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.

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

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SUPPLEMENTAL BRIEF FOR PETITIONERS IN RESPONSE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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SUPPLEMENTAL BRIEF FOR PETITIONERS IN RESPONSE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

Pursuant to Rule 15.8 of the Rules of this Court, petitioners submit this brief in response to the Brief for the United States as Amicus Curiae, filed December 4, 2002.

The Solicitor General agrees with petitioners on numerous key aspects of this case:

- The Solicitor General agrees (U.S. Br. 10-11, 13-15) that the Ninth Circuit erred in *Shamrock Farms Co.* v. *Veneman*,[1] 146 F.3d 1177 (9th Cir. 1998) (Reinhardt, J.), cert. denied, 525 U.S. 1105 (1999). Specifically, the Solicitor General observes that 7 U.S.C. § 7254 does not provide California with *any* immunity from Commerce Clause scrutiny through its direction not to "construe" any "provision of law" to limit specified California nutritional and labeling requirements.

- The Solicitor General agrees (U.S. Br. 11-13) that the Ninth Circuit further erred in the decision below – even if *Shamrock* was correctly decided – by extending California's immunity to cover *all* of California's pricing and pooling regulations, rather than to cover only the kinds of laws identified in the text of 7 U.S.C. § 7254.

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[1] Ann M. Veneman, the named defendant (in her official capacity) who successfully defended California's programs in *Shamrock*, was also the original lead defendant in the cases below. Ms. Veneman is now the U.S. Secretary of Agriculture. Respondents are among her successors as officials of the California Department of Food and Agriculture. Petitioners note that the Solicitor General's brief ascribes views to the U.S. Department of Agriculture but is not signed by any attorneys from the U.S. Department of Agriculture.

- The Solicitor General agrees (U.S. Br. 15-16) that the challenged "California milk pricing and pooling laws, at a minimum, raise substantial questions under the Commerce Clause because of their facially disparate treatment of California dairy farmers and dairy farmers located outside the State."

- The Solicitor General agrees (U.S. Br. 18) that, armed with the immunity conferred by the erroneous decisions in *Shamrock* and *Ponderosa*, California has "shield[ed]" its pricing and pooling laws "from Commerce Clause scrutiny."

- The Solicitor General agrees (U.S. Br. 18) that, in view of the erroneously conferred immunity, California could engage in future Commerce Clause violations through its pricing and pooling programs, which only this Court could correct, because the only lower federal courts with jurisdiction would be bound to follow those erroneous precedents.

- The Solicitor General agrees (U.S. Br. 18) that this Court regularly grants certiorari in Commerce Clause cases without a square conflict in the circuits on the exact question presented.

- And the Solicitor General agrees (U.S. Br. 19) that "this case is a suitable vehicle in which to address" the legal difficulties posed by the Ninth Circuit's decisions immunizing California's milk laws from Commerce Clause scrutiny.

Nevertheless, while acknowledging (U.S. Br. 17) that it is "a close question," the Solicitor General urges denial of certiorari. He does so principally on two grounds: (1) no "circuit conflict" is "likely to arise with respect to the application of [this Court's clear-statement] standard with respect to Section 7254, which concerns only California's 'law[s], regulation[s], or requirement[s]'" (U.S. Br. 18); and (2) the errors

below, as measured by the perceived impact of the contested 1997 state pricing and pooling amendments alone, have not *yet* – so far as the U.S. Department of Agriculture (USDA) has "detected * * * to date" – had any adverse effect on the federal milk program (U.S. Br. 18-19). The first point, though factually accurate, is more reason, not less, for a grant of certiorari. The second point suffers from both factual inaccuracy – as confirmed by other USDA publications – and insufficiency as a basis for denial of certiorari.

1. The certiorari petitions in this case presented numerous conflicts in analysis between the decision below and decisions of this Court and other circuits. See, *e.g.*, 01-950 Pet. 17-21; 01-1018 Pet. 16-17, 22. Those conflicts present more than a sufficient basis for a grant of certiorari to review the erroneous decision below. Even if the Solicitor General is right, however, to focus solely on the impossibility of a square circuit conflict *with respect to Section 7254*, that only means that the need for review by this Court is especially urgent.

