Nos. 01-950, 01-1018

In the Supreme Court of the United States

HILLSIDE DAIRY, INC., A&A DAIRY, L&S DAIRY, and MILKY WAY FARMS,

Petitioners,

v.

WILLIAM J. LYONS, JR., Secretary, Department of Food & Agriculture, State of California, and ROBERT TAD BELL, Undersecretary, Department of Food & Agriculture, State of California,

Respondents.

PONDEROSA DAIRY, PAHRUMP DAIRY, ROCKVIEW DAIRIES, INC., and DARREL KUIPER and DIANE KUIPER, D/B/A D. KUIPER DAIRY,

Petitioners,

v.

WILLIAM J. LYONS, JR., Secretary, Department of Food & Agriculture, State of California, and ROBERT TAD BELL, Undersecretary, Department of Food & Agriculture, State of California,

Respondents.

Writs Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR *AMICUS CURIAE* DAIRY INSTITUTE OF CALIFORNIA IN SUPPORT OF PETITIONERS ON THE MERITS

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BRIEF FOR *AMICUS CURIAE*
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STATEMENT OF INTERESTS

Dairy Institute of California is a California non-profit mutual benefit trade association representing dairy processing companies that purchase 52% of the milk produced in California. Dairy Institute members manufacture over 80% of the fluid, frozen and cultured dairy products and cheese, sold in California. Many Dairy Institute members also have manufacturing facilities in other states.[1]

California processors have historically operated within California's regulated minimum pricing structure administered through the State's milk marketing program. California processors have been able to maintain their businesses and adhere to the State's regulated minimum prices for raw milk, so long as the minimum price structure does not increase raw milk prices to levels exceeding competitive conditions. One measure of competitive conditions is the price charged by out-of-state producers for raw milk.

California processors depend on milk purchases from sources outside California in order to meet their obligations to customers while still remaining competitive.

The July 1997 amendments to California's Pooling Plan upset the competitive balance. As a result of these amendments, out-of-state dairy farmers cannot receive the full value for their product when it is sold to California processors. These amendments create an economic disincentive for California processors to do business with out-of-state producers and lead to shutting down markets for those producers. The absence of reasonably priced supply fosters uncompetitive conditions within

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[1] No counsel for any party to this proceeding authored this brief in whole, or in part. No person or entity other than *Amicus Curiae* Dairy Institute of California, its members or counsel, made any monetary contribution to the preparation of submission of this brief.

California, and the resulting uncompetitive conditions unduly increase milk prices to processors, wholesale customers and consumers.

SUMMARY OF ARGUMENT

The Ninth Circuit erred in this case because it mistakenly relied on *Shamrock Farms Co. v. Veneman*, 146 F.3d 1177 (9th Cir. 1998) (Reinhardt, J.) *cert denied*, 525 U.S. 1105 (1999). While *Shamrock* correctly concluded that 7 U.S.C. § 7254 (1999) shielded California's milk composition standards from scrutiny under the dormant aspect of the Commerce Clause of the U.S. Constitution, it erroneously extended that shield beyond the items enumerated in the statute – composition and labeling – and embraced all of California's milk pricing and pooling policies.

The Ninth Circuit erred in *Shamrock*, and consequently in this case, for at least three reasons.

First, in *Shamrock* and in this case, the Ninth Circuit ignored the plain language of the statute. The statute specifically identifies California's milk composition and labeling standards as areas protected from federal interference. The statute does not list California's milk pricing or pooling. Under the settled rules of construction, the language of the statute – what it states and what it omits - should be the clearest guide to congressional intent.

Second, the Ninth Circuit in this case relied on *Shamrock* for its conclusion that in spite of the statutory ellipsis, pooling and pricing policies must be included on the list of protected California activities because pricing and pooling policies are "closely related" to California's composition requirements and therefore also protected from Commerce Clause challenges. *Ponderosa Dairy v. Lyons*, 259 F.3d 1148, 1153 (9th Cir. 2001) (Pet. App. A7 – A8) (citing *Shamrock*, 146 F.3d at 1178, 1182). Both cases mistakenly relied on Congressional testimony taken out of context – perhaps inadvertently – to support the conclusion that composition standards were "closely related" to pooling and pricing policies. A fair and full reading of that testimony lends no support to that conclusion, however. Conversely, a review of California's milk laws shows the contrary. The State's milk composition and labeling standards are stand-alone bodies of law, independent of the pricing and pooling policies California has adopted.

