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

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

Petitioners accept the Solicitor General's formulation of the first question presented in his cert.-stage amicus brief:

1. Whether 7 U.S.C. § 7254 exempts California's pricing and pooling regulations from scrutiny under the Commerce Clause.

The second question presented (originally presented in the petition in No. 01-1018) is narrower than the second question presented in the Solicitor General's cert.-stage amicus brief and is as follows:

2. Whether substantive judicial review of discriminatory effect under the Privileges and Immunities Clause is foreclosed as a matter of law when state discrimination is facially based on the out-of-state location of a farm or business, but the challenged state statute does not expressly refer to out-of-state "residency" or "citizenship."

RULE 24.1(b) AND 29.6 STATEMENT

Petitioners in No. 01-950 are Hillside Dairy, Inc., A&A Dairy, L&S Dairy, and Milky Way Farms. Petitioners in No. 01-1018 are Ponderosa Dairy, Pahrump Dairy, Rockview Dairies, Inc., and Darrel and Diane Kuiper, d/b/a D. Kuiper Dairy. Respondents in both cases are William J. Lyons, Jr., Secretary of the California Department of Food and Agriculture, successor to Ann M. Veneman, Secretary of the California Department of Food and Agriculture at the time these lawsuits were filed; and Robert Tad Bell, Undersecretary of the California Department of Food and Agriculture, successor to A.J. Yates, Deputy Secretary of the California Department of Food and Agriculture at the time these lawsuits were filed. See 01-950 Pet. App. A14 nn.* & 1 (noting substitution of Lyons for Veneman); *id.* at A1 (listing Yates as a defendant-appellee); Sup. Ct. R. 35.3. Ms. Veneman is now the U.S. Secretary of Agriculture. Mr. Yates is now the Administrator of the Agricultural Marketing Service of the U.S. Department of Agriculture.

None of the corporate petitioners has issued stock or securities that are publicly traded, and none of the petitioners has a corporate parent, subsidiary, or affiliate that has issued publicly traded stock or securities.

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A15)[1] is reported at 259 F.3d 1148. The order denying rehearing and rehearing en banc (Pet. App. A59-A60) is unreported. The opinion and order of the district court granting summary judgment for respondents (Pet. App. A16-A22) is unreported.

JURISDICTION

The judgment of the court of appeals was entered August 9, 2001 (Pet. App. A1). Rehearing was denied September 24, 2001 (Pet. App. A59). The petitions for a writ of certiorari were filed December 26, 2001, and granted January 10, 2003. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Commerce Clause of Article I, Section 8, of the Constitution provides: "The Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

The Privileges and Immunities Clause of the Constitution, Art. IV, § 2, cl. 1, provides: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

Sections 143-145 of the Federal Agricultural Improvement and Reform Act of 1996 (1996 Farm Bill), Pub. L. No. 104-127, 110 Stat. 888, 915-918 (codified at 7 U.S.C. §§ 7253-7255), appear at JA 17-22 and at Pet. App. A65-A70.

California Food & Agric. Code § 35784 provides: "Market milk, at the time of delivery to the consumer, shall contain not

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[1] Citations to "Pet. App." are to the appendix to the petition in No. 01-950.

less than 3.5 percent of milk fat and not less than 8.7 percent solids not fat. The minimum percentages of milk fats and solids not fat required by this section may vary by an amount no greater than 0.1 of 1 percent, provided that the total combined percentages of milkfat and solids not fat, at the time of delivery to the consumer, shall equal or exceed 12.2 percent."

Excerpts of the California Department of Food and Agriculture's Pooling Plan for Market Milk, as amended, effective July 1, 1997, appear at JA 32-60.

STATEMENT

California engages in milk product *compositional* regulation as well as *economic* regulation of raw, unprocessed milk. So does the federal government.

California's product composition regulations include standards of identity for, among other things, milk that is packaged and consumed as a beverage. Those standards are contained in various sections of the Milk and Milk Products Act of 1947, Division 15 of the California Food and Agricultural Code. See Cal. Food & Agric. Code §§ 32501-39912. These standards of identity for fluid milk are sometimes referred to as "fluid milk standards" or "product composition regulations." The standard for packaged whole milk in Section 35784 includes higher requirements for "solids not fat" (*e.g.*, protein, lactose, and minerals) content of certain milk than the corresponding federal requirements. See also Cal. Food & Agric. Code § 38181, 38191, 38211. The California product composition requirements are administered by the Milk and Dairy Foods Control Branch of the California Department of Food and Agriculture (CDFA). See http://www.cdfa.ca.gov/ahfss/mdfc. Federal standards of identity and composition for milk and other food products are administered by the Food and Drug Administration (FDA). See 21 U.S.C. §§ 341, 371; 21 C.F.R. Parts 130-169; 21 C.F.R. § 131.110 (milk standards). Food product composition standards, also called "standards of

identity," are essentially standardized recipes to correspond with specific product names. See, *e.g.*, *62 Cases of Jam* v. *United States*, 340 U.S. 593 (1951); *Federal Security Administrator* v. *Quaker Oats Co.*, 318 U.S. 218 (1943).

California's economic regulation of milk includes milk pricing laws, milk pooling laws, and corresponding regulations. California's raw milk pricing laws are contained in the Milk Stabilization Act, Division 21, Part 3, Chapter 2, of the California Food and Agriculture Code. See Cal. Food & Agric. Code §§ 61801-62403; JA 23-25. California's milk pooling laws are contained in the Gonsalves Milk Pooling Act, Division 21, Part 3, Chapters 3 and 3.5, of the California Food and Agriculture Code. See Cal. Food & Agric. Code §§ 62700-62756; JA 25-31. The Dairy Marketing Branch of CDFA administers two Stabilization Plans under the Milk Stabilization Act. See http://www.cdfa.ca.gov/dairy/stabplans/ncastabplan.PDF; http://www.cdfa.ca.gov/dairy/stabplans/scastabplan.PDF. The Milk Pooling Branch of CDFA administers the Pooling Plan under the Milk Pooling Act. See JA 32-60 (1997 version of Pooling Plan); http://www.cdfa.ca.gov/mkt/mp/POOLPLAN_09-01.pdf (current version).

These two statutes and the corresponding plans are often referred to together as California's system of milk "pricing and pooling regulations." The U.S. Department of Agriculture (USDA) administers the corresponding federal plans – known as "Federal Milk Marketing Orders" (FMMO). See 7 C.F.R. §§ 1000-1135; see also 7 U.S.C. § 608c; *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 341-343 (1984).

This case concerns a statute – Section 144 of the 1996 Farm Bill, 7 U.S.C. § 7254 (JA 20-21) – that negates federal preemption of certain aspects of California's *compositional*

regulation of beverage milk.[2] No one disputes that a purpose – if not *the* purpose – of the statute was to protect California's higher fluid milk standards from preemption under the Nutrition Labeling and Education Act of 1990 (NLEA), 21 U.S.C. § 343-1(a), a statute administered by the FDA. According to the Ninth Circuit, the statute also constitutes unmistakably clear congressional permission for California to engage in *economic* regulation through its milk pricing and pooling plans without regard to whether any aspect of those plans would otherwise violate the Commerce Clause. Petitioners contend, by contrast, that Section 144 does not broadly exempt California's pricing and pooling plans from *any* body of federal law, and does not exempt *any* body of California law from scrutiny under the Commerce Clause. Accord U.S. Br. 8-9 (filed Dec. 4, 2002).

The individual petitioners also contend that the 1997 amendments to California's Pooling Plan discriminate against them on the basis of out-of-state residency, in violation of the Privileges and Immunities Clause. The merits of the Privileges and Immunities Clause claim, like the merits of the Commerce

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[2] Section 144 provides in full:

> **§ 7254. Effect on fluid milk standards in State of California**
>
> 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.

Clause challenge to the 1997 amendments by all petitioners, are not before this Court. The Ninth Circuit did not decide whether there is "substantial reason for the discrimination beyond the fact that they are citizens of other States," *Toomer* v. *Witsell*, 334 U.S. 385, 396 (1948), because it denied that any discrimination on the basis of citizenship had occurred. To reach that conclusion, the Ninth Circuit examined only the face of the 1997 amendments, which in explicit terms discriminate on the basis of where milk is produced rather than on the basis of the citizenship of those producing it. Despite *Chalker* v. *Birmingham & N.W. Ry.*, 249 U.S. 522 (1919), which condemns "laws which *in their practical operation* materially abridge or impair the equality of commercial privileges secured by the federal Constitution to citizens of the United States" (*id.* at 526-527 (emphasis added)), the Ninth Circuit refused to consider the individual petitioners' factual contention that milk production is so closely tied to residency that discrimination on the basis of the location of the dairy farm is in practical operation discrimination on the basis of the citizenship of the dairy farmer.[3]

Petitioners contend that the Ninth Circuit erred both in construing 7 U.S.C. § 7254 to foreclose any challenge under the Commerce Clause, and in construing the Privileges and Immunities Clause to disallow claims in the absence of *facial* citizenship discrimination without regard to the practical effect of a state law or regulation. Petitioners do not ask the Court to resolve the complex merits of their constitutional challenges to the 1997 amendments to California's Pooling Plan, merits

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[3] This factual contention was not developed below, as the Privileges and Immunities Clause claims were dismissed under Fed. R. Civ. P. 12(b)(6). See C.A. Excerpts of Record Tab 8. However, as petitioners pointed out in briefs to the courts below, the most recent Census of Agriculture reveals that 93% of reporting dairy farm operators reside on the farm they operate. USDA, 1997 CENSUS OF AGRICULTURE Table 51, http://www.nass.usda.gov/census.

issues that have never been fully developed below because of the lower courts' dismissal of petitioners' claims on threshold grounds. Rather, "if the Court were to * * * reverse on the Section 7254 question" and the question whether the Privileges and Immunity Clause applies at all, "it would be appropriate to remand the underlying Commerce Clause" and Privileges and Immunities Clause "question[s] for consideration by the lower courts in the first instance." U.S. Br. 17 (filed Dec. 4, 2002).

A. California's Milk Product Composition Regulation and Stabilization and Pooling Plans

Single-state economic regulation of milk has been difficult ever since this Court construed the Commerce Clause in *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935), to forbid the States from setting minimum prices for milk purchased in interstate commerce. However, Congress authorized the U.S. Secretary of Agriculture to establish and maintain "orderly marketing conditions for agricultural commodities in interstate commerce." 7 U.S.C. § 602(1); see *Block* v. *Community Nutrition Inst.*, 467 U.S. at 346 ("The Act contemplates a cooperative venture among the Secretary, handlers, and producers the principal purposes of which are to raise the price of agricultural products and to establish an orderly system for marketing them.").