Last Term, for example, this Court reversed a decision of the Federal Circuit in *United States Postal Service* v. *Gregory*, 534 U.S. 1 (2001). As a major reason why this Court should grant certiorari, the Solicitor General's certiorari petition argued: "As a result of the Federal Circuit's exclusive jurisdiction over appeals from decisions of the MSPB * * *, the issue in this case is unlikely to be presented to any other court of appeals." Petition for a Writ of Certiorari at 6, *United States Postal Service* v. *Gregory*, 534 U.S. 1 (2001) (No. 00-758) <http://www.usdoj.gov/osg/briefs/2000/2pet/7pet/2000-0758.pet.aa.pdf>. The exclusive jurisdiction of a single circuit over an issue, coupled with the importance of that issue and the erroneous nature of the decision below, was presented (successfully) as a reason to grant certiorari – not, as in the Solicitor General's brief in the present case, as a reason to deny.

The respondent in *Gregory*, like the Solicitor General in this case (U.S. Br. 19), suggested that an intrepid litigant could

simply raise the issue again in a future case and preserve it all the way up to this Court for review. The Acting Solicitor General did not react well to that suggestion. She stated that "it will be difficult for an agency to challenge the MSPB's refusal in a subsequent case to consider" the issue and that the hypothetical future case that might bring the issue before this Court would leave this Court "without the benefit of a court of appeals' decision fleshing out the case, and the absence of such a decision would make such a case less appropriate for review than this one." Reply Brief for the Petitioner at 8-9, *United States Postal Service* v. *Gregory*, 534 U.S. 1 (2001) (No. 00-758) <http://www.usdoj.gov/osg/briefs/2000/2pet/7pet/2000-0758.pet.rep.pdf>. So too here – where private litigants with limited resources would have to pursue hopeless litigation at the district court and court of appeals levels just to preserve the hope of review in this Court after this Court had already denied petitions in both *Shamrock* and *Ponderosa* – it is simply not realistic to suggest (U.S. Br. 19) that, if the present petitions are denied, the future will present a better chance for review of this issue than the present cases.

The Solicitor General's approach in *Gregory* and other Federal Circuit cases, not his approach in the present case, is the correct one: important errors of federal law should not go uncorrected just because they can arise in only one circuit. The impossibility of development of a square circuit conflict (in the narrow sense the Solicitor General embraces) only heightens the need for review by this Court without awaiting a conflict that can never develop.

Exempting an entire California regulatory program in a vital national industry from the Commerce Clause (indeed, under the logic of *Shamrock*, from the entire Federal Constitution and all treaties) is no small thing. When a California regulatory program has been struck down under the Constitution, this Court has been willing to grant certiorari even to review a *correct* Ninth Circuit decision, even though "the decision of the

Court of Appeals [wa]s consistent with the views of other federal courts that ha[d] addressed the issue." *Saenz* v. *Roe*, 526 U.S. 489, 498 (1999), aff'g *Roe* v. *Anderson*, 134 F.3d 1400 (9th Cir. 1998); see also *Anderson* v. *Green*, 513 U.S. 557 (1995) (per curiam) (prior grant of certiorari to address same issue, also in the absence of a circuit conflict). The Court in *Saenz* noted California's importance as "one of the largest, most populated, and most beautiful States in the Nation." 526 U.S. at 492. If correct decisions sustaining constitutional attacks on important California programs merit this Court's review, then erroneous decisions upholding important California programs against constitutional attack merit review as well. See also *Barclays Bank PLC* v. *Franchise Tax Board*, 512 U.S. 298 (1994) (reviewing, and affirming, state-court decision upholding California tax against Commerce Clause challenge).

2. The Solicitor General is likewise mistaken in urging this Court to withhold a grant of certiorari until some later date when USDA "detect[s]" the "future * * * adverse consequences" of the Ninth Circuit's errors. U.S. Br. 18-19. For one thing, as discussed below, the States of Minnesota, Nevada, and Wisconsin have already detected adverse consequences for their dairy industries. The future is now. As the Solicitor General correctly recognizes, the *current* California milk pricing and pooling laws already "raise substantial questions under the Commerce Clause" (U.S. Br. 15-16); yet the Ninth Circuit's decision shields those insular policies from any constitutional scrutiny at a time when petitioners, three States, and the entire processing industry in California have expressed concerns about the impacts of those policies.

It appears that USDA, in advising the Solicitor General, focused on a much narrower issue than the ones raised in the certiorari petitions, *i.e.*, the question whether California's 1997 pooling amendment adversely affects the Department's administration of the federal milk order program. U.S. Br. 18-19. But that point is not in question. Petitioners understand that

minimum prices can be administered at high levels or low ones. The Solicitor General did not address or dispute broader concerns raised by petitioners and the States of Minnesota, Nevada, and Wisconsin about the significant impacts of California's milk policies on dairy farmers and consumers. Those broader concerns have been acknowledged in official USDA publications.