Third, in *Shamrock* and in this case, the Ninth Circuit virtually abandoned this Court's standard for determining when

Congress intends to exempt state regulation from dormant Commerce Clause scrutiny. The standard for that determination, as this Court has held most recently, is whether Congress' intention in that regard is "unmistakably clear." *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 91 (1984). *See also Sporhase v. Nebraska ex. rel. Douglas*, 458 U.S. 941, 960 (1982); *C & A Carbone, Inc. v. Town of Clarkston*, 511 U.S. 383, 408 (1994) (O'Connor, J., concurring). Congress was "unmistakably clear" about its intention to protect California's milk composition and labeling standards from federal interference. Section 7254 expressly identifies those subject areas. However, Congress did *not* identify California's milk pricing and pooling policies as subject to the same protection. That should put paid to any obligation to inquire regarding what is "unmistakably clear" and what isn't.

For all of these reasons, the Court should reverse the court below and, further, disapprove *Shamrock* insofar as it holds that California's milk pooling and pricing policies are exempt from scrutiny under the dormant Commerce Clause.

ARGUMENT

I. The Court Below Misconstrued the Plain Language of 7 U.S.C. § 7254.

Section 7254 expressly lists two areas pertaining to fluid milk standards in California that are protected from direct or indirect preemption, prohibition or limitation under federal law: (1) setting the percentage of milk solids not fat in fluid milk products sold or marketed in California, and (2) labeling of fluid milk products with regard to milk solids or solids not fat.[2]

Section 7254 nowhere mentions California's pricing and pooling policies.

That should be the end of it. Had Congress wished to protect California's milk pooling and pricing policies from federal

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[2] 7 U.S.C. § 7254, also referred to as Section 144 of the Federal Agriculture Improvement and Reform Act of 1996, states in its entirety: "Nothing in this Act or any other provision of law shall be construed to preempt, prohibit, or otherwise limit the authority of the State of California, directly or indirectly, to establish or continue to effect any law, regulation, or requirement regarding – (1) the percentage of milk solids or solids not fat in fluid milk products sold at retail or marketed in the State of California; or (2) the labeling of such fluid milk products with regard to milk solids or solids not fat."

action, Congress would have said so directly. The customary guides to statutory construction reinforce that conclusion.

A. Under the Doctrine of *Expressio Unius Est Exclusio Alterius*, Congress' Explicit Protection of Composition and Labeling Standards from Federal Intervention Supports the Conclusion that Congress Did Not Intend Implicitly to Extend Protection in Unenumerated Areas.

The venerable doctrine of statutory construction, *Expressio unius est exclusio alterius*, is applicable here. Congress having specified two areas in which California's milk standards are exempt from federal intervention, it is not for the court to spawn others by judicial fiat.

In *TRW Inc. v. Andrews*, 534 U.S. 19 (2001), a unanimous Court reversed the Ninth Circuit which had held that the statute of limitations for violation of the Fair Credit Reporting Act ("FCRA") begins to run at the time the plaintiff discovers he or she has been injured by a violation of the FCRA and not at the (earlier) time of the violation itself. *Id.* at 26. Although the statute on its face began to run at time of the violation, not the time that the plaintiff discovered his or her injury, *id.* at 22, the Ninth Circuit held that the requirement of discovery was implied in *every* federal statute of limitations. *Id*. at 26. Reversing the Ninth Circuit, the Court noted that Congress had adopted an explicit limitation based on discovery in FCRA actions involving misrepresentation, and so would not be presumed to have done the same thing *implicitly* in all other FCRA actions. *Id.* at 28. The Court stated, "The most natural reading of § 1681p [the limitation based on discovery in FCRA misrepresentation actions] is that Congress implicitly excluded a general discovery rule by explicitly including a more limited one." *Ibid. See also United States v. Johnson*, 529 U.S. 53, 58 (2000) ("When Congress provides exceptions in a statute, it does not follow that courts have authority to create others. The proper inference, and the one we adopt here, is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth."); *Andrus v. Glover Construction Co.*, 446 U.S. 608, 616-17 (1980) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of a contrary legislative intent.")