Today, almost all of the 48 contiguous States are covered by the Federal Milk Marketing Order (FMMO) program. The major exception is California. Among other things, the federal program contains its own pricing and pooling mechanisms. See generally *West Lynn Creamery, Inc.* v. *Healy*, 512 U.S. 186, 189 n.1 (1994); *Block* v. *Community Nutrition Inst.*, 467 U.S. at 343.

California has been regulating fluid milk standards for beverage milk sold at retail since at least 1907. See *Ex parte Hoffman*, 155 Cal. 114, 116-117, 99 P. 517, 518 (1909). During the 1990s, certain California composition and labeling standards for packaged fluid milk were preempted by those administered by the FDA under the NLEA, 21 U.S.C. § 343-

1(a). See *Shamrock Farms Co.* v. *Veneman*, No. CIV-S-95-318, slip op. 3 (E.D. Cal. June 5, 1995) (Levi, J.). Section 144 of the 1996 Farm Bill – whatever other effects may be in dispute – gave California an exemption from the preemptive effect of the NLEA with regard to fluid milk fortification. Thus, California requires fluid milk processors to fortify beverage milk that is sold at retail with minimum levels of solids not fat (using non-fat dry milk or condensed milk) that exceed federal composition and labeling standards under the NLEA. Cal. Food & Agric. Code § 35784.

California, like USDA, also engages in economic regulation of raw milk. Since the 1930s, California has regulated processors (those who convert raw milk to finished dairy products such as beverage milk, sour cream, ice cream, cheese, and butter) by requiring that California processors pay dairy farmers minimum prices when purchasing raw milk. See, *e.g.*, Stabilization and Marketing Plan for Market Milk, As Amended, for the Northern California Marketing Area <http://www.cdfa.ca.gov/dairy/stabplans/ncastabplan.PDF>. Raw milk is classified according to the end product for which it is used. California's five Classes (1-3, 4a, and 4b) include Class 1, fluid/beverage milk, and Classes 4a and 4b, nonfat dry milk, butter, and hard cheese. See Calif. Food & Agric. Code §§ 61932-61935. A processor purchasing raw milk for conversion to fluid milk must pay the Class 1 price; a processor purchasing raw milk for conversion to hard cheese must pay the Class 4b price. Generally, the highest minimum prices apply to Class 1 milk and the lowest to Class 4a or 4b milk.

As in the federal program (see *West Lynn*, 512 U.S. at 189 n.1), California has since 1969 administered a revenue equalization pool to redistribute among dairy farmers revenue from the sale of milk at various classified prices. See JA 32-60 (1997 version of Pooling Plan); http://www.cdfa.ca.gov/mkt/mp/POOLPLAN_09-01.pdf (current version). Minimum price regulation – described above and carried out through the Stabil-

ization Plans – results in different prices for the same raw milk depending on whether it is used by the processor for Class 1, 2, 3, 4a, or 4b purposes.

To limit competition for and transaction costs associated with sales to the highest paying (generally Class 1) processors, California dairy farmers agreed (by rule and referendum) to pool their revenue and divide it up on a uniform or pro rata basis. The distribution is called the "blend price." There are two farm blend prices in California (called "quota" and "overbase") instead of a single blend price, as in the federal system. See CDFA, Marketing Services Division, Dairy Marketing Branch, *Glossary of Dairy Marketing Terms* <http://www.cdfa.ca.gov/dairy/appendix.html>.

The mechanics of enforcing this basic pair of concepts – that processors pay the nonuniform prices depending on the Class or Classes of products they produce, but farmers receive the blend price – are somewhat intricate. In California, CDFA is the administrator of the revenue pool. Processors are simply required to serve as "conduits" of the redistributed revenue. In this capacity a Class 1 processor pays the applicable quota or overbase blend price to the dairy farmer. The amount paid directly to farmers is "credited" against the processor's total minimum Class 1 price obligation. This total is also called the "gross pool obligation." The processor pays the remainder of the minimum Class 1 price into the Pool. The Class 1 processor, by two checks, has therefore simply accounted for the full minimum price. A Class 4a or 4b processor similarly pays the blend price to the dairy farmer. Because the blend price is generally greater than the processor's Class 4 price obligation, the processor receives from the Pool reimbursement for the difference between the blend price and the (lower) minimum Class 4a or 4b price. The Class 4 processor has therefore also simply accounted for the minimum Class 4 milk price – its gross pool obligation – while farmers have received their pooled, blend price.

In practice, most processors do not exclusively produce one Class of products and must pay the gross pool obligation based on a weighted average of the various Class prices. The weighted average applied to a hundredweight sales unit of milk (*i.e.*, 100 pounds of milk) is referred to as the "plant blend price." For example, the plant blend price for a plant processing 50% Class 1 milk at $18 per hundredweight and 50% Class 2 at $15 would be $16.50. The "plant blend price," fundamentally a processor concept that results from pricing regulation, is not to be confused with the "blend price," fundamentally a producer (dairy farmer) concept that results from pooling regulation.

Before the 1997 Pooling Plan amendments, out-of-state dairy farmers (including petitioners) were the masters of their own economic destiny. Unlike their California counterparts, who through pooling were guaranteed the blend price and eligible to own "quota" without having to compete for the best purchasers, Arizona and Nevada farmers had both the opportunity and the burden to compete for the California business worth competing for, mainly the Class 1 sales. California did not pool and redistribute the difference between the sale price (plant blend price paid) and the blend price. Rather, California processors and out-of-state farmers engaged in something more closely resembling a free-market transaction, with the total price going entirely to the seller – the out-of-state farmer. See U.S. Br. 5-6 (filed Dec. 4, 2002) ("although a handler that principally produced fluid milk had to pay money into the pool for its raw milk purchases from California dairy farms, it did not have to pay money into the pool for its purchases from out-of-state farmers").

California farmers were protected by the Pool system from having to compete for sales generating the highest minimum price, while out-of-state farmers had no such protection from competition, nor did they receive the benefits of being able to own and transfer quota. As the CDFA Milk Pooling Branch Chief explained in testimony before Congress in 1995:

> Out-of-state dairy farmers may not own quota. *In compensation,* out-of-state dairy farmers shipping to an instate plant receive the plant blend price. Thus, it is possible for an out-of-state dairy farmer shipping to an instate fluid milk plant (Class 1 plant) to receive a higher price than an instate dairy farmer receiving the quota price.

Formulation of the 1995 Farm Bill (Dairy Title—Technical Considerations): Hearings Before the Subcomm. on Livestock, Dairy, and Poultry of the House Comm. on Agriculture, 104th Cong., 1st Sess. 347 n.13 (1995) (prepared statement of Glenn T. Gleason, Chief, Milk Pooling Branch, CDFA) (emphasis added); see also Pooling Plan § 104, JA 32; U.S. Br. 4 n.1 (filed Dec. 4, 2002).

After 30 years of staying out of the transactions between out-of-state dairy farmers and California processors, CDFA's economic regulatory arm in July 1997 implemented amendments to the California Pooling Plan that forced out-of-state dairy farmers to participate in the California Pool, but only as second-class citizens. As the Solicitor General has observed, "out-of-state dairy farmers, unlike California dairy farmers, are not guaranteed any minimum price for their raw milk (much less the quota price)." U.S. Br. 6 (filed Dec. 4, 2002); see also *id.* at 17. CDFA adopted the challenged amendments after repeated requests by California dairy farmer groups to address what was widely referred to as the "out-of-state milk problem." See C.A. E.R. Tab 11K at 2. Petitioners' challenges to the 1997 amendments are the subject of these lawsuits.

B. This Case

Petitioners are corporations and individuals who operate dairy farms in Nevada and Arizona. In two separate actions that are now consolidated, they challenged the constitutionality of the 1997 amendments to the California Pooling Plan. They contended that the Pooling Plan, and underlying provisions of the Milk Stabilization and Milk Pooling Acts, directly burden

and discriminate against out-of-state dairy farmers in violation of the Commerce Clause and the Privileges and Immunities Clause.

Without reaching the constitutional merits, the district court rejected those claims. In granting summary judgment for the State on the Commerce Clause claims, the court relied on *Shamrock Farms Co.* v. *Veneman*, 146 F.3d 1177 (9th Cir. 1998), cert. denied, 525 U.S. 1105 (1999), which the court understood as holding that 7 U.S.C. § 7254 "immunized California's milk pricing and pooling laws from Commerce Clause challenge." Pet. App. A19. The court dismissed the claim under the Privileges and Immunities Clause on the ground that "the pooling plan does not discriminate against nonresidents." Pet. App. A5; C.A. E.R. Tab 8 at 5.

The Ninth Circuit affirmed. Pet. App. A1-A15. The Ninth Circuit agreed with the district court that *Shamrock* controlled the Commerce Clause claim. Although *Shamrock* had addressed California's milk composition requirements for fluid milk and its fortification allowance for in-state handlers, not every pricing and pooling requirement for raw milk, the Ninth Circuit held that "*Shamrock* broadly refers to the pricing and pooling laws and finds them to be closely related to California's composition requirements and protected from Commerce Clause challenges." Pet. App. A7-A8. Relying (*id*. at A8) on legislative history cited in *Shamrock*, without any analysis of whether that legislative history had anything to do with economic regulation of raw milk, the court concluded that California's raw milk and fluid milk regulations are "closely related" and that it "follows that the 1997 amendments which directly affect raw milk, indirectly affect fluid milk." Pet. App. A10. The Ninth Circuit believed that that conclusion somehow meant that application of the Commerce Clause to California's raw milk Stabilization and Pooling Plans would somehow "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." 7 U.S.C. § 7254.

The Ninth Circuit also affirmed the dismissal of the claims under the Privileges and Immunities Clause. The court dismissed the individual dairy owner petitioners' claims because "[t]he amendments do not, *on their face*, create classifications based on any individual's residency or citizenship." Pet. App. A14 (emphasis added). Analyzing only the face of the Pooling Plan, not its practical effect, the court observed that "the classifications the pooling plan amendments create are based on the location where milk is produced," not on "any individual's residency or citizenship." *Ibid.*[4]

SUMMARY OF ARGUMENT

Only an unmistakably clear statute will suffice to exempt state regulations from Commerce Clause scrutiny. The text of the statute is by far the best evidence of whether Congress has spoken with clarity. Ambiguous statements will not suffice.

