No. 01-950

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.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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LIST OF PARTIES

The Petitioners are Hillside Dairy, Inc., A&A Dairy, L&S Dairy, and Milky Way Farms (hereafter "Petitioners"). The Respondents are William J. Lyons, Jr., Secretary of the California Department of Food and Agriculture, and Robert Tad Bell, Undersecretary of the California Department of Food and Agriculture (hereafter "CDFA").

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioners reassert that none of the Petitioners have issued stock or securities that are publicly traded, and none of the Petitioners have a corporate parent, subsidiary or affiliate that has issued publicly traded stock or securities.

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INTRODUCTION

Pursuant to Supreme Court Rule 15.6, petitioners Hillside Dairy Inc., A&A Dairy, L&S Dairy and Milky Way Farms file this reply brief to respond to one surprising and inaccurate proposition raised in the brief in opposition filed by Respondents William J Lyons, Jr., and Robert Tad Bell. This reply is necessary because petitioners could not have anticipated that the California Department of Food and Agriculture ("CDFA") would controvert principles that are universally accepted in the dairy industry.

NUMEROUS OFFICIAL PUBLICATIONS BY THE STATE OF CALIFORNIA AND USDA DEMONSTRATE THAT THIS CASE RAISES ISSUES OF NATIONAL SIGNIFICANCE

Respondents assert that this case does not raise an issue of national importance notwithstanding the fact that economic forces in the dairy industry have created a careful balance between national production and prices. Historically, even a small change in national milk production will cause a substantial change in farm milk prices. *See* Economic Research Service, USDA, Livestock Dairy and Poultry Outlook, *Dairy Forecasts* at 9 (LDP-M-92) (February 2002) (a less than 2 percent decrease in milk production from 2000 to 2001 resulted in a substantial increase of approximately 21 percent in the national all milk price). (App. 2a-3a). Indeed, California's dairy industry is so large that it dominates the national milk market. Agricultural Marketing Service, Dairy Division, USDA, *Preliminary Report On Alternatives To The Basic Formula Price* at 37 (April 1997) (California is "the largest milk-producing state in the nation and has a large dairy manufacturing sector."). (App. 5a). In 1997 CDFA itself acknowledged the growth and dominance of the California dairy industry in an official publication, worthy of judicial notice, where CDFA explained that:

> California dairy farmers have dramatically increased their share of the national market for milk. Since 1950, California has more than tripled its share of national milk production from 5.1 to 16.8 percent. California's increased market share is balanced by loss of market share in the Midwest.

Calif. Dep't of Food and Agric., California Dairy Review, *California Dairy Industry's Share of National Market Continues to Grow* (May 1997). (App. 7a). Thus, because of California's dominance, efforts to grow the California dairy industry through protectionist measures necessarily will have implications for the national dairy industry.

Although Respondents' brief seeks to minimize California's ability to affect the nationwide market for milk, CDFA has itself expressly acknowledged in an official publication also worthy of judicial notice that, single-handedly, California can disrupt this economic balance. In 1999, CDFA issued a "Statement of Determination and Order of the Secretary of Food and Agriculture regarding proposed amendments to the Stabilization and Marketing Plans for Market Milk for the Northern and Southern California Marketing Areas Based Upon a Public Hearing Held on September 21, 1999." In discussing the effect of incentives in California to produce more milk, CDFA stated:

> As California's share of the national supply grows ever larger, its increasing rate of annual production increase can *dramatically affect the delicate balance between the national milk supply and commercial demand.*

California Dep't of Food & Agric., Statement of Determination (October 21, 1999) at 46 (*emphasis added*). (App. 13a).

By Respondent's own admission, therefore, it is inconceivable that this case lacks national significance. The Ninth Circuit's judicial activism, by freeing California from the constraints of the negative Commerce Clause, would leave the rest of the nation's dairy industry vulnerable to the whims of the California dairy farmers that petition for and vote on California milk regulations. It would also upset the federal regulatory program Congress created in the Federal Price Support Program and the Federal Milk Market Order Program. *See* Petition at 12-13. As a result, the claim of a Commerce Clause exemption by California and the grant of one by the Ninth Circuit—not Congress—is an issue of national significance that merits the review of this Court.

