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' REPLY BRIEF

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INTRODUCTION

This appeal involves two distinct inquiries. The first asks whether Plaintiff States alleged sufficient facts to establish parens patriae standing and a ripe controversy *on March 5, 2015*—nine months before the Shell Egg Laws went into effect—when we first filed our Complaint.[1] The second inquiry asks whether Plaintiff States could allege sufficient facts to establish parens patriae standing and a ripe controversy *today*—seven months after the Shell Egg Laws have gone into effect—if we were given leave to amend our Complaint. Given the extensive briefing the parties have already submitted as to the sufficiency of the allegations in our March 5, 2015 Complaint, this reply brief will focus solely on the second inquiry.

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[1] As used throughout this reply brief, "Complaint" refers to the March 5, 2015 First Amended Complaint—the first pleading filed by all six Plaintiff States. An earlier pleading, filed by Missouri alone on February 3, 2014, was amended *by stipulation with California* solely to add the other five Plaintiff States. The Complaint does not assert any counts or legal theories that were not in Missouri's earlier pleading. At the time of the amendment, California had not yet answered or otherwise responded to the original complaint, and neither HSUS nor ACEF had moved to intervene.

I. Appellees misstate the standard of review for a district court's denial of leave to amend due to futility.

Appellees claim that a district court's decision to deny leave to amend as futile is reviewed solely for abuse of discretion, CA Br. at 15; HSUS Br. at 10; ACEF Br. at 13, but that's only one half of the relevant standard. As this Court has explained, "[w]e review for abuse of discretion the district court's denial of leave to amend a complaint. However, whether such denial rests on an inaccurate view of law . . . requires de novo review of the underlying legal determination." *Gordon v. City of Oakland*, 627 F.3d 1092, 1094-95 (9th Cir. 2010); *see also Sonoma Cnty. Ass'n of Retired Employees v. Sonoma Cnty.*, 708 F.3d 1109, 1118 (9th Cir. 2013)("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") (internal quotations omitted); *Krainski v. Nevada ex rel. Bd. of Regents of Nevada Sys. of Higher Educ.*, 616 F.3d 963, 972 (9th Cir. 2010) (same); *Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc.*, 368 F.3d 1053, 1061 (9th Cir. 2004) (same); *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003) (same).

This two-step review is appropriate in cases such as this, where the district court denied Plaintiff States leave to amend based on a legal conclusion that "amend[ment] would be futile, as plaintiffs lack standing to bring this action on behalf of each state's egg farmers." Order at 25. First, the Ninth Circuit reviews the district court's underlying legal conclusion de novo. If the district court applied the law correctly, then the Ninth Circuit reviews its decision to deny leave to amend for an abuse of discretion. But if the district court got the law wrong, its discretion is not entitled to any deference.

II. Plaintiff States could plead sufficient facts in an amended complaint to cure the alleged defects in our original Complaint.

Under the notice pleading standards in the Federal Rules, a complaint must contain "(1) a short and plain statement of the grounds for the court's jurisdiction ...;(2) a short and plain statement of the claim showing that the pleader is entitled to relief; and (3) a demand for the relief sought . . . ." Fed. R. Civ. Pro. 8(a). Appellees contend, and the district court concluded, that our Complaint does not satisfy these liberal requirements. Plaintiff States disagree, and we ask this Court to decide who is right. But even if this Court concludes that Plaintiff

States did not allege sufficient facts to establish parens patriae standing and a ripe controversy *some nine months before the Shell Egg Laws went into effect*, it does not follow that we cannot do so now.

In its response brief, Defendant-Inervenor/Appellee Association of California Egg Farmers ("ACEF") characterizes Plaintiff States' appeal from the district court's order denying leave to amend as a "puzzling criticism, given that Plaintiffs neither asked for leave to amend in [our] oppositions to the motions to dismiss, nor filed a separate motion for leave to amend, not sought reconsideration after the district could dismissed [our] complaint." ACEF Br. at 28-29. "It is difficult," ACEF argues, "to see how the district court can be faulted for denying relief that the Plaintiffs never properly requested." *Id.* at 29.

ACEF cites no legal authority holding that dismissal *with prejudice* is the default unless the plaintiff affirmatively requests leave to amend. On the contrary, this Court has expressly held that "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); *see also Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) ("[I]n a line of cases stretching back nearly 50 years, we have held that 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.").

