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,
California Department of Food
& Agriculture, et al.,
Respondents.

PONDEROSA DAIRY, PAHRUMP DAIRY,
ROCKVIEW DAIRIES, INC., and D. KUIPER DAIRY,
Petitioners,
v.

WILLIAM J. LYONS, JR., Secretary,
California Department of Food
& Agriculture, et al.,
Respondents.

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

BRIEF OF SELECT MILK PRODUCERS, INC. AND CONTINENTAL DAIRY PRODUCTS, INC., AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICI CURIAE*

Select Milk Producers, Inc. ("Select") and Continental Dairy Products, Inc., ("Continental") file this brief in support of the arguments advanced by Petitioners Hillside Dairy, Inc., A&A Dairy, L&S Dairy, Milky Way Farms, Ponderosa Dairy, Parhump Dairy, Rockview Dairies, Inc., and Darrel and Diane Kuiper, dba D.Kuiper Dairy. [1] Consent to the filing of this brief has been granted by the Hillside Dairy, Inc., et al., petitioners and the Ponderosa Dairy, et al., petitioners as well as by the respondents herein. Written consent of all of the parties accompanies this filing.

Select and Continental have an interest in maintaining stable and competitive marketing conditions for fluid milk and milk products irrespective of state borders. The California milk pricing regulations that are at the core of this case are by design and intent established to protect the California dairy industry from out-of-state competition for milk supplies while making out-of-state sales of their dairy products more competitive. This state mercantile dairy policy significantly interferes with the trading of milk and milk products between the states.

Select is a New Mexico milk marketing cooperative with members in New Mexico, Texas, and Kansas. Continental is an Ohio milk marketing cooperative with members in Indiana, Michigan and Ohio. They market

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1 This brief was authored in whole by the attorneys for *amici curaie* Select Milk Producers, Inc. and Continental Dairy Products, Inc. and no person or entity, other than the *amici curiae*, made a monetary contribution to the preparation or submission of this brief.

their members' milk to regions throughout the country with the exception of the Northwest and the Northeast. The free movement of milk throughout the entire nation is necessary because the areas with efficient milk production are not necessarily where the market for milk and milk products lies. For example, New Mexico is now the seventh largest producer of milk among the States, but is thirty-sixth in population. It is a large exporter of milk into the remaining states. The availability of a national market for that milk is essential to producers in such exporting states. As production continues to grow so does the reliance on markets in other states and regions.

These cooperatives market milk of their members to bottlers and manufacturers nationwide, including those in California and in areas under the Federal Milk Marketing Orders ("FMMO"), 7 C.F.R. Parts 1000 - 1135, administered by the United States Department of Agriculture ("USDA") in accordance with the Agricultural Marketing Agreement Act of 1937, 7 U.S.C.A. §608c ("AMAA"). The AMAA stabilizes the marketplace by creating orderly marketing conditions.

This goal is met through the use of a two-tiered pricing system wherein plants pay minimum prices for milk based upon their use of the milk (to make butter, cheese, creams, bottled milk, etc.) but producers receive a uniform price irrespective of the end use of their milk. The law prohibits the Secretary from promulgating marketing regulations that create trade barriers. As a result, the cooperatives can move their members' milk into these orders and know that they compete equally with the other producers regardless of the source of this milk. *Zuber v. Allen*, 396 U.S. 168 (1969). If Select and Continental elect to deliver milk to a distant plant, there are no economic or price regulations that make their milk at that plant less valuable than milk from other producers.

Not all milk is subject to the minimum pricing under the FMMOs. Manufacturing plants have the option to participate or not. Some do not. Additionally there are plants located in regions not subject to the minimum federal prices. In those instances, Select and Continental compete with other producers on the basis of the market dynamics in that region.

California is an exception to all of this. As the largest milk producing state as well as the most populated, its industry operates under its own set of economic rules that protect its producers from out-of-state competition for milk supplies and subsidize its manufacturers to more favorably compete for product sales in the national marketplace.