CONCLUSION

Wherefore, the Petitioners, Hillside Dairy, Inc., A&A Dairy, L&S Dairy, and Milky Way Farms respectfully pray that a writ of certiorari issue.

Respectfully submitted,

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March 15, 2002

APPENDIX A

Excerpt of the Livestock Dairy and Poultry Outlook Prepared by the Economic Research Service of the United States Department of Agriculture

ECONOMIC INDICATOR FORECASTS

			2001					**2002**				
	IV	**Annual**	**I**	**II**	**III**	**IV**	**Annual**	**I**	**II**	**III**	**IV**	**Annual**
GDP, chin wtd (bil. 1996 dol.)	9,304	9,224	9,335	9,338	9,333	9,288	9,325	9,290	9,344	9,428	9,521	9,402
CPI-U, annual rate (pct.)	2.7	3.4	4.2	3.1	0.7	1.6	2.4	1.9	2.1	2.2	2.5	2.2
Unemplyment (pct.)	4.0	4.0	4.2	4.5	4.8	5.6	4.8	5.9	6.0	6.1	5.9	6.0
Interest (pct.)												
3-month Treasury bill	6.0	5.8	4.8	3.7	3.2	1.9	3.4	1.8	2.0	2.4	3.1	2.4
10-year Treasury bond yield	5.6	6.0	5.1	5.3	5.0	4.4	4.9	4.3	4.5	4.7	5.0	4.6

DAIRY FORECASTS

	[2000]		**2001**					**2002**				
	IV	**Annual**	**I**	**II**	**III**	**IV**	**Annual**	**I**	**II**	**III**	**IV**	**Annual**
Milk cows (thous,)	9,211	9,210	9,157	9,125	9,100	9,098	9,120	9,090	9,080	9,065	9,045	9,070
Milk per cow (pounds)	4,416	18,204	4,511	4,676	4,464	4,481	18,132	4,635	4,815	4,595	4,620	18,665
Milk production (bil. pounds)	40.7	167.7	41.3	42.7	40.6	40.8	165.4	42.1	43.7	41.7	41.8	169.3
Commercial use (bil. pounds)												
milkfat basis	43.3	169.2	40.6	42.4	43.1	43.6	169.6	41.2	43.3	44.4	44.4	173.3
skim solids basis	40.7	161.3	39.9	41.2	41.8	41.0	163.9	40.8	42.0	43.0	42.6	168.4
Net removals (bil. pounds)												
milkfat basis	0.2	0.8	0.1	0.0	0.0	0.0	0.1	0.1	0.0	0.0	0.1	0.1
skim solids basis	1.8	8.6	2.2	1.6	0.7	1.3	5.8	1.6	1.2	0.5	0.5	3.8

DAIRY FORECASTS—Continued

Prices (dol./cwt)											
All milk	12.70	12.33	13.37	15.30	16.53	14.50	14.93	13.05 -13.35	12.25 -12.85	12.50 -13.40	13.60 -14.60	12.85 -13.55
Basic Formula Price/Class III	9.32	9.74	10.56	13.63	15.64	12.57	13.10	11.20 -11.50	10.80 -11.40	11.10 -12.00	12.00 -13.00	11.30 -12.00
Class IV	12.69	11.83	12.76	14.93	15.15	12.18	13.76	11.60 -11.80	11.35 -12.05	11.65 -12.65	11.75 -12.85	11.60 -12.40

APPENDIX B

Agricultural Marketing Service
Dairy Division

A Preliminary Report On Alternatives To The Basic Formula Price

April 1997

Submitted To:
Director Of The Dairy Division
Agricultural Marketing Service

By:
Basic Formula Price Committee

* * *

[page 37]

represent legitimate market transactions. Thus, DMN price series should be carefully considered before being used to construct a new BFP.

Because of the performance of product price formulas, the BFP Committee has identified three of these as options for further debate and dicussion to replace the current BFP. Those options are discussed below, in the section entitled "Four Options to Replace the BFP."