ACEF cites no case or rule of civil procedure under which a plaintiff waives any opportunity to amend her pleadings unless she moves for leave to amend in opposition to a motion to dismiss. And its implicit suggestion that Plaintiff States were required to seek "reconsideration" in the district court in order to preserve this issue for appeal is equally baseless. Other than Rules 50, 59, and 60 (none of which is applicable here), "[t]he Federal Rules of Civil Procedure do not expressly provide for motions for reconsideration." *San Luis & Delta-Mendota Water Auth. v. U.S. Dep't of Interior*, 624 F. Supp. 2d 1197, 1207 (E.D. Cal. 2009) *aff'd sub nom. San Luis & Delta-Mendota Water Auth. v. United States*, 672 F.3d 676 (9th Cir. 2012); *see aslo In re Sturgis Printing Co., Inc.*, 74 B.R. 624, 625 (D. Haw. 1987) ("Although the Federal Rules of Civil Procedure do not make provision for motions

to 'reconsider,' such motions have become unfortunate fixtures in the legal landscape.").

The parties fundamentally disagree about (a) whom Plaintiff States brought this lawsuit to protect and (b) what harms we brought it to protect them from. In large part, our disagreement is a function of timing. Plaintiff States filed our Complaint almost nine months before the Shell Egg Laws went into effect because the impending regulations were already forcing our farmers to adopt California's production methods or lose access to California's markets. Given the immediate and irreparable harm already resulting from that choice, it should not be surprising that the lion's share of factual allegations in our Complaint focused on Shell Egg Laws' impact on our egg farmers.

But the Shell Egg Laws threaten far more than just one industry. Imposing new regulations on the quality and condition of shell eggs—regulations different from and in addition to the uniform national standards mandated by Congress under the Egg Products Inspection Act—the Shell Egg Laws threatened the livelihoods of grocers, bakers, and restaurant owners in Plaintiff States. More importantly, they threatened the physical and economic well-being of our consumers—

especially those of limited means for whom eggs were (at the time of filing) the least expensive and most readily available source of protein in the American diet.

Finally, the Shell Egg Laws threatened our citizens' right to participate in representative government. By conditioning the sale of shell eggs *within California* on producers' voluntary discontinuation of certain production methods employed legally (and now exclusively) *outside California*, the Shell Egg Laws have the practical effect of regulating conduct within Plaintiff States' borders. Such extraterritorial regulation harms more than the individual farmers forced to change their conduct. It usurps the democratic authority of our people as a whole by supplanting our public policy preferences with the priorities of California legislators we did not elect and cannot vote out of office.

A voter-harm theory of parens patriae standing may be novel, but it's not just some academic contrivance or grandiloquent expression of democratic ideals. While this case was still pending in the district court, Missouri voters passed a ballot initiative called the "Missouri Right to Farm Amendment," which added the following provision to the

Missouri Constitution:

> In order to assert our rights, acknowledge our duties, and proclaim the principles on which our government is founded, we declare . . .
>
> That agriculture which provides food, energy, health benefits, and security is the foundation and stabilizing force of Missouri's economy. To protect this vital sector of Missouri's economy, ***the right of farmers and ranchers to engage in farming and ranching practices shall be forever guaranteed in this state***, subject to duly authorized powers, if any, conferred by article VI of the Constitution of Missouri.

Mo. Const. art. I, § 35 (emphasis added). Missouri amended its constitution in direct response to growing efforts by HSUS and other animal rights groups ban many commercial farming practices in other states by enacting strict animal husbandry regulations like the Shell Egg Laws.

That a majority of Missouri *voters*—not just Missouri egg farmers—amended their state constitution specifically to prevent their state from adopting legislation like the Shell Egg Laws in Missouri casts serious doubt on the district court's assumption that "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."

At the very least, Plaintiff States should be allowed to plead the additional information we've gathered since the Shell Egg Laws went into effect.

CONCLUSION

For the reasons stated above and in our Appellants' Brief, this Court should reverse the district court's judgment and order dismissing the Amended Complaint with prejudice, and remand for further proceedings.

July 30, 2015

Respectfully submitted,

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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 2,267 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.

July 30, 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 July 30, 2015, I electronically filed the foregoing document described as APPELLANTS' REPLY 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.

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