**No. 149, Original**

# In the Supreme Court of the United States

STATE OF INDIANA, ET AL., PLAINTIFFS

*v.*

COMMONWEALTH OF MASSACHUSETTS

*ON MOTION FOR LEAVE TO FILE A BILL OF COMPLAINT*

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE**


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This brief is filed in response to the order of this Court inviting the Solicitor General to express the views of the United States.

**STATEMENT**

1. In November 2016, Massachusetts voters passed a ballot initiative with the stated objective "to prevent animal cruelty by phasing out extreme methods of farm animal confinement, which also threaten the health and safety of Massachusetts consumers, increase the risk of foodborne illness, and have negative fiscal impacts on" Massachusetts. Prevention of Farm Animal Cruelty Act (Massachusetts Act or Act), 2016 Mass. Acts 1052. The Act prohibits knowingly confining certain animals "in a cruel manner" within Massachusetts, and it prohibits businesses from knowingly selling within Massachusetts shell eggs, whole veal meat, or whole pork meat that is the product of animals "confined in a cruel manner." *Ibid.* "Confined in a cruel manner" is defined to mean "confined so as to prevent a covered animal

from lying down, standing up, fully extending the animal's limbs, or turning around freely." *Id.* at 1053.[1]

Violations of the Massachusetts rules are punishable by civil fines of up to $1000, to be imposed exclusively by the Massachusetts Attorney General. 2016 Mass. Acts 1054. The Attorney General may also seek injunctive relief. *Ibid.* In an action to enforce the Act, a business can defend itself on the ground that it "relied in good faith" on a "written certification or guarantee" by its supplier that the shell egg, whole pork meat, or whole veal meat it purchased was not derived from a covered animal that was confined in a cruel manner. *Id.* at 1054-1055.

The Act directs the Massachusetts Attorney General to promulgate regulations for its implementation by January 1, 2020. 2016 Mass. Acts 1055. The Attorney General has not yet done so. The prohibitions and enforcement provisions of the Act will take effect on January 1, 2022. *Ibid.*

2. In December 2017—more than four years before the Act would take effect—the States of Indiana, Alabama, Arkansas, Louisiana, Missouri, Nebraska, North Dakota, Oklahoma, South Carolina, Texas, Utah, West Virginia, and Wisconsin filed a motion in this Court for leave to file a bill of complaint against the Commonwealth of Massachusetts, claiming (Compl. ¶¶ 47-58) that the Act violates the negative prohibition of the

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[1] In 2018, California voters adopted a proposition very similar to the Massachusetts Act. Prevention of Cruelty to Farm Animals Act, Cal. Proposition 12 (2018), https://vig.cdn.sos.ca.gov/2018/general/pdf/topl.pdf#prop12. A prior California law governing confinement standards for egg-laying hens is the subject of another pending motion for leave to file a bill of complaint in this Court. *Missouri* v. *California*, No. 22O148 (filed Dec. 4, 2017).

Commerce Clause of the Constitution, Art. I, § 8, Cl. 3. Plaintiffs assert standing (Compl. ¶¶ 34-35) by alleging that state institutions such as prisons will pay higher prices for eggs and meat as a result of the Act. They further allege (Compl. ¶¶ 24-33) that the State of Indiana, through Purdue University, owns and operates farms that sell pork products on the market and that confine covered animals "in conditions that do not currently comply with" the Act. Compl. ¶ 28. Plaintiff also assert *parens patriae* standing (Compl. ¶¶ 36-46) on the theory that the Act will cause residents in their States to pay higher prices for eggs, pork, and veal.

In opposition to the motion, Massachusetts argues that this case does not warrant an exercise of this Court's original jurisdiction (Br. in Opp. 8-20); that plaintiffs lack standing (*id.* at 20-27); and that the Act does not violate the Commerce Clause (*id.* at 27-34).