Section 144 of the 1996 Farm Bill does not broadly protect California's economic regulation of raw milk from federal law, nor is the Commerce Clause part of the federal law from which Section 144 provides protection. The statute does *not*, as the Ninth Circuit claimed (Pet. App. A10), "appl[y] to 'any provision of law' that 'directly or indirectly' has an effect on fluid milk." It gives California permission, free from certain constraints of federal law, to use direct or indirect means to "estab-

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[4] The court also held that the corporate petitioners could not raise a Privileges and Immunities Clause claim. Pet. App. A13. Petitioners did not advance corporate claims in the court of appeals and do not challenge that aspect of the decision. See *Paul* v. *Virginia*, 75 U.S. (8 Wall.) 168, 178-179 (1869).

lish or continue to effect" requirements regarding two specified subjects that are a small subset of the subjects that have to do with packaged fluid milk. It is not even remotely plausible to say that the *entire* range of things covered by California's pricing and pooling plans has anything to do with percentage and labeling of milk solids and solids not fat, let alone that every provision is necessary "to establish or continue to effect" fluid milk composition and labeling requirements. Indeed, Congress in this very same legislation demonstrated that it knows how to use the vocabulary of California pricing and pooling regulation and would not likely refer to that body of regulation through the language it used in Section 144.

Furthermore, Congress made no reference to the Commerce Clause. The "provision[s] of law" courts are not to "construe[]" to invalidate California's fluid milk composition standards are statutory. Both the use of the verb "construe" and the pairing of "this Act" with "any other provision of law" suggest that the *most* natural reading of the text is that it does not refer to the Constitution; the applicable clear-statement rule precludes construing ambiguous text as a Commerce Clause exemption.

Legislative history *cannot* supply the necessary clear statement. Even if it could, however, the legislative history of Section 144 would help respondents not one bit. From its origin as one item on the wish list of Congressman Bill Thomas, through the Conference Report and even subsequent floor statements, Section 144 was *never* described as having anything to do with the Commerce Clause and *always* described as a provision that would preclude the NLEA from preempting California's historical composition standards for fluid milk.

The Commerce Clause challenge itself is not before the Court but is a very serious one. Both the California Legislative Counsel and the U.S. Solicitor General have observed its seriousness. The 1997 amendments project California's legislation into surrounding States and do so to suppress or mitigate the consequences of competition between States.

The Ninth Circuit also erred at the threshold of analysis of Privileges and Immunities Clause jurisprudence by holding that the individual petitioners' claims must fail because the discrimination effected by the milk pooling scheme is based on the location of the farm where the milk is produced, and not the residency or citizenship of the producer. In the relevant areas of its jurisprudence, this Court has emphasized substance, not form. In particular, *Chalker* v. *Birmingham & N.W. Ry.*, 249 U.S. 522 (1919), and *United Building & Construction Trades Council* v. *Mayor and Council*, 465 U.S. 208 (1984), construe the Privileges and Immunities Clause in ways that directly foreclose the Ninth Circuit's analysis.

ARGUMENT

I. SECTION 144 OF THE 1996 FARM BILL DOES NOT EXEMPT CALIFORNIA'S STABILIZATION AND POOLING PLANS FROM SCRUTINY UNDER THE COMMERCE CLAUSE

A. Only an Unmistakably Clear Statute Will Suffice to Exempt State Statutes or Regulations from Commerce Clause Scrutiny

"Congress, if it chooses, may * * * confer[] upon the States an ability to restrict the flow of interstate commerce that they would not otherwise enjoy." *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 44 (1980). "[F]or a state regulation to be removed from the reach of the dormant Commerce Clause," however, "congressional intent must be *unmistakably clear*." *South-Central Timber Dev., Inc.* v. *Wunnicke*, 467 U.S. 82, 91 (1984) (emphasis added); see also *Wyoming* v. *Oklahoma*, 502 U.S. 437, 458 (1992); *Maine* v. *Taylor*, 477 U.S. 131,139 (1986); *C&A Carbone, Inc.* v. *Town of Clarkstown*, 511 U.S. 383, 408 (1994) (O'Connor, J., concurring in the judgment). The Ninth Circuit itself has paid lip service to the need for "unmistakably clear" congressional intent. Judge Reinhardt's opinion for the Ninth Circuit in *Shamrock*, for example,

acknowledged that only an unmistakably clear congressional intent would suffice. 146 F.3d at 1180. In determining that Congress had indeed spoken with unmistakable clarity, however, not only did the Ninth Circuit err; the Ninth Circuit completely failed to analyze the clarity of the materials on which it relied to demonstrate a supposed congressional intent.

"The requirement that Congress affirmatively contemplate otherwise invalid state regulation is mandated by the policies underlying dormant Commerce Clause doctrine." *South-Central Timber*, 467 U.S. at 91-92. The rationale for the clear-statement rule in this area of the law is that, "when Congress acts, all segments of the country are represented, and there is significantly less danger that one State will be in a position to exploit others." *Id.* at 92. From that rationale, it necessarily follows that the text of the statute is the best evidence of whether congressional intent has been manifested with sufficient clarity; and that, if legislative history is to be examined at all, it must manifest a congressional decision that is both *collective* and *clear*. Statements of witnesses at a subcommittee hearing – on which the Ninth Circuit relied in both *Shamrock*, 146 F.3d at 1182, and the decision below, Pet. App. A8 – are particularly poor candidates to manifest clear, collective intent.

In numerous cases in various areas of the law, this Court has emphasized the stringency with which it will apply clear-statement rules. "In traditionally sensitive areas, * * * the requirement of [a] clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Gregory* v. *Ashcroft*, 501 U.S. 452, 461 (1991) (internal quotation marks and citations omitted). Therefore "it must be *plain to anyone reading the Act* that it covers" the subject at issue in the litigation. *Id.* at 467 (emphasis added). It is not enough that it "could be broadly read." *Raygor* v. *Regents of University of Minnesota*, 534 U.S. 533, 542 (2002); see also *id.* at 544-545. "Evidence of

congressional intent must be both unequivocal and textual." *Dellmuth* v. *Muth*, 491 U.S. 223, 230 (1989).

Specific words may not be required, but an absence of ambiguity is. Affirmative statements, not inference, must be found. *Sporhase* v. *Nebraska ex rel. Douglas*, 458 U.S. 941, 960 (1982). "[W]hen Congress has not 'expressly stated its intent and policy' to sustain state legislation from attack under the Commerce Clause, [courts] have no authority to rewrite the legislation based on mere speculation as to what Congress 'probably had in mind.'" *New England Power Co.* v. *New Hampshire*, 455 U.S. 331, 343 (1982) (citation omitted).

Section 144 of the 1996 Farm Bill protects some body of California law against some body of federal law. In light of the applicable clear-statement rule, the statute must be examined both to ascertain whether the Stabilization and Pooling Plans are clearly part of the California law to be protected, and whether the Commerce Clause is clearly part of the federal body of law from which Section 144 protects. Neither proposition is true. As the Solicitor General correctly observed in his cert.-stage amicus brief, "Section 7254 does not contain any indication at all, much less an 'unmistakably clear' one, that Congress intended to immunize California's milk pricing and pooling laws from Commerce Clause scrutiny." U.S. Br. 10 (filed Dec. 4, 2002).

B. Section 144 of the 1996 Farm Bill Contains No Unmistakably Clear Indication – Indeed, No Indication at All – That Congress Intended to Immunize California's Pricing and Pooling Laws from Commerce Clause Scrutiny

1. The text of Section 144 refers to neither pricing and pooling laws nor the Commerce Clause

Section 144 of the 1996 Farm Bill, 7 U.S.C. § 7254, provides in full:

> **§ 7254. Effect on fluid milk standards in State of California**
>
> 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.

The statute is obviously designed to provide some degree of protection from federal law for California's product composition and labeling requirements for packaged fluid milk. Petitioners respectfully submit, however, that it does not broadly protect California's economic regulation of raw milk from federal law, nor is the Commerce Clause part of the federal law from which Section 144 provides protection.

a. Section 144 does not broadly protect California's economic regulation of raw milk from federal law

In *Shamrock*, and again in the decision below, the Ninth Circuit interpreted the phrase "any other provision of law," from which specified California regulations are protected, to include the Commerce Clause. Even if that interpretation was right – and it was not right (see pp. 23-25, *infra*) – several further interpretive violations of the "clear statement" rule are required to conclude that Congress immunized *all* things California does with its pricing and pooling plans to impede interstate commerce. And those leaps are not sustainable as a matter of ordinary statutory interpretation, let alone under the clear-statement principle applicable to statutes said to abrogate the Commerce

Clause. See U.S. Br. 11 (filed Dec. 4, 2002) ("Section 7254, even if understood to provide a Commerce Clause immunity for some state laws, does not reach the laws at issue here.").

The Ninth Circuit at least understood that the Pooling Plan concerns *raw* milk, whereas the statute refers to regulation of *fluid* milk sold at retail. To bridge the gap between the statute's references to regulation of fluid milk sold at retail and its holding that regulation of raw milk is also protected, the Ninth Circuit engaged in a wholesale rewriting of the statutory text. In the court's view:

> Ponderosa and Hillside's argument is unpersuasive because § 144 applies to "any provision of law" that "directly or indirectly" *has an effect on fluid milk*. Raw milk and fluid milk are closely related. *It follows that the 1997 amendments which directly* ***affect*** *raw milk, indirectly* ***affect*** *fluid milk.*

Pet. App. A10 (emphasis added). But Section 144 simply does not apply to any provision of law that directly or indirectly has an effect on fluid milk. In statutory context, "directly or indirectly" modifies "establish or continue to effect." Thus, whatever the statute gives California permission to do, California may do "directly or indirectly." That is hardly the same thing as saying that California has been given permission to do anything and everything that directly or indirectly has any effect on fluid milk. Rather, California has been given permission, free from certain constraints of federal law, to "establish or continue to effect" requirements "*regarding*" two specified subjects that are a small subset of the subjects that have to do with fluid milk.