Section 7254 satisfies even the Court's restrictive reading of the *Expressio unius* rule in *Barnhart v. Peabody Coal Co.*, 523 U.S. ___, 123 S. Ct. 748, 71 USLW 4041 (January 15, 2003). In *Barnhart*, the Court cautioned that it applied the principle only when "[t]he items expressed are members of an 'associated group or series,' justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence." *Id.* at ___, 123 S.Ct. at 760 (quoting *United States v. Vonn*, 535 U.S. 55, 65 (2002)). *See also Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73, 81 (2002).

It is beyond dispute that the milk composition standards described in § 7254(1) and the milk labeling standards described in § 7254(2) are an "associated group or series." Congress' election to afford explicit protection from federal interference in these two areas of California milk law, without also listing California pricing and pooling policies, justifies the conclusion that Congress intended no such protection for the latter.

B. The Ninth Circuit's Ruling that Virtually All of California's Milk Laws are Protected from Federal Intervention Because They are "Closely Related" to the §7254(1) Composition Standards Would Render § 7254(2) Superfluous.

The Ninth Circuit holds that California's milk pricing and pooling policies are protected from federal intervention under § 7254 because they are "closely related" to the milk composition standards of § 7254(1). *Ponderosa*, 259 F.3d at 1153 (Pet. App. A7-A8) (citing *Shamrock*, 146 F.3d at 1182). How much more closely related to the composition standards are the labeling standards of § 7254(2)? Subsection (1) refers to standards governing "the percentage of milk solids or solids not fat in fluid milk.…" Subsection (2) refers to the "the labeling of such fluid milk products with regard to milk solids or solids not fat." Under the Ninth Circuit's reasoning, subsection (2) protecting labeling is superfluous because labeling is "closely related" to the composition standards of subsection (1) and therefore protected already from federal interference.

It is a canon of construction, however, that the courts will whenever possible avoid construction of statutes that render any section mere surplusage. *See TRW*, 534 U.S. at 29. In *TRW*, dealing with the statute of limitations under the Fair Credit and Reporting Act, the court cited the canon as an additional reason

for rejecting the Ninth Circuit's decision that implied a discovery element in every FCRA statute of limitations. The Ninth Circuit's gloss, the Court said, would make surplusage of the single statute that contained an explicit discovery element in actions based on intentional misrepresentation. *Ibid.* The Court held, "It is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void or insignificant.'" *Id.* at 31 (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)). *See also United States v. Menasche*, 348 U.S. 528, 538-39 (1955).

The plain language of the statute, along with the conventional canons of construction, compel the conclusion that Congress did not intend to exempt California's pooling and pricing policies from dormant Commerce Clause scrutiny.

II. California's Milk Composition and Labeling Standards Are Not "Closely Related" to the State's Pricing and Pooling Policies.

Were the plain language of the statute all that this Court considered, its decision to overturn the Ninth Circuit in this case would already be an easy one. That decision is easier still, however, in light of the lower court's misplaced reliance on the congressional testimony described in *Shamrock*. Further, an examination of the outline and structure of California's milk laws shows that the State's milk composition and labeling standards are independent of the pricing and pooling policies and not "closely related" at all.

A. The Congressional Testimony Cited in *Shamrock* and in this Case below Does Not Support the Conclusion that the Milk Standards Identified in Section 7254 are "Closely Related" to the State's Milk Pooling and Pricing Policies.

The *Shamrock* court cited statements made by a Member of Congress from California and the Executive Director of this *Amicus Curiae* Dairy Institute of California as legislative history demonstrating that Congress intended that the milk pricing and pooling be exempted from Commerce Clause scrutiny. 146 F.3d at 1182. *Shamrock's* description of those statements is misleading.