**DISCUSSION**

The motion for leave to file a bill of complaint should be denied because this is not an appropriate case for the exercise of this Court's original jurisdiction, which the Court has repeatedly stated should be exercised only "sparingly." *Mississippi* v. *Louisiana*, 506 U.S. 73, 76 (1992) (citations omitted). This case does not present the rare circumstance in which the Court would exercise its original jurisdiction to resolve a Commerce Clause question. Even assuming plaintiffs have standing, they have not asserted the type of interest that would warrant review by this Court at this time. And in order to resolve plaintiffs' challenge, both on standing and the merits, it would be necessary to resolve complex factual disputes that are better suited to a district court.

1. The Constitution includes within this Court's original jurisdiction "all Cases * * * in which a State shall

be Party." U.S. Const. Art. III, § 2, Cl. 2. Since the First Judiciary Act, Congress has provided by statute that this Court has "original and exclusive jurisdiction of all controversies between two or more States." 28 U.S.C. 1251(a); see Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 80; see also Stephen M. Shapiro et al., *Supreme Court Practice* § 10.1, at 620-621 (10th ed. 2013). But although that jurisdiction is exclusive, the Court has "interpreted the Constitution and [Section] 1251(a) as making [its] original jurisdiction 'obligatory only in appropriate cases,'" *Mississippi*, 506 U.S. at 76 (quoting *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 93 (1972)), and therefore "as providing [the Court] 'with substantial discretion to make case-by-case judgments as to the practical necessity of an original forum in this Court,'" *ibid.* (quoting *Texas* v. *New Mexico*, 462 U.S. 554, 570 (1983)).

In exercising that discretion, this Court has "said more than once" that its original jurisdiction should be invoked only "'sparingly,'" observing that original jurisdiction "'is of so delicate and grave a character that it was not contemplated that it would be exercised save when the necessity was absolute.'" *Mississippi*, 506 U.S. at 76 (quoting *Wyoming* v. *Oklahoma*, 502 U.S. 437, 450 (1992), and *Louisiana* v. *Texas*, 176 U.S. 1, 15 (1900)) (citations omitted). The Court has therefore expressed "reluctance to exercise original jurisdiction in any but the most serious of circumstances." *Nebraska* v. *Wyoming*, 515 U.S. 1, 8 (1995); see *Connecticut* v. *Massachusetts*, 282 U.S. 660, 669 (1931) ("[T]his Court will not exert its extraordinary power to control the conduct of one State at the suit of another, unless the threatened invasion of rights is of serious magnitude and established by clear and convincing evidence.").

2. This is not one of the rare cases that warrants the exercise of this Court's original jurisdiction. In deciding whether to exercise jurisdiction, the Court considers "'the nature of the interest of the complaining State,' focusing on the 'seriousness and dignity of the claim,'" and whether there exists an alternative forum "in which the issue[s] tendered" to the Court "'may be litigated.'" *Mississippi*, 506 U.S. at 77 (citations omitted). Both factors weigh against the exercise of jurisdiction here.

a. This Court has explained that "[t]he model case for invocation of this Court's original jurisdiction is a dispute between States of such seriousness that it would amount to *casus belli* if the States were fully sovereign." *Mississippi*, 506 U.S. at 77 (quoting *Texas*, 462 U.S. at 571 n.18). In many of the instances in which this Court has exercised its original jurisdiction over a controversy between States, the disputed questions "sound[ed] in sovereignty and property, such as those between states in controversies concerning boundaries, and the manner of use of the waters of interstate lakes and rivers." *Supreme Court Practice* § 10.2, at 622 (collecting cases). The Court "has also exercised original jurisdiction in cases sounding in contract, such as suits by one state to enforce bonds or other financial obligations of another state," or "to construe and enforce an interstate compact." *Id.* at 624.

The plaintiff States' asserted interests in this case do not fall into any of those categories. Instead, plaintiffs allege that the challenged Massachusetts Act: (1) will force consumers in their States, including state institutions, to pay higher prices for eggs and meat; and (2) will impose compliance costs on plaintiff Indiana through its hog farm at Purdue University. Neither of

those asserted interests justifies the exercise of this Court's original jurisdiction.

i. Plaintiffs' allegations (Compl. ¶¶ 19, 40-46) regarding economic harm to state residents and institutions from increased prices for eggs and meat are insufficient because plaintiffs have not persuasively shown a likelihood of higher prices outside Massachusetts that are directly attributable to the Massachusetts Act.