USDA's pricing formulas have reflected and will continue to reflect California's pricing because of differences in California's pricing policies, the sheer size of the California dairy industry, and the need to maintain relative price alignment throughout the country. 65 Fed. Reg. 20094, 20096 (April 14, 2000). In a recent formal rulemaking regarding the proper price levels for raw milk used to produce manufactured dairy products, USDA had no trouble detecting an impact from the California scheme:

> [T]he Federal order program has and will continue to *reflect California's impact on dairy product prices* while establishing [cheese, butter, and nonfat dry milk] prices that are reflective of national supply and demand conditions.

67 Fed. Reg. 67906, 67937 (Nov. 7, 2002) (emphasis added).

As explained in USDA pricing decisions and in the petitions (01-950 Pet. 4-5, 12-13; 01-1018 Pet. 7), the market value of California milk products has had a powerful impact on the level of federally regulated minimum raw milk prices and the structure of federal milk pricing regulations. 67 Fed. Reg. 67906, 67937 (Nov. 7, 2002); 64 Fed. Reg. 16026-01, 16100-01 (April 2, 1999); 58 Fed. Reg. 58112, 58125 (Oct. 29, 1993). By encouraging California dairy producers to expand their production, that State has managed to depress milk and milk product prices across the country, causing "dairy farm exits"

and accelerated milk cow slaughter.[2] As one well-known milk economist succinctly put it: "More milk, more cheese, more butter, and lower milk prices!" Kenneth Bailey, *Dairy Market Outlook* (Pennsylvania State University, Nov. 22, 2002) <http://dairyoutlook.aers.psu.edu>.

Moreover, the Solicitor General considerably understates the adverse practical impacts of this issue for other States. California is an enormous player in a national – indeed, international – dairy market. Policies designed to protect California dairy farmers, if insulated from constitutional review, affect dairy farmers everywhere. That is why this Court has already heard, by way of amicus filings, from the State of Nevada and the Dairy Institute of California. That is why the Secretary of Agriculture for Wisconsin and the Commissioner of Agriculture for Minnesota wrote a detailed joint letter to the Solicitor General (App., *infra*, 1-7) expressing the serious competitive consequences for their dairy industry arising from California's pricing and pooling policies. Those state officials have had no trouble "detecting" the impact of California's protectionist legislation. As the Wisconsin and Minnesota letter states

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[2] See Economic Research Service, USDA *Livestock, Dairy & Poultry Outlook*/LDP-M-98/August 15, 2002, at 6 <http://www.ers.usda.gov/publications/so/>; see also LDP-M-95/May 29, 2002, at 1. The 1997 pooling amendments directly at issue in this case are just one part of a larger package of protective regulations that have stimulated California's dairy expansion at the expense of the rest of the country for decades. Since the third quarter of 1997, when the contested pooling rules took effect, California's inventory of dairy cows has grown by 259,000 cows. During the same period the other States lost 336,000 cows, more than a third of which were lost by the State of Wisconsin. National Agricultural Statistics Service (NASS), USDA, *Milk Production* (monthly 1997-2002) <http://www.usda.gov/nass/>; NASS, USDA, *U.S. Dairy Herd Structure* (Sept. 26, 2002) <http://jan.mannlib.cornell.edu/reports/nassr/livestock/dairy-herd/specda02.pdf>.

plainly: "California has clearly used its pricing and pooling regulations for strategic purposes." App., *infra*, 4; see also *Paul* v. *United States*, 371 U.S. 245, 252 (1963) (observing almost 40 years ago that "California policy, as respects milk, effectively eliminates competition").

All of this is another way of saying that, whether or not USDA's ability to administer the federal program is unaffected, the results of that administration are indisputably and significantly altered by California's ability to insulate its system and adversely affect (lower) national prices for cheese, butter, and nonfat dry milk – as outlined in the letter from the Wisconsin and Minnesota agriculture officials (App., *infra*, 4-6).

In the absence of a clear congressional command, California should not be free to exact these consequences without constitutional scrutiny. Yet, as the Solicitor General acknowledges, that is exactly what the Ninth Circuit – in what is now well-entrenched case law – erroneously permits. There is no reason to await further mischief.