Foreign state milk producers receive different treatment in the pricing than producers located within California. Some California producers receive an enhanced "quota price" on some of their milk and the remaining milk is paid on the basis of an "overbase" price. The enhanced price on quota milk (19.5 cents per pound of solids-not-fat) comes out of the pool due producers. CDFA Pooling Plan for Market Milk, as amended, effective September 1, 2001, § 906 (hereinafter, "Pooling Plan"). There is no correlation between the actual use of the milk and its right to this quota. None of Select's members own quota even though Select from time to time has marketed their milk into the state. Only milk produced in California can acquire this quota.

Through its universal minimum pricing and pooling plan, the California system imposes minimum prices on plants for milk based upon one of five classes of milk usage. Plants account to a settlement pool by paying for milk purchases offset by the quota and overbase due the supplying producer. The result is that a Class 1 plant pays more for the milk than the producers supplying it receive and a Class 4 plant generally pays less than what its suppliers ultimately receive.

Producers receive a uniform price regardless of use. The minimum class prices do not attract milk to the plant. In this way, California provides what it believes is an appropriate producer price by combining higher prices for Class 1 which offset lower minimum prices for milk used in its cheese and non-fat dry milk (NFDM) plants. Generally the prices for milk used for manufacturing are lower than those in the rest of the nation.

Because they are not entitled to the uniform minimum prices, Select and Continental have to compete for sales at the minimum prices. As a result, Select rarely, if ever, moves milk into the California Class 4a or 4b markets (milk used in NFDM or cheese). This is because California, using in part the money from the Class 1 buyers, is able to reduce the minimum prices plants in California pay for milk used in making cheese or non-fat dry milk while, at the same time, continue to pay producers in California a reasonable minimum price.

On the other hand, the higher priced Class 1 markets can be attractive. As explained, California needs the extra money from the Class 1 and 2 sales to both have lower manufacturing prices to promote its domestic plants and pay its producers an adequate quota and overbase price. Milk purchased from out-of-state producers for Class 1 reduces the amount of money in the pool that supports the lower minimum prices for the manufacturing plants. To reduce the erosion of the Class 1 sales to out-of-state producers, the California Department of Food and Agriculture ("CDFA") changed the rules so as to make importing milk less attractive. That is the genesis of this case.

Currently, any California bottling plant which receives out-of-state milk is effectively required to pay into the California pool the full Class 1 price and only receives a credit equal to the quota price for that month. This compulsory payment provides additional funds to the California pool to subsidize its manufacturing plants and, at the same time, reduces the money a plant can offer for out-of-state milk. In order to competitively market milk to a California bottling plant, an out-of-state seller has to reduce the selling price a penny for every penny charged by CDFA to the plant. Neither the out-of-state producer nor its cooperative will benefit in any way from the payment into the pool.

Not only do the California regulations discourage exporting milk into that state, but also change the competitive balance outside of the state. Milk from nearby states discouraged from moving into California, primarily Nevada and Arizona, will seek markets East and will, necessarily, more directly compete with Select and Continental in their markets. In this way, California's interpretation of its consumer labeling laws exerts influence over the pricing and movement of raw milk used not only for bottled milk but for cheese, butter, and cream. The regulations affect the flow of raw milk not only into and out of California, but throughout the rest of the Nation.

The lower California minimum prices for milk used to make cheese and NFDM further alter the marketplace outside of that state. By design and intent of the California program, the California plants are given an economic advantage through lower milk costs. These plants can, and do, sell their products for less than the rest of the nation. They then report these lower prices to the National Agricultural Statistics Service ("NASS"). These NASS surveys are used by the USDA to establish the minimum prices for milk in the federal orders. 7 C.F.R. § 1000.50. In this way, the lower prices in California translate into lower prices for the federal markets. If it was unable to impose Class 1 fees on imported milk, this result would not occur.

Finally, the mercantile policies in California, particularly its goal of keeping its domestic manufacturing plants competitive, challenges new manufacturing plants outside of California. Select has from time to time considered the acquisition of, or partnership with, manufacturing capacity in its marketing area. All business models have to factor in the potential of California continuing to tailor its pool program to keep its plants more competitive.

