proved under **the amendment to the pleadings** that would constitute a valid and sufficient claim or defense." *Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988) (emphasis added) (citing *Baker v. Pacific Far East Lines, Inc.*, 451 F. Supp. 84, 89 (N.D. Cal. 1978)). In other words, if an amended complaint would necessarily fail to State a justiciable claim, then leave to amend can be denied for futility. *Jones v. Community Redevelopement Agency of City of Los Angeles*, 733 F.2d 646, 650-51 (9th Cir. 1984), *see also Partington v. Bugliosi*, 56 F.3d 1147, 1162 (9th Cir. 1995). Such is not the case here.

In this case, the district court denied leave to amend Plaintiff States' complaint even though it did not have a proposed amended complaint before it. The district court reasoned that future amendments would be futile on the basis that Plaintiffs "lack standing to bring this action on behalf of each State's egg farmers." *Id.* Indeed, both the district court's opinon and the California defendants' motion to dismiss both demonstrate that amendment could not be futile as a matter of law and logic in this matter.

For instance, when discussing the want Plaintiff States' standing on the Commerce Clause claims, California defendants State several times that the motion to dismiss should be granted because "plaintiffs do not allege or argue" one thing or another. *See e.g.*, Defs.' Mot. to Dismiss, Dkt. 58 at 5 (on standing "plaintiffs fail to make even the most basic allegations necessary that there is an injury in fact"); *id.* at 6

("allegations fail to allege a cognizable theory of *parens patriae* standing"); *id.* at 9 ("plaintiffs['] "conclusory allegations" that their egg producers fear prosecution is "twice-removed because the plaintiff States are assuming that their egg producers will want to sell eggs in California but will not want to comply with the California law"); *id.* at 11-13, 15 (dormant Commerce Clause allegations are insufficient because a ban applicable both in State and out cannot be discriminatory, and also concluding no dormant Commerce Clause claim exists because Plaintiff States have not alleged a substantial burden on interstate commerce resultant from the California intrastate regulation).

In reviewing these assertions the district court found that amendment of the complaint was futile, but such a finding begs the question at issue as a matter of logic. California defendants themselves enumerated deficiencies that if amended would have cured the "futility" the district court found. Utah does not dispute the possibility that in some cases Plaintiffs may lack standing to sue on behalf of the egg farmers located in their State; however, Plaintiff States' do not have standing simply on the basis of alleged harm to the egg farmers in their States. As discussed above, Plaintiff States' standing in this suit is proper under the doctrine of *parens patriae* – for the general heath benefit of the citizens of their States.

The district court's decision to foreclose the possibility of amending the Plaintiffs' complaint without even considering a proposed amended complaint is contrary to the "extreme liberality" of Rule 15. In fact, long-standing Ninth Circuit

jurisprudence stands for the exact opposite conclusion. In *Sidebotham v. Robison*, this Circuit held that "dismissal without leave should not be granted where there is possibility of a good complaint being filed." 216 F.2d 816, 826 (9th Cir. 1954). The general rule is that where other facts exist that, if alleged, would cure the defects of a complaint, a court should grant leave to amend. *Id.* (citing *Tipton v. Bearl Sprott Co.*, 175 F.2d 432 (9th Cir. 1949)). The fact that California defendants themselves listed possible amendments suggests that the district court should have at a minimum allowed State plaintiffs leave to amend the complaint. If upon remand and amendment Plaintiff States fail to allege sufficient facts which taken liberally State a cause of action, then perhaps wholesale dismissal is warranted. But, as here, where both the district court and the defendants noted specific areas where the complaint could have been amended, it is illogical for the district court to find amendment futile.

To decree preemptively that it is impossible for Plaintiff States to allege any facts that would support a finding of standing without considering an amended complaint is arbitrary and a clear abuse of discretion. The district court committed a reversible error by failing to grant leave to amend the complaint in this matter.

II. AN AMENDED COMPLAINT WOULD BE NOT BE FUTILE IN THIS CASE AND WOULD MEET STANDING REQUIREMENTS FOR A DORMANT COMMERCE CLAUSE CLAIM

Plaintiff States have made a colorable claim for standing to challenge California's AB 1427 as violating the dormant Commerce Clause. Because AB 1427 arguably has disproportionate inter regulatory effects that harm Plaintiff States, those

States have a colorable *parens patriae* claim to test the provision's constitutionality. Since AB 1427 has more than an incidental effect on the inter egg trade, Plaintiff States can sufficiently allege harm to challenge whether the provision violates the dormant Commerce Clause.