The Ninth Circuit summarized the testimony of the Honorable Bill Thomas as "explaining that the success of California's milk standards is attributable to the State's pricing system." *Shamrock*, 146 F.3d at 1182 (citing *Hearing Before the Subcomm. On Livestock, Dairy and Poultry*, 104th Cong., Apr. 20, 1995 ("*House Hearing*"), at 435-436).[3] That is not what he said. The theme of Rep. Thomas' statement was the success of "the California dairy industry." *House Hearing* at 435. After attributing "[a] substantial part of that success" to the "enormous growth in California's population," Rep. Thomas described "two other factors for the California dairy industry's success." *Ibid.* First, he explained that "the State of California has for over 30 years had a set of standards for fluid milk products which ensure a high quality product." *Ibid.* Then, Rep. Thomas stated, "The California dairy industry has enjoyed great success for another reason: the pricing system for dairy products in California has been developed through a very flexible, market-oriented approach." *Ibid.* Thus, Rep. Thomas actually attributed the success of California's dairy industry to the State's "pricing system"; he did not attribute the success of California's "milk standards" to the "pricing system," as the Ninth Circuit asserts. *Shamrock,* 146 F.3d at 1182.

Also misleading is the Ninth Circuit's summary of the written testimony of Craig S. Alexander, Executive Director at the time of Dairy Institute of California. The *Shamrock* court stated that Mr. Alexander "discuss[ed] California's pricing and pooling system in the context of California's milk quality standards." 146 F.3d at 1182. That is not an accurate summary of Mr. Alexander's testimony. Mr. Alexander made remarks regarding "those issues which specifically impact California's programs" that Congress should consider as it pieces together a new national farm bill. *House Hearing*, at 480. Those "issues" briefly mentioned by Mr. Alexander were "California's milk marketing programs," "California market order pricing policies," "Federal Producer Security Legislation," and finally, "Milk Solids Standards." *Id.* at 481-82. Contrary to the Ninth Circuit's summary of Mr. Alexander's remarks, the final discussion regarding California's milk composition standards did not form the "context" of Mr. Alexander's remarks, and did not even relate to his earlier remarks regarding milk pricing. *Ibid.*

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[3] Applicable pages of the *House Hearing* are attached hereto as A1 through A7.

Thus, the Ninth Circuit fails to cite any reliable legislative history in *Shamrock* demonstrating that Congress intended that the milk pricing and pooling scheme be included in the § 7254 exemption as a means of effecting California's milk composition standards.

B. California's Milk Marketing Laws Show that the State's Milk Pooling and Pricing Policies are Independent of the Milk Standards Identified in § 7254.

In *Shamrock*, the Ninth Circuit asserted that California's pricing and pooling laws are an element of the "milk fortification scheme" and are "an essential part of California's plan to maintain its milk composition standards." 146 F.3d at 1182. In the case at bar, the court below added that the pricing and pooling schemes are "closely related" to composition standards. *Ponderosa*, 259 F.3d at 1153 (Pet. App. A7-A8). Each of those assertions is incorrect. Illogically, the Ninth Circuit has lumped together three different legislative schemes, found in three distinct provisions of the California Food & Agricultural Code and administered by three different divisions of the California Department of Food and Agriculture.

California's law regarding milk composition standards (or "standards of identity") is set forth in Milk and Milk Products Act of 1947, which is codified in Division 15 of the State's Food & Agricultural Code. *See* CAL. FOOD & AGRIC. CODE § 32501, *et seq*. (West 2001). Not surprisingly, California's milk labeling laws relating to those milk compositional standards are also found in Division 15 of the State's Food and Agricultural Code. *See* CAL. FOOD & AGRIC. CODE § 32912 (West 2001). *See generally, People ex rel. Lockyer v. Shamrock Foods Co.*, 24 Cal.4th 415, 418-19, 11 P.3d 956, 959, 101 Cal.Rptr.2d 200, 203 (2000). The Milk and Dairy Foods Control Branch of the California Department of Food and Agriculture enforces the state's composition standards and labeling requirements.