CONCLUSION

For the reasons stated above, as well as those previously stated in the petitions, reply briefs, and amicus briefs, the petitions for writs of certiorari should be granted.

Respectfully submitted,

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DECEMBER 2002

APPENDIX

State of Wisconsin
Scott McCallum, Governor

_____

Department of Agriculture, Trade and Consumer Protection
James E. Harsdorf, Secretary

June 12, 2002

The Honorable Theodore B. Olson
Solicitor General
Department of Justice
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Washington, DC 20530-0001

Subject: Impacts of California State Milk Pricing and Pooling Regulations on Minnesota and Wisconsin Dairy Industries: Hillside Dairy v. Lyons, No. 01-950 and Ponderosa Dairy v. Lyons, No. 01-1018

These comments are being offered to assist you in responding to the Supreme Court's request for information on the Hillside Dairy et al. v. Lyons et al. and Ponderosa Dairy v. Lyons et al. cases (Petition Nos. 01-950 and 01-1018). We understand that the issue before the Supreme Court is whether California's pooling regulations are exempt from Commerce Clause scrutiny because of Section 144 of the 1996 Farm Bill. The States of Wisconsin and Minnesota do not believe that Section 144 can properly be extended to apply to other California milk regulations. In fact, our states had representatives involved in the formulation of the 1996 Farm Bill who had no reason to believe that the provision was intended to reach California's regulations relating to raw milk.

While we are not writing to provide you with a legal analysis of the statutory construction of Section 144, the States of Wisconsin and Minnesota want you to know that the outcome of these cases will have significant ramifications for

our dairy industries' ability to compete effectively and fairly for national milk and dairy markets. Thus, the States of Wisconsin and Minnesota respectfully suggest that these cases raise issues of national significance and should receive the attention of the Supreme Court. **Our position is that California should be prohibited from using their state pooling provisions under California regulations to restrict commerce involving outside milk.**

Our interests in the case lie in the economic and public significance of the dairy industries in the States of Minnesota and Wisconsin. There are 26,000 dairy farms in Minnesota and Wisconsin. These farms represent 27.6 percent of the nation's total dairy farm numbers and they produce 18.7 percent of the nation's milk.

In contrast, California's 2,195 dairy farms produce about 19.2 percent of the nation's milk. California also produces 18 percent of the nation's cheese while Minnesota and Wisconsin produce 33.3 percent. **Because of California's size in the dairy industry, their state milk pricing and pooling policies have direct impacts on national dairy markets and the interstate commerce upon which such markets rely.**

Milk and dairy products, such as cheese and butter, are sold in a highly competitive national market place. Milk and dairy products are transported long distances, often coast to coast, between production and processing locations and final sales outlets. Every state relies on interstate sales to balance the supply and demand of fluid milk and dairy products.

Milk pricing is highly regulated so as to ensure that consumers enjoy an adequate supply of milk and that dairy farmers are protected from disorderly marketing conditions. The primary vehicle for regulating milk pricing and pooling

regulations across the US currently and for decades has been the federal milk marketing order program, which is authorized under the Agricultural Marketing Agreement Act of 1937. Pub. L. No. 75-137, 296, 50 Stat. 246-249 (1937) (codified in scattered sections of 7 U.S.C.). **Federal law was used since 1937 to regulate milk pricing and pooling because of the interstate nature of milk movements.**

Historically, because of geographic isolation and a formerly contained dairy industry, California used state law to regulate milk pricing and pooling. The state's approach, as California's dairy industry has grown, has provided their dairy industry unique advantages relative to federal milk marketing orders, which apply only to specific geographic areas and only upon approval by producers in that area.

Many states in the past have tried to regulate milk pricing primarily to protect or benefit their states' farmers only to have failed repeatedly after successful court challenges. Minnesota was the most recent failed attempt with state regulation of milk pricing, which was struck down by the courts on interstate commerce grounds in 1993. Marigold Foods, Inc. v. Redalen, 834 F. Supp. 1163 (D. Minn. 1993).

California has been the significant exception in maintaining a pervasive price and pooling regulation outside of the federal milk marketing order program. This has occurred despite the state's tremendous growth in milk, cheese and nonfat dry milk production and their huge impact on the nation's dairy industry. California's reach and impacts on the dairy industry is so great that many industry persons suggest that what goes in California so goes in the rest of the US. The question is how long can California's state milk pricing and pooling regulations be allowed to create inequities for

the nation's dairy industry and the federal programs on which the dairy industry depends.