Suppose California had been given permission, "directly or indirectly, to establish or continue to effect any law, regulation, or requirement regarding soccer or football." Soccer and football are part of the universe of sports, just as the composition and labeling subjects identified in Section 144 are part of the universe of fluid milk regulation. The Ninth Circuit's logic

would require that the statute, ostensibly just about football and soccer, be construed as permission to engage in the regulation of all sports and indeed all exercise:

> Ponderosa's and Hillside's argument is unpersuasive because [the hypothesized statute] applies to "any provision of law" that "directly or indirectly" has an effect on [sports]. [Exercise] and [sports] are closely related. It follows that the 1997 amendments which directly affect [exercise], indirectly affect [sports].

The specification of two subjects that the protected requirements must "regard[]" would be rendered meaningless by this substitution of the general universe to which those two subjects belong (sports) for the two specified subjects themselves.

Not only did the Ninth Circuit read "directly or indirectly" to modify a phrase it does not modify, and substitute the broad universe of "fluid milk" for the two specified subjects within that universe, but also the Ninth Circuit introduced a concept – "has an effect on fluid milk" – that is to be found nowhere in the statute. Suppose – contrary to fact – that the statute did say "fluid milk" instead of specifying two *aspects* of fluid milk regulation that Congress wished to protect. Even so, it would read: "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 fluid milk." Such a statute still would require that the protected "law, regulation, or requirement" be one "*regarding*" fluid milk. California would be given some leeway to "establish or continue to effect" such requirements by indirect means as well as direct ones, but a "law, regulation, or requirement regarding fluid milk" – not a law, regulation, or requirement that "has an effect on fluid milk" – would still have to be identified. Because the verb "effect" appears in the statute, the Ninth Circuit seems to have leaped to the conclusion that it was proper to rewrite the statute as if it used the noun "effect" in a different place in the

statute, or used the verb "affect" in a different place in the statute, but the concepts of "affecting" and "having an effect on" are wholly absent from the statute Congress actually wrote. Particularly in a context in which a "clear statement" principle applies, such loose construction of statutory text is indefensible.

The universe of state laws and regulations that were given some form of protection from federal preemption is specified in the statute. That universe consists of requirements "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." On the statute's face, the protected requirements have to do with composition and labeling of fluid (*i.e.*, processed) milk, specifically with respect to the percentage of milk solids or solids not fat. It is a leap to get from those statutory terms to *any* of California's economic regulations, let alone California's dairy farmer pooling provisions for raw (*i.e.*, unprocessed) milk. See U.S. Br. 11 n.2 (filed Dec. 4, 2002).

One particular form of economic regulation that is part of California's stabilization plans is a so-called "fortification allowance" (*i.e.*, discounted minimum price) given to California processors in recognition of the fact that California requires higher fat and solids-not-fat content in fluid milk than does the federal government and that money must be spent to bring raw milk up to California standards. *E.g.*, Stabilization and Marketing Plan for Market Milk, As Amended, for the Northern California Marketing Area, § 303(B)-(E) <http://www.cdfa.ca.gov/dairy/stabplans/ncastabplan.PDF>. There is enough of a relationship between the fortification allowance, on the one hand, and the types of product composition and labeling requirements identified in Section 144, on the other, to create some arguable (though very thin) support for the Ninth Circuit's determination in *Shamrock* that the fortification allowance was necessary for California's fluid milk standards or labeling requirements. See 146 F.3d at 1182 (relying on counsel's sup-

posed concession during oral argument that the fortification allowance was "adopted in order to assist milk producers [*sic*] in complying with the milk content provisions"). That holding may well be wrong, but is not before the Court in this case.[5]

The further leap that must be made to bring the entirety of California's pricing and pooling plans within the universe of state laws protected by Section 144, however, is utterly indefensible. Section 144 is exclusively about the percentage of, and labeling with respect to, milk solids and solids not fat, *not* pricing and pooling. It is designed to protect Cal. Food & Agric. Code § 35784 and related regulatory requirements administered by the Milk and Dairy Foods Control Branch of CDFA, not to protect the unmentioned Stabilization and Pooling Plans administered by other branches of CDFA. Nor is it even remotely plausible to say that the *entire* range of things covered by the pricing and pooling plans has anything to do with percentage and labeling of milk solids and solids not fat, let alone that every provision is necessary "to establish or continue to effect" fluid milk composition and labeling requirements – which is, after all, the statutory text that must make it "plain to anyone reading the Act" (*Gregory*, 501 U.S. at 467) that the pricing and pooling laws are exempted from the Commerce Clause.

Believing that it had already determined in *Shamrock* that *all* California pricing and pooling requirements are immunized from the Commerce Clause, the Ninth Circuit did not engage in

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[5] *Shamrock* was certainly wrongly decided, in any event, because the federal laws against which Section 144 protects do not include the Commerce Clause (see pp. 23-25, *infra*); and Shamrock's complaint in this regard was "that California processors receive a competitive advantage against out-of-state processors because California only gives the fortification allowance to in-state processors." 146 F.3d at 1179. Furthermore, California's fluid standards have been in effect since at least 1907, see *Ex parte Hoffman*, 155 Cal. at 116-117, 99 P. at 518, but pooling was not adopted until 1969 – proving that pooling is unnecessary to maintain fluid milk standards.

any analysis – other than the hopelessly confused passage quoted above – of the relationship between the economic regulations at issue in this case and the product composition and labeling subjects mentioned in Section 144. And it is revealing what respondents had to say on that subject in their brief in opposition to the certiorari petitions. Only on page 15 did respondents address that relationship (the brief in opposition is otherwise largely devoted to the Commerce Clause merits, which are not before the Court). All they could say was "[e]ach of the challenged provisions is interrelated to California's fluid milk standards" without saying *why* or *how* the economic regulations petitioners challenge are necessary "to establish or continue to effect" the product composition and labeling requirements for which Congress created some degree of protection. It is a truism that "really, universally, relations stop nowhere" (*New York State Conf. of Blue Cross & Blue Shield Plans* v. *Travelers Ins Co.*, 514 U.S. 645, 655 (1995)), so that one can with a straight face claim that almost anything is "interrelated" to almost anything, but the statute actually before the Court requires far more than interrelatedness. See also U.S. Br. 12 (filed Dec. 4, 2002). It requires that the challenged state regulation be related to the specified fluid milk standards in such a way that striking down the former under federal law would – so obviously as to satisfy the applicable clear-statement rule – prevent California from "establish[ing] or continu[ing] to effect" the latter. 7 U.S.C. § 7254. No one has come up with any plausible theory – let alone a clear statement – that even purports to explain why striking down California's 1997 pooling amendments might jeopardize its product composition standards for fluid milk.

Congress in this very same legislation demonstrated that it knows how to use the vocabulary of California pricing and pooling regulation and would not likely refer to that body of regulation through the language it used in Section 144. See U.S. Br. 11-12 (filed Dec. 4, 2002). In the immediately preceding Section 143, 7 U.S.C. § 7253 (JA 17-20), for example,

not only did Congress provide for California's voluntary entry into the FMMO system, but also it provided that "[t]he order covering California shall have the right to * * * recognize quota value." 7 U.S.C. § 7253(a)(2) (JA 17). The reference to "quota" in Section 143 is to a term that is unique to California's Pooling Act and Pooling Plan.[6] Likewise, Section 145, 7 U.S.C. § 7255 (JA 21-22) is devoted in its entirety to restrictions on allowable "manufacturing allowances" under state law. As CDFA's Glossary (see note 6, *supra*) indicates, this term is "also called make allowance" and is "[u]sed to describe factors used in establishing California Class 4a and 4b prices and federal Class III and IV prices." It is an important component of California's Stabilization (pricing) Plans. *E.g.*, Stabilization and Marketing Plan for Market Milk, As Amended, for the Northern California Marketing Area, § 300.0(D)(1), (D)(2), (E)(1)(a), (E)(1)(b) <http://www.cdfa.ca.gov/dairy/stabplans/ncastabplan.PDF>. Congress used precise terminology when it wanted to refer to aspects of the Stabilization and Pooling Plans; it did not speak of them through indirect and obscure references to California's product composition regulations.

b. Section 144 does not protect any body of California law from the Commerce Clause

Misconstruing the body of *state* law saved from federal preemption by Section 144 was not the Ninth Circuit's only error. The Ninth Circuit also misconstrued – in both the deci-

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[6] See generally CDFA, Marketing Services Division, Dairy Marketing Branch, *Glossary of Dairy Marketing Terms* <http://www.cdfa.ca.gov/dairy/appendix.html>. The glossary notes that "quota" is a California-specific term and defines it as follows: "Part of a two–tiered pricing system in California. Essentially, quota is an entitlement that allows a producer to receive a price for milk that is $1.70 per hundredweight higher than the overbase price. Originated with the inception of the milk pooling program in 1969."

sion below and *Shamrock* – the body of *federal* law *from* which the specified body of California law is exempted.

As the Solicitor General observed in his cert.-stage amicus brief (at 10-11 (emphasis in original)):

> The statutory text does not unambiguously indicate that Congress intended to exempt *any* of California's laws from the Commerce Clause. Section 7254 does not refer to the Commerce Clause specifically or to the Constitution more generally. Moreover, its directive that no provision of law "shall be construed" in a particular manner is more naturally read as referring only to non-constitutional sources of law, because Congress is not ordinarily assumed to have intended to constrain the Judiciary's authority to construe the Constitution. Cf. *City of Boerne* v. *Flores*, 521 U.S. 507, 535-536 (1997). * * * Section 7254 thus is best understood as protecting certain California laws against preemption only by "this Act" [*i.e.*, the [1996 Farm Bill]) and any other provisions of federal statutory or regulatory law.

To reach its contrary conclusion, the Ninth Circuit in *Shamrock* paid lip service to the applicable clear-statement principle, but chose a far more expansive interpretation of the statute than its natural meaning. Judge Reinhardt's opinion for the court mocked petitioners' interpretation of the statute as one that would have required the Ninth Circuit to "conclude that the Commerce Clause, or, for that matter, the Full Faith and Credit Clause, or the provision of the Twenty-Second Amendment to the Constitution that prohibits the election of any person to the Office of President more than twice, do not constitute 'provisions of law.'" 146 F.3d at 1181. But statutory interpretation requires a contextual search for *meaning*, not a one-phrase-at-a-time parsing. As the Solicitor General correctly argues, the use of a form of the verb "construe" in Section 144 is one powerful indication that Congress meant to exempt the specified California laws and regulations from

federal regulations and statutes, not the Constitution. Another powerful indication is that Congress referred to "this Act or any other provision of law," a pairing most naturally read to suggest that Congress had statutory law in mind.[7] Words are, after all, "known by the company [they] keep[]." *Sprietsma* v. *Mercury Marine*, 123 S. Ct. 518, 526 (2002) (quoting *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 575 (1995)).