In summary, the California pooling program does affect the flow of milk and milk products into and out of California. Its quota program is designed to promote production growth in its state, its lower manufacturing milk prices discourage its domestic plants from buying milk from out-of-state, its compensatory payment provision on imported milk used in Class 1 subsidizes the California producers and reduces market opportunities for out-of-state milk, its barriers to importing milk forces nearby milk east into those markets, its subsidized domestic manufacturing plants influence national, and thus federal, milk prices, and the development of new manufacturing capacity elsewhere.

None of this minimum pricing, pooling, compensatory payments, quota or the like has anything to do with the minimum composition standards of bottled milk sold at retail. Producers deliver raw milk that contains the components in the ratios the cows produce. The plants take some of those components out (generally reducing the butter fat from over three percent to some lesser amount) and adding protein through fortification. Quota, overbase, minimum prices, compensatory payments and the like have nothing to do with that.

Neither Select nor Continental nor their members are citizens of California and cannot participate within that political arena. The various elements within the California dairy industry and the regulatory body have a clear interests in preserving this system. The only opportunity that Select, Continental, or the petitioners, have to open up competition to a fair and equal basis is by a Constitutional challenge such as this one.

As the foregoing show, Select and Continental are most interested in the outcome of this case. The result of this case will not be felt merely by a few producers in Arizona and Nevada or the California dairy industry, but by all producers throughout the Nation. If unchecked, California can protect its producers from competition with outside sources of milk and use its internal pooling to underprice cheese and NFDM manufacturers.

SUMMARY OF ARGUMENT

California's milk pricing and pooling regulations constitute an unreasonable burden on interstate commerce in violation of the Commerce Clause. U.S. Const. art. I, § 8, Cl. 3. Congress did not clearly and explicitly remove California's milk pooling and pricing scheme from the purview of the Commerce Clause. Under the most fundamental maxims of statutory construction, there can be no conclusion that the result achieved by the California Department of Food and Agriculture was the result intended by Congress. Congress has not exempted the California program from the restrictions of the Commerce Clause. *Maine v. Taylor*, 477 U.S. 131, 137-38 (1986). Because of the constitutional ramifications of such a grant of authority, these grants must be made explicitly and "unmistakably clear." *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 91-92 (1984). Furthermore, in interpreting an alleged exemption from the application of the Commerce Clause, the statutory language should demonstrate that the Congress has "affirmatively contemplate[d]" the otherwise unconstitutional state regulations. *Id.*

The effect of California's milk regulations on interstate commerce is significant. By assessing milk handlers a compensatory payment on milk purchased from outside California for distribution to producers within California and other interferences with market dynamics it creates a *de facto* discriminatory barrier to foreign milk. *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994).

In total, the scheme both discourages out-of-state milk from entering the California market and taxes such milk so as to subsidize and promote its domestic dairy industry. The California program thus insulates California producers and manufacturers from interstate competition.

In short, California has created and administered a dairy program that clearly violates the Commerce Clause of the United States Constitution. To the extent that Congress created any exemption for California, thereby permitting CDFA to impose a burden on interstate commerce, that exemption was limited to the issue of California's milk identity standard, the sole issue addressed by Congress at 7 U.S.C. § 7253. The regulations governing the pricing and pooling of milk in California having the effect of discriminating against out-of-state milk should be declared unconstitutional by this Court.

ARGUMENT

I. *California's milk pricing and pooling scheme constitutes a de facto barrier to the interstate transportation of raw milk.*

The California regulations impose barriers on the interstate movement of raw producer milk into the state. First, only producers in California can own quota and participate in this higher price or the overbase price. Second, the subsidization of the manufacturing plants through the in-state pooling among producers and processors discourages out-of-state producers from selling their milk to manufacturing plants in California. Third, the compensatory payment required of Class 1 plants to the California pool on milk purchased from out-of-state producers subsidizes competing in-California producers and makes importation less attractive. These clearly fall within the prohibited trade practices this Court has struck down over the years and most recently in *West Lynn Creamery*.

In a tacit recognition of the interference, California argues, and the Ninth Circuit agreed, that Congress through its power over interstate commerce has exempted this pooling and pricing program from general prohibition of interference with interstate commerce.