The Commerce Clause to the United States Constitution provides that "[t]he Congress shall have Power . . . [t]o regulate Commerce . . . among the several States." U.S. Const. Art. I, § 8, cl. 3. Even though it is clearly phrased as a grant of enumerated regulatory authority to Congress, the Commerce Clause has a dormant or negative aspect that denies each of the several States the power to discriminate unjustifiably against or burden the interstate flow of articles of commerce. *See, e.g.*, *Wyoming v. Oklahoma*, 502 U.S. 437, 454 (1992); *Welton v. Missouri*, 91 U.S. 347 (1876). "Although the Clause thus speaks in terms of powers bestowed upon Congress, the Court long has recognized that it also limits the power of the States to erect barriers against interstate trade." *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 35 (1980). This is to say that on its simplest terms, the dormant Commerce Clause primarily is concerned both with incidental effects on interstate commerce caused by legitimate single State regulation, and with State regulation that is motivated by a single State's concern for itself at the expense of the economic interests of sister States in the balance of the Union.

While it is not in the text of the constitution, and it is sometimes criticized as a judicial creation,[3] the Court has also recognized the dormant Commerce Clause as it reasons that the Framers granted Congress plenary authority over interstate commerce due to the "conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Hughes v. Oklahoma*, 441 U.S. 322, 325-26 (1979). Such an observation is likely true as a matter of first principles, as James Madison observed that such Balkanization would "nourish unceasing animosities, and not improbably terminate in serious interruptions of the public tranquility." The Federalist No. 42 (Madison) at 214 (Garry Wills, ed. 1982).

Justice Jackson famously echoed Madison's sentiment when commenting on this economic rationale:

> This principle that our economic unit is the Nation, which alone has the gamut of powers necessary to control of the economy, including the vital power of erecting customs barriers against foreign competition, has as its corollary that the states are not separable economic units. . . . 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. . . .

H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 537-538 (1949). Thus it has always been envisioned that the policy behind the dormant Commerce Clause is a

[3] *See, e.g.*, *C&A Carbone, Inc. v. Clarkstown*, 511 U.S. 383, 401 (1994) (O'Connor, J., concurring in judgment) ("The scope of the dormant Commerce Clause is a judicial creation").

constitutional check on State protectionism and self interest; the dormant Commerce Clause recognizes a "national 'common market'" which the single States cannot destroy by advancing their own regulatory interests at the expense of the nation. *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 350 (1977).

Yet, any limitation imposed by the Commerce Clause on State regulatory power "is by no means absolute," and the Supreme Court has continually and constantly stated that "the States retain authority under their general police powers to regulate matters of 'legitimate local concern,' even though interstate commerce may be affected." *Lewis*, 447 U.S. at 36. Thus, it is important to note that the Supreme Court has recognized that the negative or dormant aspect of the Commerce Clause was not intended "to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country." *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 443-444 (1960).

In determining whether a single State has overstepped its role in regulating inter commerce, the Supreme Court has distinguished between State statutes that burden interstate transactions only incidentally, and those that affirmatively discriminate against such transactions. While statutes in the first group violate the Commerce Clause only if the burdens they impose on interstate trade are "clearly excessive in relation to the putative local benefits," *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), statutes in the second group are subject to more demanding scrutiny.

The Court explained in *Hughes*, 441 U.S. at 336, that once a State law is shown to discriminate against interstate commerce "either on its face or in practical effect," the burden falls on the State to demonstrate both that the statute "serves a legitimate local purpose," and that this purpose could not be served as well by available nondiscriminatory means. *See also*, *e.g.*, *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 957 (1982); *Hunt*, 432 U.S. at 353; *Dean Milk Co. v. Madison*, 340 U.S. 349, 354 (1951). With the attachments to this brief and reasons cited above in mind, under a *parens patriae* theory, Plaintiff States could perhaps prove after amending their complaint that AB 1437 is void under the principles of *Pike or Hughes*.

Under *Pike*, State regulations violate the Commerce Clause if the burdens they impose on interstate trade are "clearly excessive in relation to the putative local benefits." *Id.* The Arizona Act at issue in *Pike* required that all cantaloupes grown in be packed in before shipment to another state. *Id.* at 138. Bruce Church, Inc. violated the statute by harvesting cantaloupes in Arizona and shipping them 31 miles to California to its packing facility. *Id.* Arizona issued an order prohibiting Bruce Church from shipping their fruit to California to be packed. *Id.* Without available packing facilities in Arizona, the company stood to lose $700,000 in lost crop, *id.* at 137, and the district court granted preliminary injunctive relief to prevent the loss. The Supreme Court, finding the local benefits *de minimis*, affirmed, holding the potential loss plus the requirement that Bruce Church would have to pay $200,000 to

build a packing facility in Arizona rather than ship its crop a short distance to California, was clearly excessive in relation to the benefits to Arizona. *Id.*