The applicable clear-statement rule forecloses any contrary argument. With more than one reasonable meaning (assuming that the *Shamrock* court's reading is reasonable at all), Section 144 is ambiguous. It would *not* "be plain to anyone reading the Act" that it constitutes Congress's consent to specified state requirements that might otherwise violate the Commerce Clause. G*regory* v. *Ashcroft*, 501 U.S. at 467. "In the instances in which we have found such consent, Congress' intent and policy to sustain state legislation from attack under the Commerce Clause was expressly stated." *Sporhase*, 458 U.S. at 960 (internal quotation marks and citations omitted). There is no such express statement here.

2. The legislative history cannot provide the necessary unmistakably clear statement, and in any event does not support respondents at all

According to the Ninth Circuit in *Shamrock*, "the legislative history * * * demonstrates that Congress intended that the milk pricing and pooling scheme be included in the exemption as a means of effecting California's milk composition standards."

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[7] Congress often uses phrases such as "notwithstanding any other provision of law" in ways that make it absolutely obvious it is not attempting to provide an exemption from the Constitution. *E.g.*, 21 U.S.C. § 862b ("[n]otwithstanding any other provision of law, States shall not be prohibited by the Federal Government from testing welfare recipients for use of controlled substances"). Congress also refers often to "the Constitution and laws" of the United States. *E.g.*, 42 U.S.C. § 1983.

146 F.3d at 1182; see Pet. App. A8 (similar conclusion by panel below). No portion of the legislative history, however, supports the proposition that California's pricing and pooling regulations have been granted a blanket exemption from the Commerce Clause. Rather, "the context in which Section 7254 was enacted supports the conclusion that it was intended solely to protect California's fluid milk composition and labeling laws against preemption by federal statutes and regulations." U.S. Br. 13 (filed Dec. 4, 2002).

We respectfully submit that legislative history can *never* supply "unmistakably clear" evidence of congressional intent when such evidence is lacking from the text of the statute. That principle finds support in both this Court's cases and logic. With respect to a similar "clear statement" rule, this Court has stated that "[e]vidence of congressional intent must be both unequivocal *and textual*." *Dellmuth* v. *Muth*, 491 U.S. at 230 (emphasis added); see also *Sporhase*, 458 U.S. at 960. And the only thing that is before *all* of the 535 Members of Congress who vote on a piece of legislation and the President who signs it is the *text* of the statute, not its voluminous legislative history. If something is unclear on the face of the statute, any clearer statement in the legislative history will, at a minimum, raise doubts about whether that statement appears in legislative history rather than statutory text precisely because it could not receive the assent of a majority of each House and the signature of the President. The very failure to put the clear statement into the text of the statute precludes the conclusion that *Congress* – as opposed to some subset of its Members – has made its intent unmistakably clear. See *C&A Carbone*, 511 U.S. at 410 (O'Connor, J., concurring in the judgment) (citing *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 37 (1992); *Dellmuth* v. *Muth*, 491 U.S. at 230).[8]

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[8] See also *Lane* v. *Peña*, 518 U.S. 187, 192 (1996) (federal sovereign immunity); *Seminole Tribe* v. *Florida*, 517 U.S. 44, 56 (1996) (Elev-

If, despite these points, legislative history can *ever* provide the requisite unmistakable clarity when such clarity is absent from the text, then one would expect the text and legislative history to have several characteristics. The text would presumably make it passably, but not unmistakably, clear that Congress intended to exempt the very state laws at issue from the Commerce Clause. The legislative history would presumably be closely tied to the statutory text in a way that removed ambiguity from the very phrases being construed. It would presumably come from a very authoritative source (such as a Conference Report or, at the very least, a particularly authoritative Committee Report from one House or the other). And it would surely make explicit reference to the Commerce Clause, or *at least* the Constitution, and make explicit reference to the state laws being exempted, or *at least* make unmistakably clear reference to a genus of state laws being exempted.

Nevertheless, the Ninth Circuit gave dispositive weight to legislative history with *none* of those characteristics. The Ninth Circuit relied on two witness statements in a field hearing conducted in California by four Members of a Subcommittee long before any version of the 1996 Farm Bill was drafted. Neither witness mentioned the Commerce Clause or the Constitution at all. Neither witness mentioned "pooling." The one witness who mentioned "pricing" did so as part of a wish list of things he hoped Congress would do, but Congress granted a different one of his wishes in Section 144.

Approximately a year before the 1996 Farm Bill became law, and before any version of the bill was drafted, the Subcommittee on Dairy, Livestock, and Poultry of the House Committee on Agriculture held five hearings in dairy-producing locations around the country. See *Formulation of the 1995 Farm Bill*

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enth Amendment); *Hilton* v. *South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 204 (1991) (same); *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 243 (1985) (same).

(Dairy Title): Hearings Before the Subcomm. on Dairy, Livestock, and Poultry of the House Comm. on Agriculture, 104th Cong., 1st Sess. (1995) (*1995 Field Hearings*). In essence, Members of the Subcommittee traveled around the country to receive the initial "wish lists" of each dairy-producing region.

The California dairy industry's representatives had their say in a hearing held April 20, 1995, in Tulare, California. *1995 Field Hearings* 425-599. Congressman Bill Thomas of California did not attend the hearing in person but submitted a short written statement. Because the Ninth Circuit relied on – and badly misconstrued – this legislative history, we reproduce it nearly in full. Congressman Thomas summed up California's wish list as follows:

> As most of you know, the California dairy industry has been very successful in recent years. A substantial part of that success is due to enormous growth in California's population. There are two other factors for the California dairy industry's success that I hope the Subcommittee will allow the State to preserve.
>
> First, the State of California has for over 30 years had a set of standards for fluid milk products which ensure a high quality product. These standards require addition of nonfat solids into low fat milk, making low fat milk taste like whole milk. Milk consumers also get more calcium and protein under these standards. The standards are strongly supported by consumers in California, by dairymen and by nutritionists interested in the health of children and women.
>
> Unfortunately, national nutritional labeling requirements may lead to the termination of California's system. These standards have come under assault recently by dairymen outside the state, who wish to ship lower standard, so-called "federal milk" into California. California's fluid milk standards are one area where a state really "knows

best." The California fluid milk market is almost totally self-contained–only 1% of the state's total consumption comes from out-of-state sources. The standards are not a barrier to milk produced in other states as, until recently, all *packaged* milk entering the state conformed to California standards. In a case such as this, where a state has had a very successful program for several decades, and where any burden on outside interests is largely theoretical, I would hope the federal government would not override that system.

In addition to all the nutrition and health reasons why California fluid milk standards should remain in place, there will be a very real impact on the federal deficit if the California standards are overridden. * * *

Unless the law is amended soon, California's standards may be eliminated. To give the State the ability to preserve a system that has served Californians well, I have introduced H.R. 1298. This bill would exempt California's standards from the federal requirement. Although the bill is not before the House Agriculture Committee, I hope you would join me in supporting it.

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. Products are priced according to what the market dictates. California dairymen believe very strongly that this system must be retained. In fact, the Subcommittee may want to examine the California system, to see whether there are aspects of it which could serve as the basis for changes in the federal order system.

I also want to say a word about California's "make allowance" for manufactured dairy products. When Congress sought to override the California "make allowance" in section 102 of the 1990 Farm Bill, it involved USDA and

> dairymen in a morass. USDA recently suggested that section 102 should be rethought during development of the 1995 farm bill. In reconsidering the policy, I hope the Subcommittee will decide to allow California to retain its historic practice.
>
> The advantages of allowing California to preserve its make allowance are clear. * * *

Id. at 435-436 (underlining in original; italics added).

Congressman Thomas thus sounded three themes: (1) prevent "the federal government" from "overrid[ing]" California product composition and labeling requirements pertaining to the addition of nonfat solids into low-fat fluid milk by "exempt[ing] California's standards from the federal requirement"; (2) "retain[]" California's pricing system in general; and (3) "allow[] California to preserve its make allowance" by repealing Section 102 of the 1990 Farm Bill. With respect to *none* of those themes did Congressman Thomas mention the Commerce Clause. With respect to themes (1) and (3), he had specific amendments to federal legislation in mind, but theme (2) – retain California's pre-1995 pricing system – was merely general.

Other witnesses echoed some of the same themes – also without mention of the Commerce Clause. For example, Jim Tillison, on behalf of the Alliance of Western Dairy Producers, advocated maintaining California's "higher fluid milk standards" by "exempt[ing] California standards from NLEA preemption, remov[ing] the preemption of higher State standards by minimum Federal standards, or rais[ing] national fluid milk standards to California levels." *1995 Field Hearings* at 458; see also *id*. at 481-482 (statement of Craig S. Alexander on behalf of the Dairy Institute of California) ("Federal Milk Solids Standards. * * * It was of concern to our members that federal preemption of the California standards took place under the Nutritional Labeling and Education Act of 1990 without consid-

eration of the longstanding tradition of our program."); *id*. at 517-518 (prepared statement of A.J. Yates, Deputy Secretary of CDFA).

The Subcommittee Chairman, Congressman Gunderson, stated sympathy for the witnesses' position on NLEA relief. *1995 Field Hearings* at 476. He expressed less expectation that Congress – when it got around to drafting a bill – would give California what it wanted with respect to pricing: "[Witnesses] suggested that * * * California should have its own state order, its own state pricing system, its own state standards, its own state make allowance, but yet you want to have access to a national price support program to a national market. * * * I am not sure God could pass that through the U.S. Congress." *Id*. at 477.

As of February 9, 1996, when the House Committee on Agriculture reported favorably on a version of what was to become the 1996 Farm Bill, the proposed solution to the NLEA problem was to amend the federal standards to be the same as California's for solids-not-fat and milk-fat percentages. See H.R. REP. NO. 104-462, at 68, 94 (1996), *reprinted in* 1996 USCCAN 611, 641, 668. The Committee made no mention of the Commerce Clause.