In original-jurisdiction cases where this Court has allowed a State to proceed on a claim that another State's regulatory actions have inflicted an economic injury on the plaintiff State or its residents, this Court has required the plaintiff State to demonstrate that "the injury for which it seeks redress was *directly* caused by the actions of another State." *Pennsylvania* v. *New Jersey*, 426 U.S. 660, 663 (1976) (per curiam) (emphasis added). Thus, in *Pennsylvania* v. *West Virginia*, 262 U.S. 553, aff'd, 263 U.S. 350 (1923), the Court held that West Virginia had acted unlawfully when it "largely curtail[ed] or cut off the supply of natural gas" carried from its territory to neighboring States. *Id.* at 581; see *id.* at 591-593. In *Maryland* v. *Louisiana*, 451 U.S. 725 (1981), the Court invalidated a Louisiana natural-gas tax that was "clearly intended to be passed on to the ultimate consumer"—States and their citizens—and was structured to minimize burdens on in-state consumers "for the most part." *Id.* at 733, 736. And in *Wyoming* v. *Oklahoma*, the Court invalidated an Oklahoma law that required Oklahoma's utilities to purchase a minimum percentage of their coal from mines in Oklahoma, thereby diminishing purchases of coal mined in Wyoming and depriving Wyoming of tax revenue on Wyoming coal. 502 U.S. at 442-445, 451. By contrast, the Court declined to exercise original jurisdiction in

*Louisiana* v. *Texas*, where the defendant State allegedly permitted, but did not direct or approve, the action that caused injury. 176 U.S. at 22-23. The Court held that the Constitution requires a "direct issue between" the States for this Court to exercise original jurisdiction. *Id.* at 18.

Here, plaintiffs have not shown that the Act, and any regulations Massachusetts will later promulgate to implement the Act, will necessarily cause price increases outside Massachusetts, much less that it will do so directly. Plaintiffs have offered a declaration (Compl. Ex. A17-A25) of Dr. Jayson L. Lusk, an agricultural economist. But that declaration discusses the effect of *California*'s laws regulating confinement conditions for egg-laying hens that produce eggs to be sold in California; Dr. Lusk has not evaluated the impact of the Massachusetts Act, which has not yet gone into effect and the bounds of which have not yet been determined by regulation. *Id.* at A19-A25. With respect to California's egg laws, Dr. Lusk describes price increases that cause welfare losses for "'California consumers'" in "'three California markets,'" and he predicts that the Massachusetts Act, when implemented, will have a similar impact on "consumers who will be charged higher prices for meat and eggs produced according to the Massachusetts standards." *Id.* at A23-A24 (citations omitted). Dr. Lusk's observations, however, are consistent with evidence showing that California's laws have led to market segmentation, causing prices to rise for California-compliant eggs without equivalent increases for conventionally farmed eggs. See Ass'n of Cal. Egg Farmers Amicus Br. at 4, 11-14, *Missouri* v. *California*, No. 22O148 (Mar. 5, 2018). Assessing the economic

impact of the Massachusetts Act would require an analysis of competitive constraints on the ability of out-of-state producers to pass on to non-Massachusetts consumers any increased costs they incur in complying with the Massachusetts Act for the portion of their production to be shipped to Massachusetts. Those questions of market forces and indirect effects would be best resolved by a district court that can conduct discovery and weigh expert testimony.

