No. 22O148, Original

In The Supreme Court of the United States

STATE OF MISSOURI, et al.,

Plaintiffs,

v.

STATE OF CALIFORNIA,

Defendant.

On Motion For Leave To File Bill Of Complaint

AMICUS CURIAE LANDMARK LEGAL FOUNDATION'S BRIEF IN SUPPORT OF PLAINTIFF STATES

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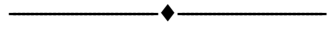
STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Landmark Legal Foundation ("Landmark") is a national public interest law firm committed to preserving the principles of limited republican government, separation of powers, federalism, advancing an originalist approach to the Constitution and defending individual rights and promoting liberty. Specializing in constitutional history and litigation, Landmark submits this brief in support of Plaintiffs State of Missouri, et al. For reasons stated herein, Landmark respectfully urges the Court to exercise its original and exclusive jurisdiction by granting Plaintiffs' Motion for Leave to File Bill of Complaint and grant the relief sought by Plaintiffs.



INTRODUCTION AND SUMMARY OF ARGUMENT

This controversy underlying Plaintiff States' Motion for Leave to File Bill of Complaint presents two important constitutional questions:

[1] The parties have consented to the filing of *Amicus Curiae*'s brief in this case. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus Curiae*, its members or its counsel made a monetary contribution to its preparation or submission.

1) Must the Supreme Court apply to itself the same constitutional and statutory construction standards it applies to all other Article III courts; and

2) May a single state use its market power to set national commercial policy by state referendum, bypassing the Constitution's Commerce, Supremacy, and Guarantee Clauses?

The Constitution provides that the Supreme Court shall have jurisdiction in all cases in which a State is a party. U.S. Const. art. III, § 2, cl. 2. Moreover, "[t]he Supreme Court shall have original *and exclusive* jurisdiction of all cases between two or more States." 28 U.S.C. § 1251(a) (emphasis added). Recent Supreme Court practice has read § 1251's "shall" as meaning "may." In cases where this Court declines to exercise its exclusive jurisdiction, it deprives states of a forum in which to have grievances against other states heard. This Court, therefore, has in effect taken sides in these controversies, which is contrary to the Framers' design. *Amicus Curiae* respectfully urges the Court to end this practice and apply the same rules to itself as it does to other Article III courts.

The Plaintiff States present a cause of action worthy of this Court's consideration even if it decides not to review its discretionary jurisdiction in controversies between states. California's "Egg Rule" presents a direct challenge to our republican form of government. Two and one half per cent of the nation's population, all living in a single state and voting in a campaign financed primarily by a single advocacy

group, have displaced a federal statute setting a national standard in a large sector of the nation's agricultural economy. Not one of the remaining 306 million Americans had any input in setting this standard. Neither did their elected representatives. This is anathema to the Constitution's carefully designed republican framework. This Court must not give its imprimatur to what is surely to become a commonplace strategy for well-financed advocacy groups looking to bypass the legislative process.

Amicus Curiae urges this Court to accept jurisdiction in this case and to invalidate the California Egg Rule as it applies to producers found in states other than California.

ARGUMENT

I. The Supreme Court Must Exercise Its Original And Exclusive Jurisdiction In Cases Between States.

Article III, § 2 of the United States Constitution provides that "[i]n all cases in which a State shall be a Party, the supreme Court shall have original jurisdiction." Congress refined the delegation of power by designating that the Supreme Court "shall have original and exclusive jurisdiction of all controversies between two or more States." 28 U.S.C. § 1251(a). Accordingly, if this Court will not hear a controversy between states, no court will or even can hear it.