On the floor of the House on February 28, 1996, however, Congressman Solomon of New York introduced an amendment – which ultimately passed – that replaced the entire dairy title of the Committee-approved bill with a new Title II. Included in the amendment were a proposed Section 204, which is worded essentially identically to what ultimately became Section 144 of the enacted statute,[9] and a proposed Section 205 that would have

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[9] The Solomon amendment used the phrase "continue in effect," which got changed to "continue to effect" in the enacted Section 144, and had one fewer comma than the final version. The changing of the common statutory phrase "continue in effect" to the unusual phrase "continue to effect" appears to have been a scrivener's error, but nothing in this case turns on the difference between the two phrases.

repealed Section 102 of the 1990 Farm Bill, former 7 U.S.C. § 1446e-1. 142 CONG. REC. H1480 (Feb. 28, 1996). Explaining his reasons for preferring his proposed Section 204 to the Committee-approved bill, Congressman Solomon explained:

> Solomon-Dooley also does not add extra solids into milk. Think about that. You do not want extra solids in your milk. You do not want that mandated down your throat, unlike the Gunderson bill. We do allow California to keep its existing standards if they see fit to do so.

Id. at H1481.

Congressman Bill Thomas of California – who had set out California's wish list in 1995 – also stated on the floor of the House his understanding of what the Solomon amendment would do (142 CONG. REC. H1486 (Feb. 28, 1996)):

> [W]e wanted to fortify our milk. Up until recently, we did what we wanted to do and left the rest of the country alone.
>
> What has occurred over the last several years is that California cannot do what it wants to do anymore. Here is a Federal court order [*Shamrock Farms Co.* v. *Veneman*, No. CIV-S-95-318, slip op. 3 (E.D. Cal. June 5, 1995)] telling California that they cannot enforce their own milk solid standards.
>
> There is no guarantee in the committee bill that we can do what we want to do. There is a guarantee in the Solomon bill.

After the House passed a bill that contained Section 204 of the Solomon amendment and a revised version of Section 205, and the Senate passed a bill with no corresponding provisions, the conferees accepted the House provisions. They explained:

> *(38) Effect on fluid milk standards in the State of California*
>
> * * *

> The conference-adopted bill provides the State of California an exemption from the preemption provisions of any Federal law respecting standards of identity and labeling for fluid milk.
>
> The State of California has had a system for requiring fortified fluid milk since the early 1960's. * * * These standards apply to all fluid milk sold at retail or marketed in the State of California.
>
> The Managers intend for the State of California to be able to fully enforce and apply its fluid milk standards and their attendant labeling requirements to all fluid milk sold at retail or marketed in the State of California. For purposes of this section, the managers intend "fluid milk" means milk in final packaged form for beverage use. (Section 144)

H.R. CONF. REP. NO. 104-494, at 338-339 (1996), *reprinted in* 1996 USCCAN 683, 701-702.[10]

Thus, Congressman Thomas got two of the three items on the wish list he had set out at the very beginning of consideration of farm legislation in the 104th Congress. In Section 144, the federal government was barred from overriding California product composition and labeling requirements pertaining to the addition of nonfat solids into low-fat fluid milk. In Section 145, 7 U.S.C. § 7255, California received relief from Section 102 of

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[10] Even after the Conference Report, there was further debate about the Farm Bill on the floor of the House before passage. In urging his colleagues to vote for the Conference-approved bill, Congressman Gunderson observed: "Section 144 is offered in an attempt to exempt California from existing Federal standards for the solids not fact [*sic*] content in Class I (fluid) milk. Regrettably, this section is drafted in such a way that the State standards would become a barrier to interstate commerce in fluid milk and, as a result, will likely spawn years of additional lawsuits on this issue." 142 CONG. REC. H3153 (Mar. 28, 1996). He obviously did not believe that Congress had insulated anything from Commerce Clause scrutiny in Section 144.

the 1990 Farm Bill, former 7 U.S.C. § 1446e-1, which was repealed, although Section 145 itself placed new restrictions on States' allowable "manufacturing allowances" (make allowances). No section of the 1996 Farm Bill, however, enacted Congressman Thomas's general wish to "retain" California's pricing system.[11]

The tenor of the discussion of what ultimately became Section 144 throughout the legislative history *confirms* what is plain on the face of the statute. It is concerned with federal statutory preemption of a specific aspect of California's composition and labeling requirements for fluid milk, not with constitutional limitations on California's economic regulation of raw milk.

C. The Ninth Circuit's Misconstruction of Section 144 Insulates from Review a Serious Commerce Clause Challenge

The underlying constitutional question – whether CDFA's Stabilization and Pooling Plans as applied to out-of-state raw milk transactions beginning in 1997 violate the Commerce Clause – is not before this Court. Nonetheless, the Ninth Circuit's treatment of Section 144 insulates from review a serious violation of the Commerce Clause involving both a direct burden on interstate commerce and discrimination against non-California milk production.

Indeed, two neutral observers have indicated that the 1997 amendments present a serious Commerce Clause question. In particular, the California Legislative Counsel was asked by California state legislators to review the 1997 amendments. The

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[11] Arguably, Section 143(a)(2) of the enacted Farm Bill, 7 U.S.C. § 7253(a)(2), JA 17, shows that Congress as a whole pushed in the *opposite* direction from Congressman Thomas's desire. That section invites California into the Federal Milk Marketing Order system – an invitation, though not a command, for California to *abandon* the very pricing system Congressman Thomas wanted to "retain."

Legislative Counsel concluded, and advised CDFA, that the amendments were protectionist in intent and effect and violated the Commerce Clause. App., *infra*, 3a-11a.[12] And, on invitation from this Court, the U.S. Solicitor General filed an amicus brief stating: "Although the United States does not take a position on the underlying constitutional question in this case, the 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." U.S. Br. 15-16 (filed Dec. 4, 2002).

Decades of this Court's Commerce Clause jurisprudence have struck down state dairy regulations aimed at insulating local dairy industries from interstate competition. In the seminal case of *Baldwin* v. *G.A.F. Seelig, Inc.*, this Court unanimously struck down a New York minimum price regulation as it applied to out-of-state raw milk because New York was attempting to project its minimum price regulation into other States. 294 U.S. 511, 524 (1935).

Baldwin involved a minimum price regulation that was adopted to ensure that New York dairy farmers would receive an adequate price for their milk. Under the regulation, New York milk processors were required to pay the minimum price when purchasing milk from New York farms. New York's power to enact that measure was not questioned. However, the corresponding regulation that was intended to prevent out-of-state milk from having a competitive advantage in light of the minimum price regulation was challenged. 294 U.S. at 519. This Court concluded that the regulation as it applied to out-of-state milk transactions (where title was taken in Vermont) directly burdened interstate commerce and violated the Commerce

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[12] In California, opinions of the Legislative Counsel, though not binding, are entitled to great weight. *California Ass'n of Psychology Providers* v. *Rank*, 51 Cal. 3d 1, 17, 793 P.2d 2, 11, 270 Cal. Rptr. 796, 805 (1990).

Clause because "*commerce between the states is burdened unduly when one state regulates by indirection the prices to be paid to producers in another*, in the faith that augmentation of prices will lift up the level of economic welfare." *Id.* at 524 (emphasis added). The Court added that "[n]ice distinctions have been made at times between direct and indirect burdens. They are irrelevant when the avowed purpose of the obstruction, as well as its necessary tendency, is to suppress or mitigate the consequences of competition between the states. Such an obstruction is direct by the very terms of the hypothesis." *Id.* at 522.[13]

More recently, in *West Lynn Creamery, Inc.* v. *Healy*, 512 U.S. 186 (1994), this Court struck down a Massachusetts pricing order that bears a striking resemblance to the challenged pooling amendments. The Massachusetts pricing order required payment into a pool by all farmers, including out-of-state farmers, but distributed that money as a subsidy to in-state farmers only. As a result, the pool payment was neutralized vis-à-vis Massachusetts farmers, but nevertheless burdened out-of-state farmers. *Id*. at 199. In that case, this Court explained that "[t]he pricing order thus violates the cardinal principle that a State may not 'benefit in-state economic interests by burdening out-of-state competitors.'" *Ibid.*

With the adoption of the 1997 amendments, California has taken to projecting its regulation into surrounding States and has

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[13] The application of California's statutory minimum-price provisions – Cal. Food & Agric. Code §§ 62077-62078, JA 25 – to out-of-state dairy farmers is such a clear violation of the core holding of *Baldwin* that CDFA officials announced that they would not enforce those provisions against out-of-state dairy farmers, and the district court entered a preliminary injunction to ensure that they would not be so enforced. See C.A. E.R. Tab 7 at 5 & n.4. The Ninth Circuit's construction of Section 144, however, calls into question the applicability to California of even the most settled of Commerce Clause principles and precedents.

done so with the purpose of suppressing or mitigating the consequences of competition between States. Moreover, this action has resulted in disparate treatment that burdens out-of-state dairy farmers for the benefit of in-state dairy farmers.

Just as New York extended its minimum price regulation to out-of-state raw milk transactions in *Baldwin* in order to mitigate the consequences of competition from unregulated out-of-state raw milk, CDFA adopted the 1997 amendments for a similar protectionist purpose. This is shown by the circumstances that gave rise to the adoption of the challenged amendments, as well as by the express statements of CDFA officials.

The California Stabilization and Pooling Plans were conceived of during a time of geographic isolation and as a result were not designed to withstand the forces of interstate competition. For example, until the mid-1990s, California's relative geographic isolation gave the State the ability to avoid many of the ordinary forces of competition in a national market. ROBERT D. BOYNTON, MILK MARKETING IN CALIFORNIA: A DESCRIPTION OF THE STRUCTURE OF THE CALIFORNIA DAIRY INDUSTRY AND THE GOVERNMENT PROGRAMS UNDER WHICH IT OPERATES 1 (5th ed. 1995) ("The uniqueness of the California System developed largely because of the state's geographic isolation."). By setting Class 1 prices high (compared to fluid milk prices prevailing elsewhere in the region) and Class 4a and 4b prices low (compared to manufacturing milk prices prevailing elsewhere in the nation), California was able, through pooling, to bring about blend prices that were high enough to provide adequate income to dairy farmers to encourage growth in milk production, while also providing manufacturers of non-beverage (non-Class 1) dairy products the prospect of cheap prices and easy access to raw milk inputs and thus an incentive to locate manufacturing facilities in California. Geoffrey Vanden Heuvel,

Milk Producers Council Newsletter, Commentary on Class 1 Findings at 3-4 (March/April 1997), P.I. App. Tab 5 at 1-2.[14]

When technology and advances in transportation made it more economical to ship into California from out of state, the system of cross-subsidization began to invite competition that California dairy farmers did not welcome. High California Class 1 prices attracted out-of-state competition, especially in southern California. Because out-of-state milk did not participate in the California Pool, every time a California producer lost a Class 1 sale to an out-of-state dairy farmer, the California Pool lost revenue. P.I. App. Tab 5 at 2 ("The out-of-state milk decision is a step in the right direction, but time will tell if it is effective in stopping the leakage of Class 1 revenue out of the pool."). Thus, the California dairy industry recognized the need to insulate the Pool through other means.