Plaintiffs also reference (Reply Br. 9) the expert report attached to the proposed bill of complaint in *Missouri* v. *California*, No. 22O148 (filed Dec. 4, 2017). As discussed more fully in the United States' amicus curiae brief in that case (at 12-13), that report acknowledged that determining cause and effect for changes in egg prices is difficult in light of the "many demand and supply forces operating over time." Compl. Ex. at A8, *Missouri*, *supra* (No. 22O148). Prices of eggs and meat outside Massachusetts—and California—are determined in part by the decisions of major purchasers, such as food processing plants, which may elect whether to buy Massachusetts-compliant eggs and meat, conventionally farmed eggs and meat, or both, and farmers outside Massachusetts, who may or may not increase their capital investment to produce Massachusetts-compliant eggs and meat for some or all of their production, and may or may not be able to pass those costs along to consumers outside of Massachusetts. A full evaluation of the Massachusetts Act thus would require consideration of trends attributable to increased consumer demand for "cage-free" or similarly farmed egg and meat products. See, *e.g.*, Dan Charles, *Most U.S. Egg Producers Are Now Choosing Cage-Free Houses*, Nat'l Pub. Radio

(Jan. 15, 2016)[2]; Br. in Opp. 26 & n.8 (citing sources discussing rising consumer preference for cage-free eggs).

In the face of such uncertainty about whether plaintiffs and their residents will suffer economic injury at all, and if so, whether the harm will be attributable to the Massachusetts Act or to decisions by other market actors, plaintiffs' Article III standing is unclear. See *Allen* v. *Wright*, 468 U.S. 737, 757 (1984) (an injury is not "fairly traceable" to a defendant's conduct, as required for standing, when it "'results from the independent action of some third party not before the court'") (citation omitted). And even assuming that plaintiffs could ultimately demonstrate standing, their claim of injury—which depends on speculation about numerous decisions of third-parties in the marketplace—is not the type of direct harm imposed by another State that this Court has typically considered when exercising its original jurisdiction in cases like *Pennsylvania* v. *West Virginia*, *Maryland* v. *Louisiana*, and *Wyoming* v. *Oklahoma*.

ii. Plaintiffs also argue (Compl. ¶¶ 26-33) that they have a sufficiently weighty interest implicated by the Massachusetts Act because certain state instrumentalities, such as Purdue University, produce hogs for the national market, which plaintiff Indiana claims requires it to comply with the Act.[3]

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[2] https://www.npr.org/sections/thesalt/2016/01/15/463190984/most-new-hen-houses-are-now-cage-free.

[3] Plaintiffs appear to disclaim a *parens patriae* interest derived from producers who operate in their States. See Reply Br. 7-8 (explaining that this is not a case in which one State attempts "to sue another state on behalf of a select group of residents," because plaintiffs allege that "they themselves suffer direct injury"). In *Oklahoma* v. *Atchison, Topeka, & Santa Fe Railway Co.*, 220 U.S.

Plaintiff Indiana's interest in its Purdue University agricultural program is insufficient to warrant an exercise of this Court's original jurisdiction. Assuming market forces would lead Purdue's program to choose to comply with the Massachusetts Act for some portion of its meat production—on the same terms as other market participants—that impact would not constitute the "most serious of circumstances," *Nebraska* v. *Wyoming*, 515 U.S. at 8, that would "amount to *casus belli* if the States were fully sovereign." *Mississippi*, 506 U.S. at 77 (citation omitted); cf. *Maryland* v. *Louisiana*, 451 U.S. at 744. This Court has rejected attempts to use ordinary economic injuries to States participating in the marketplace as a basis for original jurisdiction. See, *e.g.*, *Georgia* v. *Pennsylvania R.R.*, 324 U.S. 439, 450 (1945) ("[W]e treat the injury to the State as proprietor merely as a 'makeweight.'") (quoting *Georgia* v. *Tennessee Copper Co.*, 206 U.S. 230, 237 (1907)). As the Court has explained, "not every matter" that may "warrant resort to equity by one person against another would justify an interference by this [C]ourt with the action of a State." *Alabama* v. *Arizona*, 291 U.S. 286, 292 (1934). Rather, only a "threatened invasion of rights * * * of serious magnitude" will justify the Court's "exercise [of] its extraordinary power under the Constitution to control the conduct of one State at the suit of another." *New York* v. *New Jersey*, 256 U.S. 296, 309 (1921).