Justice Joseph Story notes in his *Commentaries on the Constitution* that this Court's power to consider controversies between two or more states "seems to be essential to the preservation of the peace of the Union." Joseph Story, *Commentaries on the Constitution of the United States*, Thomas M. Cooley, ed. Fourth Ed., vol. II, § 1679 (Clark, NJ: The Lawbook Exchange, 2011). Citing Federalist No. 80 (Hamilton), Justice Story reviews examples from the long and disastrous history of governmental systems lacking a venue for peer states to take their disagreements:

> Our own [history] has presented, in past times, abundant proofs of the irritating effects resulting from territorial disputes and interfering claims of boundaries between the States. And there are yet controversies of this sort, which have brought on a border warfare, at once dangerous to public repose and incompatible with the public interests. *Id*.

While armed conflict is not at hand, other forms of retaliation are likely and the "public interest" certainly is at risk. Retaliation by regulation, taxation, and other means are only the start of what might easily become an extensive list of measures states may take against one another should they not have an impartial tribunal before which they can have their grievances heard. This Court will fulfill neither its constitutional obligation nor serve the public interest if it continues to refuse weighing controversies between the states, thereby driving them to retaliatory tactics.

As Justice Story explained: "The same necessity which gave rise to it in our colonial state must continue to operate through all future time. Some tribunal exercising such authority is essential to preventing an appeal to the sword and a dissolution of the government." *Id*. at § 1681. "That it ought to be established under the national, rather than under the State government . . . would seem to be a position self-evident and requiring no reasoning to support it. It may justly be presumed that under the national government, in all controversies of this sort, the decision will be impartially made according to the principles of justice, and all the usual and most effectual precautions are taken to secure this impartiality, by confiding it to the highest judicial tribunal." *Id*., citing The Federalist, No. 39 (Madison), 80 (Hamilton).

This Court's current practice is to exercise its exclusive jurisdiction at its discretion. *See Nebraska v. Wyoming*, 136 S.Ct. 1034, 1034 (2016) (Thomas, J. dissenting). When this Court refuses to exercise its jurisdiction, however, it ceases to be impartial: By refusing to consider a controversy and thus depriving a state a hearing of its grievance, this Court effectively chooses sides. This Court's refusal to exercise its "essential" role poses a danger to the republic. *See id.* Moreover, longstanding statutory construction rules applied by this Court to other Article III courts should counsel it to reconsider its current practice.

In *Lexecon, Inc. v. Milberg, Weiss, Bershad, Hynes & Lerach*, 523 U.S. 26 (1997), this Court held that courts must apply jurisdictional provisions as written.

"[T]he mandatory 'shall' . . . normally creates an obligation impervious to judicial discretion." *Id.* at 35 (citing *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947) (failure to follow unambiguous federal civil procedure rule rejected)). In *Lexecon*, this Court held when considering the word "shall" in a jurisdictional rule that "[i]f we do our job of reading the statute whole, we have to give effect to the plain command, even if doing that will reverse the longstanding practice under the statute and the rule." *Id.* (citing *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 476 (1992); *Metropolitan Stevedore Co. v. Rambo*, 515 U.S. 291, 300 (1995) ("Age is no antidote to clear inconsistency with a statute.") (quoting *Brown v. Gardner*, 513 U.S. 115, 122 (1994))). The *Estate of Cowart* court summed up the situation in this case well: "The controlling principle in this case is the basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written." 505 U.S. at 476.

II. California's "Egg Rule" Poses A Significant Threat To Federalism That This Court Should Reject.

California voters passed the "Prevention of Farm Animal Cruelty Act," California Proposition 2 ("The California Egg Rule") in 2008. The Humane Society of the United States sponsored the measure's campaign spending more than $4.2 million on the issue. Approximately 8.2 million Californians voted in favor of the measure (4.7 million voted against). While more Californians voted for Prop 2 than any other previous

initiative in state history, the "yes" votes represented merely 2.5% of the American population. The new standard applied only to California egg producers putting them at a tremendous disadvantage to egg producers from other states. The state assembly responded by passing a bill extending the egg production standards to eggs produced in other states. Because California is a dominate part of the egg market, the egg rule has become a de facto national standard. Plaintiff States allege violations of the Commerce Clause and Supremacy Clause, which *Amicus Curiae* urge the Court to consider. In addition, *Amicus Curiae* implores the Court to prevent a wave of similar efforts to impose nationwide policies and rules via statewide ballot initiatives.