II. *Congress did not exempt California from the application of the Commerce Clause as it pertains to the pricing and pooling of raw milk.*

The conclusion by the Ninth Circuit Court of Appeals below that "[a]mple evidence demonstrates that the pooling laws in general, and the 1997 amendments in particular, bolster California's composition requirements and are consistent with the protection provided by [7 U.S.C. § 7253]" is misplaced. *Ponderosa Dairy v. Lyons*, 259 F.3d 1148, 1154 (9th Cir. 2001). The relevant potion of 7 U.S.C. § 7253 provides that:

> 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 milk 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.

7 U.S.C. § 7253.

This Court has repeatedly required that any Congressional grant that implicates the constitutional balance of power between the federal government and the states be unmistakably clear. *Raygor v. Regents of University of Minnesota*, 534 U.S. 533, 543 (2002) (*citing Will v. Michigan Department of State Police*, 491 U.S. 58, 65 (1989) (*quoting Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985))). Where Congress intends to permit state regulation that would otherwise violate the dormant Commerce Clause, the Court has required that exemption to be "expressly stated" and "unmistakably clear." *South-Central Timber Development*, 467 U.S. at 91.

Given the obvious effects California's regulations have on interstate commerce, the primary question before the Court is mostly one of statutory construction rather than a determination of whether the California regulations in fact violate the dormant commerce clause. Accordingly, the proper course of action for the Court is to:

> begin with the language of the statute. The first step is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. The inquiry ceases if the statutory language is unambiguous and the statutory scheme is coherent and consistent.

Barnhart v. Sigmon Coal Co., Inc., 534 U.S. 438, 450 (2002) (internal citations and quotation marks omitted).

As this Court has stated, the concept of an exemption "expressly stated" by Congress is not a nebulous concept. *South-Central Timber Development*, 467 U.S. at 91. The very fact that the court of appeals needed to rely on legislative history to support the continuance of the pooling and pricing guidelines suggests that the statutory language does not expressly remove these regulations from the Commerce Clause.

Reliance on legislative history to shed light on the meaning of a legislative enactment, especially in the situation where the text of the statute presents no ambiguity, not only contradicts the standard that this Court has laid down, but it opens the doorway to results unintended by the legislature. The text of 7 U.S.C. § 7253 concerns California's identity standards for milk. If Congress intended to implicate the pooling and pricing regulations, as well, it certainly knew how to draft language that clearly and expressly identified those aspects of California's milk regulations. The extension of the exemption is not one for the judiciary to make.

Additionally, heavy reliance on the subjectiveness of legislative history upsets the reasonable expectations of participants in the legislative process. The amici actively participated in the debates and discussions that necessarily preceded the passage of the FAIR Act, which contained the provisions now codified at 7 U.S.C. § 7253. The involvement of the amici included offering language to the sponsors of the legislation, lobbying legislators, and maintaining an awareness of the FAIR Act's ramifications. To the amici, and to others who actively participate in the legislative process, there must be some semblance of predictability in the outcome. More specifically, interested persons should be able to expect that Congress says what it means and means what is says in a piece of legislation. Broadening the exemption through judicial review, takes this decision out of the political process and denies non-parties the ability to participate. Rewriting clear statutory language to encompass legislative history undermines the legislative process at all levels.

The statute here offers no indication that Congress intended to exempt California from a Commerce Clause challenge to state regulations that priced or pooled milk in favor of in-state producers and erected a barrier to the importation of raw milk from outside the state. As pointed out by the Petitioners and the Solicitor General, the provision at issue only concerns California's ability to create regulations that define the identity of fluid milk or relate to the labeling of fluid milk. That is the extent of the exemption. It touches on no other aspect of California's milk regulations.

Absent a crystal clear exemption, California's pricing and pooling provisions must fail as an impermissible restraint on interstate commerce in violation of Congress's reserved powers under the Commerce Clause.

III. Continued application of the California milk pricing and pooling schemes impede the sale of raw milk to processors in California by producers located in other states.