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277 (1911), this Court held that a "*State*, in its corporate capacity, would have no such interest in a controversy * * * as would entitle it to vindicate and enforce the rights of a particular shipper or shippers, and, incidentally, of all shippers, by an original suit brought in its own name, in this court." *Id.* at 286.

Moreover, it is doubtful that the Massachusetts Act injures plaintiff Indiana's interest in its Purdue hog farm in a manner sufficiently certain or sufficiently direct to justify an exercise of this Court's original jurisdiction. Plaintiffs do not contend that Purdue sells livestock in Massachusetts; instead, Purdue sells livestock to "nationwide meat distributors," such as Tyson Foods, "who then resell the products to retailers, some of whom are presumably located in Massachusetts." Compl. ¶¶ 29-30; see Compl. Ex. A10. That conduct does not itself subject Purdue to the Act's requirements, as plaintiffs acknowledge (Reply Br. 6-7), because the Act applies only to sales of meat within Massachusetts. Instead, plaintiffs argue that national distributors like Tyson Foods will condition their continued purchases from Purdue on compliance with the Act. See Br. in Support 13; Compl. ¶¶ 32-33. But plaintiffs have not established a foundation for that assumption. By the time the Massachusetts Act takes effect in 2022, national wholesalers may have bifurcated their supply chains in order to purchase both Massachusetts-compliant and conventionally farmed products, thereby enabling them to continue making sales in Massachusetts while also selling conventionally farmed products outside Massachusetts at lower prices. Other national wholesalers may choose to serve only the market for conventionally farmed egg and meat products, rather than the Massachusetts market. And still others may choose to purchase only Massachusetts-compliant products not primarily because of state regulation but because of their perception of consumer demand.

b. Original jurisdiction is unwarranted in this case for the additional reason that plaintiffs' claims can be raised by other parties in a district-court action. See

*Arizona* v. *New Mexico*, 425 U.S. 794, 796-797 (1976) (per curiam) (availability of actions by other parties raising same legal claims can militate against exercise of original jurisdiction); *Mississippi*, 506 U.S. at 76 (same). Egg and meat producers who wish to sell those products in Massachusetts and are unwilling to comply with its new laws are free to sue the appropriate Massachusetts officials for injunctive relief, asserting the same Commerce Clause claim raised in plaintiffs' complaint. Indeed, they would be the most natural plaintiffs, because they would be directly affected by those laws. Alternatively, out-of-state entities that purchase significant quantities of eggs and meat, such as school systems, universities, restaurants, or institutional food-service companies, could raise the Commerce Clause claim, attempting to demonstrate standing and an equitable cause of action through allegations and proof of increased prices.

Plaintiffs argue (Br. in Support 20-21) that they have no other avenue to sue as *parens patriae* on behalf of their citizens. But this Court has declined to exercise original jurisdiction where there is "an alternative forum in which the *issue tendered* can be resolved," *Mississippi*, 506 U.S. at 77 (emphasis added), and here a private suit for injunctive relief would pursue the same goal as plaintiffs' complaint. Plaintiffs respond (Br. in Support 21) that "injuries to individual consumers are too diffuse to expect consumers to challenge the [Massachusetts Act] on their own." But if plaintiffs are correct that the Massachusetts Act will impose a significant financial burden on their institutions that produce eggs and meat (Compl. ¶¶ 25-26)—and institutions that purchase significant quantities of eggs and meat

(Compl. ¶ 34)—then that economic impact should provide adequate incentive to sue for similarly situated private farmers or consumers.

Plaintiffs also contend (Reply Br. 12-13) that original jurisdiction is necessary in this case so that they can "expeditiously" determine the legality of the Act before "mak[ing] plans and expend[ing] resources on infrastructure well in advance of the effective date." Plaintiffs bringing pre-enforcement challenges often seek expedited adjudication for similar reasons, and the Federal Rules of Civil Procedure contain mechanisms for district courts to reach a decision quickly where appropriate. See, *e.g.*, Fed. R. Civ. P. 65.