California Pricing

Analysis of the California 4a and 4b prices indicates that these prices are significantly below other prices considered as replacements for the BFP (Table 5 and Appendix 5-6). The California prices are designed to reflect the value of milk used in butter/powder and cheese, and incorporate manufacturing allowances that are greater than those used in the alternative prices for BFP replacement. Even the California cost-based manufacturing allowances used in the USC product price formulas resulted in lesser allowances than under the California order.

It is important for the price levels of milk used in manufactured dairy products under the Federal order system, and under California milk pricing regulation, to become more closely aligned without significantly reducing returns to producers. It may become difficult to maintain Federal order price levels that exceed those established under the California system, since it is the largest milk-producing state in the nation and has a large dairy manufacturing sector. Manufacturing prices established under the Federal order system cannot be imposed upon pooled handlers without causing them difficulties in competing with California handlers if these differences are not reconciled.

[page 37 continued]

It is unknown whether the California dairy industry will become part of the Federal milk order system at this point in the reform process. The inclusion of California would mitigate the problem of differing prices. Under one system these prices

* * *

APPENDIX C

California Dairy Review May 1997

CALIFORNIA DAIRY INDUSTRY'S SHARE OF NATIONAL MARKET CONTINUES TO GROW

As can be seen in the table below, California dairy farmers have dramatically increased their share of the national market for milk. Since 1950, California has more than tripled its share of national milk production from 5.1 to 16.8 percent. California's increased market share is balanced by loss of market share in the Midwest.

While California produced record volumes of milk in 1996, it share of the national market (16.8 percent) was still lower than that enjoyed by Wisconsin Dairy farmers at their peak in 1980 (17.4 percent).

TOP STATE MILK PRODUCTION PERCENT OF TOTAL UNITED STATE PRODUCTION

Ranked by 1996 Production

State	1950	1960	1970	1980	1990	1995	1996 1/
California	5.1	6.5	8.1	10.6	14.1	16.3	16.8
Wisconsin	12.7	14.4	15.8	17.4	16.5	14.8	14.5
New York	7.6	8.3	8.8	8.5	7.5	7.5	7.5
Pennsylvania	4.8	5.6	6.1	6.6	6.7	6.8	6.9
Minnesota	6.9	8.3	8.2	7.4	6.8	6.1	6.1
Texas	3.0	2.4	2.6	2.8	3.7	3.9	4.0
Michigan	4.6	4.2	3.9	3.9	3.5	3.6	3.5
Washington	1.5	1.6	1.8	2.3	3.0	3.4	3.4
Idaho	1.0	1.3	1.3	1.5	2.0	2.7	3.1
Ohio	4.5	4.2	3.8	3.4	3.2	3.0	2.8
Iowa	5.3	4.8	4.0	3.2	2.9	2.6	2.5
New Mexico	0.2	0.2	0.3	0.5	1.0	2.3	2.4
Vermont	1.8	1.5	1.7	1.8	1.6	1.6	1.7
Missouri	3.5	3.0	2.6	2.2	2.1	1.7	1.6
Florida	0.5	1.1	1.4	1.6	1.7	1.5	1.6
Arizona	0.2	0.4	0.5	0.8	1.1	1.4	1.6
Illinois	4.5	3.4	2.5	2.0	1.9	1.5	1.5
Indiana	3.2	2.6	2.0	1.7	1.5	1.4	1.4

Kentucky	2.1	2.0	2.1	1.7	1.5	1.3	1.2
Virginia	1.7	1.6	1.5	1.6	1.4	1.3	1.2
Tennessee	2.0	1.8	1.8	1.7	1.5	1.1	1.0
Oregon	1.1	0.9	0.8	0.9	1.1	1.1	1.0
U.S. Total (million lbs.)	116,602	123,109	117,007	128,406	148,319	155,425	154,268

Source: Milk Production annual released February 1997 by the Agricultural Statistics Board; NASS, U.S. Department of Agriculture, Washington, D.C. and Dairy Facts Wisconsin 1996 Issued by the Wisconsin Department of Agriculture.

1/ 1996 numbers subject to revision.