Every objective observer of the dairy industry recognizes that no state's milk market can be isolated economically in today's dairy industry and that regulatory, technical or economic changes in one area of the dairy industry affects all other areas. California has clearly used its pricing and pooling regulations for strategic purposes.

The attached March 1997 newsletter of California's Milk Producers Council recognizes the impacts of California's pricing of butter and nonfat dry milk powder on federal milk marketing order markets and California regulator's efforts to use high fluid milk pricing to compensate for their lower pricing for manufactured dairy products. In the newsletter it is stated that: " California's Class 4a butter/powder pricing have wreaked havoc on the orderly functioning of the minimum pricing programs in federal orders. The fact that California gave its butter/powder makers the ability to buy milk cheaper than their competition in the rest of the country forced USDA to create a separate Class for powder in federal orders so that their butter-powder plants could compete."

Regarding California regulators' use of the Class 1 pricing to offset lower prices for milk used in making manufactured products, the newsletter states: "By 1994, rather than correct the inadequate Class 4 price, CDFA substantially increased the Class 1 price which together with a newly established $1.70/cwt. fixed quota differential obtained this needed revenue for the overbase producer. In effect, we have tried to compensate for our low Class 4 prices by substantially raising the Class 1 price."

In recognition of CDFA's lesser willingness by 1997 to inflate Class 1 prices to subsidize low Class 4 prices, the Milk Producers Council began advocating a federal order for California both to improve prices for manufactured dairy products and to address out-of-state milk inroads in California markets which they objected to because of the impact on the pool revenues available to California dairy farmers. In 1997 CDFA changed their pooling provisions to further restrict out-of-state milk and thereby enhance the economic positions of dairy producers in California. The producers dropped their interest in exploring federal orders once CDFA tightened the restrictions on outside milk.

California's ability to manipulate its own regulations has held the rest of the country hostage. In their report (An Economic Evaluation of Basic Formula Price Alternatives-AFPC Working Paper 97-2, June 1997) to USDA for the 1995 Farm Bill's directive to reform federal milk marketing orders, a committee of university experts on milk pricing from around the US, known as the BFP University Study Committee, addressed the issue of California's impacts on federal milk order pricing.

They stated that: "Coming to grips with the Class IIIA issue requires that Federal Milk Marketing Order (FMMO) system and California state dairy policies be coordinated….However, if California fails to become part of the FMMO system and continues to maintain its current four Class pricing policy, USDA may have no alternative but to recommend four federal order Classes with an upcharge for NFDM used to make soft products and cheese…Absent such a regulation there would be incentives to locate soft product and cheese plants in California to take advantage of lower ingredient price and gain a competitive edge in dairy product markets."

In USDA's proposal to reform federal milk marketing orders (Federal Register/Vol. 64. No. 63/ Friday, April 2, 1999/ Proposed Rules-page 16109-16118), one of the criteria used to establish Class I (fluid milk) pricing under federal orders was to "Facilitate orderly marketing with coordinated system of prices." The decision goes on to say: "A system of Class I prices needs to be coordinated on a national level" and that "in supplying milk for manufactured products, demand for manufactured products influences a market's ability to procure milk for Class I needs…the adopted Class I pricing structure appropriately considers all uses of milk as a national Class I price structure." California dairy supply and demand factors has to be used by USDA to establish federal order prices nationally even though USDA could not include California as a federal order.

We cite these references to show that California's milk pricing regulations are hugely impactful on the nation's dairy industry as well as on federal regulations. California producers recognize this fact. While Minnesota and Wisconsin do not directly ship fluid milk into [California], California's ability to restrict such movements from other states is inherent to their ability to create advantages for their entire cheese, butter and nonfat dry milk manufacturers relative to our own. The result directly disadvantages our dairy industries abilities to compete fairly with California. Therefore, we encourage you to recognize the broad importance and impacts of the Hillside and Ponderosa Dairy Petitions as you prepare to provide information to the Supreme Court.

If you need additional information, please contact me at 608/224-5015 or Will Hughes, my dairy policy director, at 608/224-5142. Thank you for your consideration.

Sincerely

/s/
James E. Harsdorf
Secretary
Wisconsin Dept. of Agriculture, Trade and Consumer Protection

/s/
Gene Hugoson
Commissioner
Minnesota Dept. of Agriculture

cc

Edwin S. Kneedler, Deputy Solicitor General
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[attachment omitted in printing; all emphases are in the original]