Like the situation in *Pike*, here we have an as-applied challenge in which businesses outside of California face an imminent hazard of loss which threatens an "unrecoverable cost." *Id.* at 140. The question before this Court is not whether Plaintiff States will ultimately prevail on their dormant Commerce Clause claim. The question is merely whether they have a colorable claim that should be decided by testing the evidence in the crucible of trial. The factual question to be examined below is whether AB 1427 is "clearly excessive in relation to the putative local benefits," *Pike*, 397 U.S. at 142. As noted above, Utah maintains that the California regulation may burden Utah egg producers such that egg prices rise in Utah to the detriment of its lower income citizens who are in need of low cost sources of protein. Whether AB 1427 is clearly excessive in relation to its putative local benefits to California when balanced with the interests of Utah in maintaining low cost sources of protein for the poor is a factual issue in a classic sense and merits examination of the allegations upon remand.

Similarly, the question before the Court is not now whether Plaintiff States have definitively shown that, as in *Hughes*, AB 1427 discriminates against inter commerce "either on its face or in practical effect," such that the burden falls on California to demonstrate both that the provision "serves a legitimate local purpose," and that its purpose could not be served as well by available nondiscriminatory means.

441 U.S. at 336. Rather, the question is whether Plaintiff States could amend their complaint to allege such discrimination. Utah will not belabor the point already made: that Utah egg producers are discriminated against by AB 1427's cage restrictions. The factual question remains whether the purpose of AB 1427 could not be served as well by nondiscriminatory means, again a classic question of fact that should be examined on remand.

Plaintiff States' allegations that they have standing due to quasi–sovereign interests in their citizens' economic health presents a requisite *parens patriae* assertion of injury to the general economy. Both the Hayes' and the Utah Professors' papers demonstrate a factual basis for arguing general economic injury and injury to the working poor due to an inevitable increase in egg prices traced at least in part to AB 1427.

Whether AB 1427 can be sustained in the face of these allegations is a matter for evidence at trial and cannot be determined in the context of motion practice. AB 1427 may unconstitutionally discriminate with respect to commerce in two ways: 1) in favor of California egg farmers by shielding them from lower-priced competition from out-of-state egg farmers; and 2) against out-of-state egg farmers by making it illegal to export to California eggs produced in traditional agriculatural chicken housing. Plaintiff States and Utah maintain that commerce in eggs is "inherently national" and should not be subject to a patchwork of conflicting State regulation such as California's AB 1427. Whether factually California's regulations could survive

a claim is one that should be allowed to proceed on remand as the balancing questions necessitated by the dormant Commerce Clause analysis are factual in nature. In any case, as Utah has shown here, it would hardly be futile to allow Plaintiff States to amend their complaint to explore such issues and the constitutional questions surrounding AB 1427 are weighty enough to merit such consideration.

The pupose of *parens patriae* actions is to allow the States to bring suits regarding interests that are inherent and common to a given States' citizens' interests. The focus below of California and the district court has overly emphasized the effect on agricultural industry discrimination, though this interest is surely a legitimate State interest. As previously discussed, however, Utah and Plaintiff States similarly have a *parens patriae* interest in challenging AB 1427 on behalf of low income citizens in need of cost efficient protein sources, as those citizens can hardly maintain a suit on their own behalf. For this reason alone, if for no other, the district court's disimissal of the case with prejudice should be reversed, and the case remanded with instructions allowing Plaintiff States to amend the complaint so they may test the constitutionality of AB 1427 on the facts.

CONCLUSION

For the reasons set forth above the district court erred in dismissing this action with prejudice and without allowing Plaintiff States leave to amend their complaint. This Court should reverse and remand with instructions that Plaintiffs have leave to amend their complaint so that the district court can engage in the proper domant Commerce Clause analysis, which of necessity must balance the interests of the several States against each other, in order to determine whether California's AB 1427 constitutes extraterritorial regulation that is not justified by local interest that outweigh those of California's sister States.

DATED this 4th day of March 2015.

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By /s/ *Parker Douglas*
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CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to Fed. R. App. P. 32(a)(7)(C)(ii) that:

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By ___/s/ *Parker Douglas*_____
Parker Douglas
Utah Federal Solicitor
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CERTIFICATE OF SERVICE

I hereby certify that on March 4, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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By /s/ *Parker Douglas*
Parker Douglas
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