California's law regarding milk pricing, however, is found in Chapter 2 ("Stabilization and Marketing of Market Milk") of Part 3 ("Marketing Laws Regarding Particular Products") of Division 21 ("Marketing") of the State's Food and Agricultural Code. *See* CAL. FOOD & AGRIC. CODE § 61801, *et seq*. (West 1997). The legislative purposes of Chapter 2 are (1) to provide funds for administration and enforcement of the milk pricing laws; (2) to authorize the Director of the Department of Food and

Agriculture to prescribe marketing area and to determine minimum prices; (3) to authorize and enable the Director of the Department of Food and Agriculture to formulate stabilization and marketing plans; and (4) to enable the dairy industry to develop and maintain satisfactory marketing conditions, bring about and maintain a reasonable amount of stability and prosperity in the production of market milk, and provide means for carrying on essential educational activities. *See* CAL. FOOD & AGRIC. CODE § 61805 (West 1997). Those stated purposes underlying the California's pricing laws say nothing about maintaining the State's milk composition standards and labeling requirements. The milk pricing laws are administered by the Dairy Marketing Branch of the California Department of Food and Agriculture through the Stabilization Plan. The Dairy Marketing Branch is different from the branch that administers the composition and labeling laws.

California's Gonsalves Milk Pooling Act of 1967 is found in Chapter 3 ("Equalization Pools") of Part 3 ("Marketing Laws Regarding Particular Products") of Division 21 ("Marketing") of the State's Food and Agricultural Code. *See* CAL. FOOD & AGRIC. CODE § 62700, *et seq*. (West 1997). In enacting the milk pooling laws, the California Legislature not only articulated the purposes behind those laws, but also distinguished them from the pricing and stabilization laws (*i.e.*, Chapter 2 of Part 3 of Division 21 of the Food & Agricultural Code). The Legislature generally explained:

> It is recognized by the Legislature that currently the powers conferred upon the director by Chapter 2 (commencing with Section 61801) are inadequate to enable the dairy industry to develop and maintain satisfactory marketing conditions and bring about and maintain a reasonable amount of stability and prosperity in the production of fluid milk and fluid cream; and that to accomplish these purposes, and particularly to insure [sic] to consumers within California an adequate and continuous supply of pure, fresh, and wholesome milk at fair and reasonable prices, including a reasonable estimate of the additional supply which is needed to provide for normal fluctuations in production and in consumer demand for those products, those powers must be supplemented by the powers conferred in this chapter upon the

> director to equalize gradually the distribution of class 1 usage among the producers of this state.

CAL. FOOD & AGRIC. CODE § 62702 (West 1997).

The Legislature described the specific purposes of the pooling laws as the "equalization of usages among producers" and the "entry of new producers. " *See* CAL. FOOD & AGRIC. CODE § 62702.1. (West 1997). Those general and specific legislative purposes underlying the pooling laws are silent regarding maintenance of the State's milk composition standards and labeling requirements. The milk pooling laws are administered by the Milk Pooling Branch of the California Department of Food and Agriculture, which is different from the branches that administer the composition and labeling laws, or for that matter, the pricing laws.

III. The Ninth Circuit Has Ignored This Court's "Unmistakably Clear" Standard for Determining When Congress Intends to Confer an Exemption from Dormant Commerce Clause Scrutiny.

Section 7254 does not make "unmistakably clear" that Congress intended to exempt California's milk pricing and pooling policies from dormant Commerce Clause scrutiny. Rather, the contrary conclusion is more reasonable in light of the statute's silence on the matter, interpreted in light of the canon of *Expressio unius* and the principle that the court will avoid where possible rendering any part of a statute mere surplusage.

The Court has always maintained a very high bar to claims that Congress intended an exemption to dormant Commerce Clause scrutiny. In S*outh-Central Timber Development,* the Court held that such intent must be "unmistakably clear." 467 U.S. at 91. In that case, a timber company challenged on Commerce Clause grounds an Alaska state requirement that timber harvested on state land be processed in the state before export. Alaska responded that Congress had intended to exempt such "primary-manufacture" requirements from Commerce Clause scrutiny. In support of that claim, Alaska pointed to a federal policy restricting out-of-state shipment of unprocessed timber from *federal* lands. *Id.* at 89-90. The Court held that evidence of the federal policy was insufficient by itself to establish Congressional intent to exempt even a parallel state policy from Commerce Clause scrutiny. *See id.* at 92-93.