3. In addition to the threshold issues discussed above, plaintiffs' Commerce Clause claim in this case (Compl. ¶¶ 47-55) does not warrant an exercise of the Court's original jurisdiction for additional reasons.

The Constitution forbids States from "discriminat[ing] against interstate commerce" or "impos[ing] undue burdens on interstate commerce." *South Dakota* v. *Wayfair, Inc.*, 138 S. Ct. 2080, 2091 (2018). But the Massachusetts Act does not discriminate; Massachusetts treats alike all eggs, pork, and veal sold in that State, without any preference for local producers or local products. Cf. *Wyoming* v. *Oklahoma*, 502 U.S. at 455 (Oklahoma statute impermissibly reserved segment of Oklahoma's coal market for Oklahoma-mined coal).

States are permitted to "make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it." *Southern Pac. Co.* v. *Arizona ex rel. Sullivan*, 325 U.S. 761, 767 (1945). Under *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970), when a state statute "regulates even-handedly to effectuate a legitimate

local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Id.* at 142.

Assessing the Massachusetts Act under *Pike* would require resolution of complex factual issues. Massachusetts argues (Br. in Opp. 31-32 & n.10) that, for purposes of *Pike*, its laws are aimed at "health and safety concerns," a type of rationale that "has long been recognized" as a legitimate state interest. 397 U.S. at 143 (citation omitted); see *Raymond Motor Transp., Inc.* v. *Rice*, 434 U.S. 429, 443-444 (1978) (stating that promoting safety is a legitimate local concern). Whether the Massachusetts rules governing animal cage size will advance that objective, however, is disputed. See, *e.g.*, Reply Br. 5; Compl. ¶ 54. In *Compassion Over Killing* v. *U.S. Food & Drug Administration*, 849 F.3d 849 (9th Cir. 2017), the court of appeals affirmed the U.S. Food and Drug Administration's denial of a petition for rulemaking because the plaintiffs "had not provided persuasive evidence that eggs from caged hens are either less nutritious or more likely to be contaminated with Salmonella than eggs from uncaged hens." *Id.* at 853. Also potentially relevant for application of *Pike* is the parties' dispute, as discussed above, pp. 6-9, *supra*, over whether nationwide egg and meat prices are likely to increase and, if so, whether that increase is attributable to the Massachusetts Act as opposed to the choices of other actors in the marketplace. Each of those questions could bear on whether the Massachusetts Act will so affect commerce in other States as to impose an undue burden.

This Court has held that the Constitution also forbids States from attempting to regulate the price of

products sold in another State. See *Healy* v. *The Beer Inst.*, 491 U.S. 324, 335-337 (1989); *Brown-Forman Distillers Corp.* v. *New York State Liquor Auth.*, 476 U.S. 573, 579-582 (1986); *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U.S. 511, 527-528 (1935). Plaintiffs argue that the Massachusetts Act is invalid under *Baldwin* and its progeny, but those precedents too would require an assessment of facts regarding "whether the practical effect of the regulation is to control conduct beyond the boundaries of the State." *Healy*, 491 U.S. at 336. Of the cases relied on by plaintiffs (Br. in Support 9-15) to support their Commerce Clause challenge, almost none arrived at this Court through its original jurisdiction. Plaintiffs contend (*id.* at 15-19) that the courts of appeals are divided over whether a State may "erect[ ] trade barriers based on the circumstances of production in other states." *Id.* at 15. But those courts did not lay down a single rule of law; instead each court thoroughly assessed the operation and effect of the challenged enactments on out-of-state entities in light of the facts in each case.

Applying either *Pike* or *Baldwin* in this case would require analyzing the economic impact of decisions by a host of different actors. Those questions would be best decided after development of a factual record in an adversary case brought in district court.

## CONCLUSION

For the foregoing reasons, the motion for leave to file a bill of complaint should be denied.

Respectfully submitted.

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