APPENDIX D

STATEMENT OF DETERMINATION AND ORDER OF THE SECRETARY OF FOOD AND AGRICULTURE REGARDING PROPOSED AMENDMENTS TO THE STABILIZATION AND MARKETING PLANS FOR MARKET MILK FOR THE NORTHERN AND SOUTHERN CALIFORNIA MARKETING AREAS BASED UPON A PUBLIC HEARING HELD ON SEPTEMBER 21, 1999

Signed in the Office of the Secretary on
Thursday, October 21, 1999

* * *

[page 3]

SUMMARY: The determination to make amendments to the current Stabilization and Marketing Plans for Northern and Southern California (Plans) is based on testimony and evidence received at a public hearing held on September 21, 1999 in Sacramento, California. These determinations are further based on written comments submitted prior to the close of the hearing record and on written briefs filed within the allowed filing period. The statement of determination will be discussed in the following Sections:

* * *

[page 45]

Class 1 utilization to generate its share of revenues to the pool. It is incumbent upon the Department to determine what policy best serves the public interest.

Proposals:

There were three basic proposals presented at the hearing regarding the Class 1 price levels. One would have resulted in an increase in the Class 1 price of $0.73 per hundredweight. The second would have resulted in no change and the third would have resulted in a decrease in the Class 1 price of $0.46 per hundredweight.

Analysis:

Production Costs and Milk Prices

Over the last two years economic conditions facing dairy farmers have been favorable. With plentiful supplies of grain and feed, milk production costs throughout the nation have been quite reasonable. Relatively good weather conditions in 1999 combined with the ample supplies of low cost feeds have been particularly beneficial to the California dairy industry. California milk production costs in 1999 are running near the lowest levels achieved in the last 10 years.

Although volatile, minimum farm milk prices have been quite positive. In 1998, the average California farm milk price was about $15.00 per hundredweight. This was approximately $2.64 per hundredweight more than the previous four-year average and about $1.50 per hundredweight higher than the highest annual average over the previous four-year period. While USDA and many dairy experts were forecasting lower farm milk prices in 1999, strong cheese sales have resulted in strong average milk prices thus far. To date, the average California milk price is $13.68 per hundredweight, which also exceeds the annual average price during the years 1994, 1995, 1996, and 1997.

Production and Production Capability

California led all other states in total annual milk production with over 27.6 billion pounds in 1998. It produces over 5 billion pounds more milk than second leading state, Wisconsin. California's total production is nearly 2.4 times larger than the third and fourth leading dairy states (New York and Pennsylvania).

California has not only led the nation in total milk production since 1994, it has been consistently among the top states for having the largest rate of production increases. More importantly, the annual rate of production increase has been accelerating this year. In August 1999, California lead the nation in its monthly production increase over the same month in the prior year with an increase of about +14.6 percent (about 331 million pounds). This is the largest annual increase from one month to the same month in the prior year in the past 45 years. California's production between [page 46] January to August 1999 is currently about 9.4 % above the same period for 1998 period. There is no reason to believe that 1999 production levels won't continue to increase at high levels. It appears that 1999 may go down as the largest annual increase in milk production.

As detailed in Section IV, between 1990 to 1998 California milk production has increased 32 percent, or a 4% annual average. A four-percent annual increase on 27.6 billion pounds of milk production (1998) represents over 1.1 billion pounds of milk production. To put this annual production increase in perspective, it represents:

- 41 percent of Arizona's total 1998 production (2.68 billion pounds).
- Over 2.25 times Nevada's total 1998 annual production (466 million pounds).
- Approximately 70 percent of Oregon's total 1998 production (1.583 billion pounds).

The steady increase in total cow numbers over the past nine years indicate that the production increases are not driven solely by favorable weather and good dairy management. The California dairy industry's investment in additional cows, the fundamental resource needed to produce milk, is a strong indication that these trends will continue.

California's increasing rate of milk production and the increasing number of cows both strongly suggest that there are ample economic incentives to produce more milk. Since Class 4a and 4b prices are among the lowest in the nation, and Class 2 and 3 usage represent a lower percentage of total milk usage, it is reasonable to conclude that the current Class 1 prices levels provide some of existing incentives to produce more milk.

As California's share of the national supply grows ever larger, its increasing rate of annual production increase can dramatically affect the delicate balance between the national milk supply and commercial demand.

* * *