The Court explained the purpose of maintaining a high threshold for ascertaining Congressional intent with regard to such exemptions. The Commerce Clause is designed "'to avoid the tendencies toward economic Balkanization that had plagued relations among the colonies and later among the States under the Articles of Confederation.'" *Id.* at 92 (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979)) Legislative or regulatory action by a state affecting interests within the state will normally be constrained by the state's political processes. Such constraints may not operate, however, where the burden of the state's legislative or regulatory action falls on interests situated outside the state and therefore unrepresented in the state's political processes. *Ibid.* For such "outside interests," the Commerce Clause provides protection from discriminatory action by the state.

Although Congress may from time to time exempt specified state actions from Commerce Clause scrutiny, congressional review at least assures that all segments of the country have been represented in the decision-making process, thereby reducing the danger that one state will be in a position to exploit others. The rule requiring "unmistakably clear" intent by Congress in connection with such exemptions serves this purpose.

> A rule requiring a clear expression of approval by Congress ensures that there is, in fact, such a collective decision and reduces significantly the risk that unrepresented interests will be adversely affected by restraints on commerce.

Id. at 92. The application of the "unmistakably clear" standard to this case yields a result that is itself unmistakably clear. In enacting § 7254, Congress evidenced no intent to exempt from dormant Commerce Clause scrutiny any portion of California's milk laws other than those specifically enumerated: composition standards and labeling standards. The language of the statute omits any mention of other subject matter. The rule of construction *Expressio unius* and the judicial policy of avoiding interpretations that will render any portion of a statute surplusage support that conclusion. The congressional testimony cited in the court below does not establish that composition and labeling standards are so "closely related" to the unenumerated items that congressional intent to confer an exemption on areas other than those specifically listed in the statute must be presumed. To the contrary, an examination of California's milk laws shows that the composition and labeling standards are *not* especially entwined

with the State's pricing and pooling policies, and certainly not linked to the extent that congressional intent to extend the exemption may be inferred.

In other cases, the Court has described the test for congressional intent in similar but no less demanding ways. In S*porhase*, 458 U.S. 941, the Court rejected a claim by the State of Nebraska that Congress had intended to exempt ground water regulation from Commerce Clause scrutiny. The Court noted that in other cases sustaining such exemptions, Congress had "expressly stated" its intention to do so. *Id.* at 960 (citing *New England Power Co. v. New Hampshire*, 455 U.S. 331, 343 (1982) (quoting *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 427 (1946))). In the case at bar, of course, Congress has nowhere "expressly stated" its intention to exempt California's pricing and pooling standards from scrutiny. Had Congress wished to do so, it would certainly have added them to the short list of subject areas in § 7254.

It makes little difference in this case whether the test for Congressional intent is described as a requirement that the exemption be "expressly stated" or "unmistakably clear." Application of either standard shows that Congress did not intend to exempt California's pricing and pooling standards from dormant Commerce Clause scrutiny.

CONCLUSION

Section 7254 refers expressly to California's composition and labeling standards. It omits any reference to the broader areas of pricing and pooling. In itself, that should be sufficient evidence of Congress' intent to exempt only the former standards from dormant Commerce Clause scrutiny.

The Ninth Circuit notwithstanding, California's composition and labeling standards are not so "closely related" to the State's pricing and pooling policies as to warrant the inference that Congress intended something more than what it stated plainly in the statute. The congressional testimony summarized in *Shamrock*, read in its entirety, does not support the conclusions drawn by the *Shamrock* court regarding the interdependence of composition standards on the one hand and pooling and pricing policies on the other. Rather, an examination of California's milk laws shows that they intersect hardly at all.

The Ninth Circuit's rulings in this case and in *Shamrock* pays lip service only to the Court's standard for ascertaining

congressional intent in connection with claims of exemption from Commerce Clause scrutiny. The Court has articulated that standard as evidence that is "unmistakably clear" or even "expressly stated." The Ninth Circuit's holding in this case fails either test.

For the reasons set forth herein, this Court should reverse the Ninth Circuit in this case and disapprove *Shamrock* to the extent it holds that California's milk pooling and pricing policies are exempt from dormant Commerce Clause scrutiny.

Respectfully submitted,

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FEBRUARY 21, 2003

APPENDIX

[Table of Contents and Statements by witnesses other than Mr. Thomas and Mr. Alexander intentionally omitted]