This Court's decision in *West Lynn Creamery* is applicable to this case. In *West Lynn Creamery*, the Court had before it a Massachusetts law which imposed an assessment on all milk, regardless of origin, sold to Massachusetts retailers. Two-thirds of the milk at issue originated out of the state. The entire benefit of the assessment, however, went to Massachusetts producers.

In this case, the CDFA imposes an assessment on imported milk to increase the blend price paid only on milk produced in California. The CDFA assessments levied on foreign milk are "effectively a tax which makes milk produced out-of-state more expensive. . . . Like an ordinary tariff, the tax is thus effectively imposed only on out-of-state products." *West Lynn Creamery*, 512 U.S. at 194-95.

Additionally, the method of blending higher priced classes with lower priced manufacturing milk permits the CDFA to reduce the minimum price for milk used in manufacturing to discourage out-of-state producers from coming into the market while still supporting its domestic supply. Foreign producers are not entitled to either of the blend prices of quota and overbase.

The CDFA regulations burden interstate commerce by increasing the cost of milk produced outside California, even though the additional fees provide no benefit at all to out-of-state milk producers. Milk from producers like Select and Continental is stripped of competitive advantage vis-a-vis California milk.

IV. ***The California regulations discriminate against citizens of foreign states in violation of the Fourteenth Amendment's Privileges and Immunities Clause.***

The Court of Appeals erred in finding that the Privileges and Immunities of the individual farmers are not violated by the challenged regulations. The opinion below placed undue weight on the notion that the challenged regulations "are based on the location where milk is produced. The amendments do not, on their face, create classifications based on any individual's residency or citizenship." *Ponderosa Dairy*, 259 F.3d at 1156-57. The Petitioners properly state that facial discrimination against out-of-state residents is only one instance where privileges and immunities of citizens are infringed. Petition of Ponderosa Dairy for Writ of Certiorari, p. 19. *See also United Building and Construction Trades Council of Camden County and Vicinity v. Mayor and Council of Camden*, 465 U.S. 208, 216-18 (1984). In addition to the fact that California's pooling and pricing regulations discriminate against foreign dairies, the underpinnings of the entire California market rest on the explicit discrimination against out-of-state persons.

The "quota" system guarantees higher blend prices to the entities owning the quota. The regulations governing the transfer of quota and eligibility for ownership of quota effectively foreclose members of Continental and Select from ever receiving the higher quota blend price. The CDFA Pooling Plan defines producers as those persons producing milk in California from five or more cows. Pooling Plan, §104. The Petitioners accurately describe how the production location of milk is little more than a proxy for the citizenship of the producer. Petition of Ponderosa

Dairy for Writ of Certiorari, p. 18. To require that the milk be produced in California is tantamount to requiring that the producer be a citizen of California. Under the CDFA regulations, new producers who want to enter California's pool must first obtain a regulatory permit and continuously produce milk in the state of California for one year before making application for quota. Pooling Plan, § 451. This constitutes a true barrier to participating in the California milk market for all of Select's and Continental's members. Even if quota is obtained, the milk subject to the quota must still be produced in California. For Select and Continental, the "practical effect" is to eliminate any realistic possibility of obtaining quota and to provide an economic disincentive to sell milk to California handlers, thus preserving that market for California producers. That is not only a mercantile system in its purest form, but is a system that confers benefits and reserves benefits based on the citizenship of the participants.

CONCLUSION

California's dairy regulations clearly interfere with commerce between states and are therefore unconstitutional. California's policies adversely impact the ability of Select and Continental, as well as other dairy producers, to market milk both inside of and outside of California. The regulations are protectionist and stifle competition. While Congress has permitted California to create its own identity standard for fluid milk and to regulate labeling accordingly, the pooling and pricing regulations challenged in this case were never addressed by Congress and the application of the exemption granted should not be inferred. The "clear statement" standard governs the issue before the Court, and under that standard, California's regulations exceed the scope of the exemption granted at 7 U.S.C. § 7253 in violation of the Commerce Clause.

For these reasons, as well as those set forth in the briefs of the Petitioners, this Court should order the relief sought by Petitioners.

Dated: February 24, 2003

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