A. The Plaintiff States Present Commerce Clause and Supremacy Clause Claims and Have Standing to Prosecute the Action.

Plaintiff States present compelling Commerce Clause and Supremacy Clause claims: Californian voters passed the "Prevention of Farm Animal Cruelty Act," California Proposition 2 ("The California Egg Rule") in 2008. The state assembly passed a companion rule for egg producers from all other states to ensure that California egg producers would remain competitive in the marketplace. The California Egg Rule plainly affects the flow of goods between other states and California. And the Egg Rule is in direct conflict with the federal statutory standard for egg

production in 21 U.S.C. § 1052(b).[2] *See also* 7 C.F.R. § 57.35(a)(1)(i).

The Plaintiff States have standing, even applying Justice Scalia's requirements in his *Wyoming v. Oklahoma* dissent. In that case, dealing with a state tariff on coal imported from other states, this Court concluded that states have standing in cases where another state's laws or regulations affect the complaining state's tax revenues. Justice Scalia dissented, writing that Wyoming would only pass the zone of interest test for a state's standing in Commerce Clause cases "if it bought or sold coal or otherwise participated in the coal market. It would then be 'asserting [its] *right . . . to engage in interstate commerce* free of discrimination.'" *Wyoming v. Oklahoma*, 502 U.S. 437, 470 (Scalia, J., dissenting), quoting *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 320-321 (1977) (emphasis in original). Applying this standard, Plaintiff States' status as egg consumers alone establishes standing.

The Plaintiff States satisfy all requirements for this Court to exercise its original and exclusive jurisdiction in this case. *Amicus Curiae* suggests there is a compelling reason this Court should consider this case even if it continues to apply a discretionary jurisdictional standard: the California Egg regulation opens a

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[2] "For eggs which have moved or are moving in interstate or foreign commerce, no State or local jurisdiction may require the use of standards of quality, condition, weight, quantity, or grade which are in addition to or different from the official Federal standards. . . ."

potentially devastating crack in the republican foundation supporting the Constitution. The Rule results from the kind of factionalism the Framers sought to prevent through the separation of delegated powers at the national level and the reservation of nondelegated powers by individual states. The Constitution's design ensures the preservation of individual liberty but is at risk should California's illegitimate exercise of authority beyond its borders stand.

B. The California Egg Rule Is a Harbinger of State Factions Imposing National Policy Without the Consent of the Governed.

California's Egg Rule is an example of how a faction[3] has potential for outsized influence over public policy in a direct popular government. A tiny minority of Americans, all of whom live in a single state, have imposed a standard developed and promoted with millions of dollars by a zealous advocacy group. Unlike the Egg Products Inspection Act, 21 U.S.C. §§ 1031 *et seq.*, which underwent the rigors of the legislative process, the California Egg Rule resulted from a process that did not involve any dispassionate discussion, analysis, questioning, or debate. Yet, as Plaintiff States allege, California's market position as a huge consumer of

[3] Modern political parties and special interest groups are akin to "factions" in the Framers' day. *See The Concise Princeton Encyclopedia of American Political History*, Michael Kazin, Rebecca Edwards, & Adam Rothman, Eds. (Princeton: Princeton University Press, 2011), p. 303, 304.

eggs makes its standard de facto a national one. This is not how the Framers designed the process for setting public policy.

"Among the numerous advantages promised by a well-constructed Union, none deserves more accurately developed than its tendency to break and control the violence of faction." The Federalist, No. 10 (Madison), *The Federalist Papers*, Clinton Rossiter, ed. (New York: Signet Classics, 2003). Most often thought of as a threat of oppressive majority rule, Madison warned that a well-financed, determined, and politically savvy minority can also pose a threat to republican rule. "By a faction I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent or aggregate interests of the community." *Id*.