Accordingly, the challenged amendments were conceived of and proposed by California farm groups that had been working with CDFA officials for months to resolve what they referred to as "the out-of-state milk problem." See C.A. E.R. Tab 11K at 2. In fact, an official designated as spokesperson for CDFA indicated to a member of the California Legislative Counsel's staff that the 1997 amendments were intended to keep out-of-state milk out of California. App., *infra*, 1a-2a.

In its summary of the hearing testimony, CDFA revealed the protectionist underpinnings of the 1997 amendments when it acknowledged that one of the objectives of the proponents of the 1997 amendments was to *make sure that California's Class 1 needs were supplied by California dairy farmers*. CDFA, Analysis of Pooling Hearing February 4, 1997, at 4, C.A. E.R. Tab 11R at 4. In fact, out-of-state milk was and to

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[14] "P.I. App." refers to the appendix to the motion of plaintiffs Hillside Dairy et al. for preliminary injunction and partial summary judgment, filed in the district court June 27, 1997.

this day is perceived by California dairy farmers as a serious threat to their blend prices because it causes "the leakage of Class 1 revenue out of [their] pool." Geoffrey Vanden Heuvel, Milk Producers Council Newsletter, Commentary on Class 1 Findings at 3-4 (March/April 1997), P.I. App. Tab 5 at 1-2; see also *Out-of-state milk flooding California*, DAIRY PROFIT WEEKLY, May 27, 2002, at 2.

The 1997 amendments are protectionist in effect as well as design. As in *Baldwin* v. *Seelig*, the 1997 Stabilization Plan and Pooling Plan amendments directly burden interstate raw milk transactions.

In particular, the 1997 Pooling Plan amendments imposed a direct burden on interstate milk transactions when, for the first time, out-of-state milk was pooled. Forced taking of out-of-state farmer revenue is effectuated through the establishment of a gross pool obligation (equal to the plant blend price, which is the total minimum price obligation of an individual plant) and a credit (equal to the lesser of the modified quota blend price or the plant blend price). Pooling Plan § 900(d), JA 47-48. The obligation owed directly to the California pool is the difference between the plant blend price and the credit.

Thus, under the 1997 amendments, when the plant blend price exceeds the quota blend price (as is usually the case), no longer may the out-of-state dairy farmer receive payment of the full value of his transaction – the plant blend price. Rather, because of the 1997 amendment, CDFA no longer permits the California processor to leave out-of-state milk out of its pool obligation calculation. Sturgeon Aff. ¶¶ 7-8, Plaintiffs' Joint Compilation of Affidavits in Support of Motion for Summary Judgment Tab 5 at 2 (filed in district court April 12, 1999) (Joint Compilation). Instead, out-of-state milk is now included, but the processor receives a credit against the minimum (plant blend) price of only the quota blend price (because it is the lesser credit) and must pay the difference between the plant blend price

and the quota blend price[15] into the Pool. This transaction closely resembles the credit and compensatory payment to a federal milk pool that this Court condemned as a trade barrier in *Lehigh Valley Coop.* v. *United States*, 370 U.S. 76, 84-85 (1962). As in *Lehigh*, all incentive for the processor to pay the out-of-state farmer more than the credited (quota blend) price is removed.

Indeed, out-of-state dairy farmers have been unable to charge prices in excess of the credit assigned by CDFA. Gruebele Aff., C.A. E.R. Tab 11M at 3; see also Sturgeon Aff. ¶¶ 14-15, Joint Compilation Tab 5 at 2. Thus, CDFA has imposed a tariff on out-of-state milk purchases equal to the difference between the gross pool obligation and the administratively determined credit. This tariff is directly borne by the out-of-state dairy farmer: the 1997 amendments had the direct effect of reducing, dollar for dollar, the amount paid to out-of-state producers by the amount processors were required to pay into the California pool. Gruebele Aff., C.A. E.R. Tab 11M at 3; see also Sturgeon Aff. ¶¶ 14-15, Joint Compilation Tab 5 at 2. This revenue reduction directly reduced the profitability of shipping milk from out of state into California and for some dairies simply made it no longer worthwhile to ship milk into California. For instance, Milky Way Farms, a northern Nevada dairy farm that had been shipping to Sacramento since the 1960s and was heavily dependent on milk sales into California, made the decision to go out of the dairy farming business in the face of lower returns. Witt Decl. ¶¶ 15-16, C.A. Supp. E.R. Tab 1 at 3. In other instances, dairies facing the prospect of diminishing

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[15] Although it does not alter the fact that this change directly burdens out-of-state milk transactions and causes discriminatory treatment of out-of-state milk, the credit is actually a modified quota price. It is approximately 3 cents higher than the quota price and is adjusted so that out-of-state milk is not required to fund the transportation allowance program. Gruebele Aff., C.A. E.R. Tab 11M at 4; Gruebele Supp. Decl. ¶ 23, C.A. E.R. Tab 11N at 9.

marginal returns reacted by increasing herd size. Olsen Decl. ¶ 8, C.A. Supp. E.R. Tab 2 at 2; Ligtenberg Decl. ¶ 18, C.A. Supp. E.R. Tab 3 at 3.

Moreover, by mandating the pooling of out-of-state milk without also granting to out-of-state farmers full access to the benefits of pooling, the 1997 amendments subjected out-of-state dairy farms to disparate treatment that benefited California farmers at the expense of out-of-state farmers in violation *of West Lynn Creamery* v. *Healy*, *supra.*

First, the challenged amendments required the out-of-state dairy to give a portion of its raw milk revenue to the California pool, which increased the overall size of the California pool, making more money available for distribution to California farmers, while decreasing the price received by the out-of-state farmer by the amount of the required pool contribution. Gruebele Aff., C.A. E.R. Tab 11M at 2-3; Milk Pool Referendum Post Card Ad, The Alliance of Western Milk Producers, P.I. App. Tab 27.

Second, although the out-of-state farmer may *in some circumstances* receive the quota price (*i.e.*, the highest blend price paid to California farmers owning quota), the out-of-state farmer can never receive the true "benefit" of quota, which includes the assurance of receiving the blend price without regard to competition or plant destination. Gruebele Supp. Decl. ¶ 25, C.A. E.R. Tab 11N at 9; Comparison of Milk Marketing Orders at 6, C.A. E.R. Tab 11B at 6. The asset value ($500 or more per hundredweight) is another benefit of quota ownership that out-of-state dairy farmers are denied. History of the California Milk Pooling Program at 8, C.A. E.R. Tab 11C at 8. On the free market, quota can be bought and sold for $500 or more per hundredweight. CDFA, California Dairy Review, Quota Transfer Summary at 2 (Feb. 2003) <http://www.cdfa.ca.gov/dairy/pubs/DairyRvw/index.html>.

Third, although out-of-state producers serve many of the markets in California that would otherwise entitle them to transportation allowances, because of their out-of-state status they cannot receive these transportation allowances. Pooling Plan Art. 9.2 <http://www.cdfa.ca.gov/mkt/mp/POOLPLAN_09-01.pdf>. This creates an artificial incentive for California processors to choose California milk over out-of-state milk. Effects of this type consistently have been held unconstitutional by this Court. See *Polar Ice Cream & Creamery Co.* v. *Andrews*, 375 U.S. 361 (1964); *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U.S. 564, 576 (1997); *H.P. Hood & Sons, Inc.* v. *Du Mond*, 336 U.S. 525 (1949).

Petitioners, again, do not ask or expect this Court to resolve the merits of the constitutional issues raised in the courts below. The deep problems of protectionism and disparate treatment of out-of-state milk producers discussed above, however, demonstrate the magnitude of the matters that will go unscrutinized if the decision below is affirmed. This brief description of the constitutional problems also shows the utter lack of resemblance between the issues Congress addressed in the text and legislative history of Section 144 and the subject matter of this litigation. Economic protectionism of the sort petitioners challenge simply has nothing to do with California's desire and Congress's permission to keep California's historic compositional standards for fluid milk.

II. THE NINTH CIRCUIT'S SUMMARY TREATMENT OF THE PRIVILEGES AND IMMUNITIES CLAUSE CLAIMS ERRONEOUSLY DECLINED TO CONSIDER THE PRACTICAL EFFECT OF THE REGULATORY SCHEME ON OUT-OF-STATE DAIRY FARMERS

The Privileges and Immunities Clause was designed by the Framers to help preserve the economic union of the States by protecting individuals from discrimination in the pursuit of common callings within a State, or in the ownership or

disposition of privately held property, on the basis of out-of-state residency or citizenship. *Supreme Court of New Hampshire* v. *Piper*, 470 U.S. 274, 279-280 (1985); *United Building & Construction Trades Council* v. *Mayor and Council*, 465 U.S. 208, 219 (1984) ("Certainly, the pursuit of a common calling is one of the most fundamental of those privileges protected by the Clause.").

As it did in its disposition of Commerce Clause claims, the Ninth Circuit avoided the underlying merits of the claims under the Privileges and Immunities Clause raised by individual dairy farmers, petitioners Darrel and Diane Kuiper of Buckeye, Arizona. As in its approach to the Commerce Clause claims, the Ninth Circuit erred at the threshold of analysis of Privileges and Immunities Clause jurisprudence by circumventing long-established constitutional doctrine.