Large or small, these passionate factions are a threat that Madison argued should not be ignored. "The friend of popular governments never finds himself so much alarmed for their character and fate as when he contemplates their propensity to [faction]." *Id.* The history of earlier republican governments demonstrated to the Framers that "[t]he danger in popular forms of government would come whenever 'the interests of the people are at variance with their inclinations' because man will nearly always seek to satisfy his inclinations, however detrimental that might be to his true interests." Gary L. McDowell, *The Language of Law and the Foundations of American*

Constitutionalism (Cambridge: Cambridge University Press, 2010), p. 237 (quoting The Federalist, No. 71). Madison observed that this inclination toward detrimental interests in previous republics led inevitably to a common conclusion: "The instability, injustice, and confusion introduced within the public councils have, in truth, been the mortal diseases under which popular government have everywhere perished, as they continue to be the favorite and fruitful topics from which the adversaries to liberty derive their most species declamations." The Federalist, No. 10.

The California Egg Rule introduces exactly this kind of "instability, injustice, and confusion" into national agricultural policy and sets a dangerous precedent should the Court refuse to exercise jurisdiction in this case. Professor McDowell explains that the Framers designed the Constitution as a diffuse republic because "[t]he necessary solution is to so craft the fundamental law that these 'various and interfering interests' will be refined and enlarged by being passed through a succession of institutional filtrations and will in the end, it is hoped be rendered reasonably 'consonant to the public good.'" McDowell, *The Language of Law*, p. 237. Professor McDowell bluntly, but accurately, describes the Framer's assessment of the problem prevented by a constitutional republic – "In the end it is not only depravity but also a most remarkable gift for self-deception and delusion with human beings that renders popular government so problematic." *Id*. This is the problem faced by the California assembly, which gave rise to the foreign state egg rule.

Amicus Curiae urges the Court to grant the Plaintiff States' motion in this case. Landmark is concerned that the other "factions" will see the California Egg Rule as a blueprint for future efforts. Indeed, the Humane Society is now advancing a new proposition for the 2018 California ballot – "The Prevention of Cruelty to Farm Animals Act." *See* "Live in California and buy eggs? If voters approve this in 2018, they'll need to be cage free hens," Patrick McGreery, *LA Times*, Aug. 29, 2017. This new standard will require that egg producing hens must be "cage free." In addition to hens, the Society's new proposal will extend to pigs and calves. *See* "Pigs, calves could join chickens on California's cage-free list," Jim Miller, *Sacramento Bee*, Aug. 30, 2017.

If this Court allows California to impose national standards on the national economy, then the republican government established by the Framers is imperiled. As former Attorney General Edwin Meese has noted: "The natural standard for judging if a government is legitimate is whether the government rests on the consent of the governed. Any political powers not derived from the consent of the governed are by the laws of nature, illegitimate and hence unjust." Edwin Meese III, "The Meaning of the Constitution," *The Heritage Guide to the Constitution*, Edwin Meese, Matthew Spalding, and David Forte, Eds. (Washington, D.C.: Regnery, 2005), p. 2. The California Egg Rule is illegitimate and unjust. It should be rejected.

CONCLUSION

Missouri and the dozen other Plaintiff States seeking relief in this action bring before this Court a harbinger of controversies to come. Should other special interest groups, long frustrated in their efforts by the federal legislative process find this Court unwilling to consider cases such as this one, the American People can look forward to a steady diet of federal regulation via state ballot initiatives emanating from a "cabal of a few" by way of the "vicious arts by which elections are too often carried." The Federalist, No. 10 (Madison). *Amicus Curiae* respectfully supports the State of Missouri and urges the Court to carry out its Constitutional and statutorily delegated authority.

Respectfully submitted,

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