The Ninth Circuit's analysis of the individual dairy farmers' claims under the Privileges and Immunities Clause, U.S. CONST. Art. IV, § 2, cl. 1, went no further than an examination of the classifications made on the face of California's Milk Pooling Act, Cal. Food & Agric. Code §§ 62700-62756 (JA 25-31), and the regulations under that Act, *i.e.*, the Pooling Plan (JA 32-60). Because the alleged discrimination effected by the milk pooling scheme is based on the location of the farm where milk is produced,[16] and not the residency or

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[16] Discrimination against out-of-state milk farms, as alleged in Ponderosa's complaint and apparent on the face of state pooling laws, is illustrated by the following: (1) only California milk producers are eligible to vote in referenda to approve or disapprove state pooling plans; (2) California milk "quota" is a valuable property interest that only California milk producers are eligible to acquire, hold, transfer, and devise; (3) only California producers were awarded "quota" by the State of California, and only California producers are eligible to receive additional state-established quota, as it becomes available; (4) a California producer is guaranteed the same revenue-pooled price for milk sold to all California plants, regardless of the value of the

citizenship of the producer, the court rejected the individual dairy owners' privileges and immunities claim. Pet App A14.

The Ninth Circuit cited no decision of this Court for its conclusion that only facial discrimination on the basis of residency or citizenship is forbidden by the Privileges and Immunities Clause. This is not surprising, because the Ninth Circuit's approach of examining only the form of the legislation, and not its substance or practical effect, is contrary to this Court's precedent respecting the enforcement of constitutional rights generally and the Privileges and Immunities Clause in particular. In *Gregg Dyeing Co.* v. *Query*, 286 U.S. 472, 476 (1932), the Court speaking through Chief Justice Hughes emphasized that it is the substance of state laws that must be examined in determining their conformity to the strictures imposed by the United States Constitution:

> In maintaining rights asserted under the Federal Constitution, the decision of this Court is not dependent upon the form of a taxing scheme, or upon the characterization of it by the state court. We regard the substance rather than the form, and the controlling test is found in the operation and effect of the statute as applied and enforced by the state.

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milk to the plant under the state's classified pricing plan, while out-of-state producers bear the risk of price volatility between classes of use, and have fewer marketing opportunities to California's many dairy product manufacturing plants; (5) California milk producers are eligible to receive subsidies for the cost of transporting milk to a fluid milk processing plant, while out-of-state producers serving the same plant are never eligible for transportation allowances; (6) out-of-state producers are the only group who are unable to participate fully in the benefits of the state milk pool, but whose revenues are nonetheless taken for contribution to the revenue pool, thus subsidizing the income of their California competitors.

Discrimination is a "practical conception," and a court "must deal in this matter, as in others, with substantial distinctions and real injuries." *Gregg Dyeing*, 286 U.S. at 481; accord *Associated Indus.* v. *Lohman*, 511 U.S. 641, 654 (1994); see also *American Oil Co.* v. *Neill*, 380 U.S. 451, 455 (1965) ("When passing on the constitutionality of a state taxing scheme it is firmly established that this Court concerns itself with the practical operation of the tax, that is, substance rather than form."). The rights of citizens established under the Constitution, obviously, cannot be made subservient to clever drafting or legislative formalism. Discrimination is discrimination, whether "forthright or ingenious," direct or indirect. *West Lynn Creamery*, 512 U.S. at 201-202.

As in Commerce Clause cases, this Court's application of the Privileges and Immunities Clause has consistently involved an examination of the practical effects of state laws and regulations when a State's discrimination against out-of-state residents is not expressed on the face of those laws. In *Chalker* v. *Birmingham & N.W. Ry.*, 249 U.S. 522 (1919), a Tennessee privilege tax on railroad construction companies was struck down as discriminatory against nonresidents even though the discrimination was not based on residency or citizenship *per se*, but was based on whether a company had its principal office within Tennessee. Rejecting the conclusion of the state court that there was no discrimination on the basis of residency because the higher tax depended on the location of the company's principal office, this Court wrote:

> As the chief office of an individual is commonly in the state of which he is a citizen, Tennessee citizens engaged in constructing railroads in that state will ordinarily have their chief offices therein, while citizens of other states so engaged will not. Practically, therefore, the statute under consideration would produce discrimination against citizens of other states by imposing higher charges against them than citizens of Tennessee are required to pay. We

> can find no adequate basis for taxing individuals according to the location of their chief offices—the classification, we think, is arbitrary and unreasonable.

Id. at 527. *Chalker* establishes that it is the practical effect of a state law, and whether in practice it produces discrimination against nonresidents, that determines whether the law violates the Privileges and Immunities Clause.

Other cases since *Chalker* confirm that substance, not form, guides the analysis under the Privileges and Immunities Clause. In *Austin* v. *New Hampshire*, 420 U.S. 656 (1975), a law taxing the income of nonresidents working in New Hampshire was held to violate the Privileges and Immunities Clause because its burden fell disproportionately on nonresidents – in-state residents' income was not taxed. The Court reviewed the decisions in *Shaffer* v. *Carter*, 252 U.S. 37 (1920), and *Travis* v. *Yale & Towne Mfg. Co.*, 252 U.S. 60 (1920), which also determined the validity of state income tax schemes under the Privileges and Immunities Clause, and noted that those cases put aside "'theoretical distinctions'" and looked to "'the practical effect and operation'" of the tax scheme at issue. Justice Marshall wrote for the Court in *Austin* that the New York scheme at issue in *Travis* "could not be sustained when its actual effect was considered" by the Court. *Austin*, 420 U.S. at 664. In *Shaffer*, 252 U.S. at 55, the Court held that "where the question is whether a state taxing law contravenes rights secured by [the federal Constitution], the decision must depend not upon any mere question of form, construction, or definition, but upon the practical operation and effect of the tax imposed."

Contrary to the Ninth Circuit's ruling here, this Court has "never read the [Privileges and Immunities] Clause so literally as to apply it only to distinctions based on state citizenship." *United Building & Construction Trades Council* v. *Mayor and Council*, 465 U.S. at 216. *Chalker* and the other authorities just cited examine the effect of state laws and regulations and

not merely the words used by the lawmaking body. These cases warn against allowing States to evade the limitations of the Privileges and Immunities Clause simply by drafting laws in ways that avoid facial distinctions on the basis of residency or citizenship. The cases have rejected a "formalistic construction" of the Clause under which a law "would be immune from scrutiny * * * simply because it was not *phrased* in terms of state citizenship or residency"; such a construction "would effectively write the Clause out of the Constitution." *United Building*, 465 U.S. at 217 n.9 (emphasis added).[17]

Practical effect also is the test for compliance with restrictions on state regulation of commerce under the Commerce Clause, which has in common with the Privileges and Immunities Clause the purpose of promoting interstate harmony and creating a national economic union. *Supreme Court of New Hampshire* v. *Piper*, 470 U.S. at 279-280. *In Dean Milk Co.* v. *City of Madison*, 340 U.S. 349, 354 (1951), this Court held invalid an ordinance requiring that milk sold within a city have been pasteurized within a five-mile radius of the city center, explaining as follows:

> [T]his regulation, like the provision invalidated in *Baldwin* v. *Seelig, Inc.*, [294 U.S. 511 (1935)], in practical effect

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[17] In *United Building*, a municipal ordinance of the City of Camden required that at least 40% of the employees of contractors working on city construction projects be Camden residents. The Supreme Court of New Jersey rejected a Privileges and Immunities Clause claim on the ground that the ordinance had identical effects on out-of-state citizens and New Jersey citizens not residing in Camden. In an opinion by then-Justice Rehnquist, this Court reversed by a 8-1 vote, concluding (465 U.S. at 217-218) that "Camden's ordinance is not immune from constitutional review at the behest of out-of-state residents merely because some in-state residents are similarly disadvantaged." As would be appropriate in the present case, the Court "remand[ed] the case for a determination of the validity of the ordinance under the appropriate constitutional standard." *Id*. at 210.

> excludes from distribution in Madison wholesome milk produced and pasteurized in Illinois. * * * In thus erecting an economic barrier protecting a major local industry against competition from without the State, Madison plainly discriminates against interstate commerce.

That the ordinance also discriminated against Wisconsin producers did not mitigate the fact that the practical effect of the ordinance was to discriminate against interstate commerce. Thus, a determination that a state law does not discriminate on its face and purports to regulate even-handedly does not end the question of what level of Commerce Clause scrutiny should apply. "When a statute discriminates 'in practical effect' against interstate commerce, the fact that it purports to apply equally to citizens of all states does not save it." *Government Suppliers Consolidating Services, Inc.* v. *Bayh*, 975 F.2d 1267, 1278 (7th Cir. 1992) (citing *Brimmer* v. *Rebman*, 138 U.S. 78 (1891)), cert. denied, 506 U.S. 1053 (1993).

The practical effect of laws and regulations must guide the determination of whether those laws contravene the purpose of the Privileges and Immunities Clause to "'place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned.'" *Hicklin* v. *Orbeck*, 437 U.S. 518, 524 (1978) (quoting *Paul* v. *Virginia*, 75 U.S. (8 Wall.) at 180). Although the lower courts did not reach the merits, it cannot be doubted that the practical effect and intent of California's Milk Pooling Act and implementing regulations is to discriminate between milk producers who do not reside in California and those who do, and the distinctions thus drawn should be scrutinized on the merits.

Data and experience indicate that the vast majority of persons engaged in the production of milk reside on the farms producing the milk. See note 3, *supra*. By discriminating on the basis of the location of the farm where milk is produced, and favoring milk produced on in-state farms, the California

plans have the natural effect of discriminating against producers because they do not reside in California. Unless California can somehow justify the differential treatment on remand, this violates a fundamental guarantee of the Privileges and Immunities Clause. "[I]t was long ago decided that one of the privileges which the clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State." *Toomer* v. *Witsell*, 334 U.S. at 396.

The Ninth Circuit's reliance on the distinctions made on the face of a state law or regulation allows the Clause to be avoided by exalting form over substance. That approach is contrary to the teachings of this Court and invites States of the Ninth Circuit to craft discrimination against non-residents by ingenious and indirect means. The judgment on the individual petitioners' Privileges and Immunities Clause claim should be reversed and the case remanded for consideration of that claim.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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FEBRUARY 2003

APPENDIX

DECLARATION OF FRANCES S. DORBIN,
PRINCIPAL DEPUTY LEGISLATIVE COUNSEL

[**reprinted from Appellants' Supplemental Excerpts of Record, filed in the Ninth Circuit April 10, 2000**]

I, Frances S. Dorbin, declare upon personal knowledge as follows:

1. I am employed as a Principal Deputy Legislative Counsel in the Office of Legislative Counsel.

2. The Office of Legislative Counsel is a nonpartisan office of legal advisors to, among others, the California Assembly and the California Senate, which assists in writing proposed legislation, provides analysis of legislation, and provides opinions concerning, among other things, California laws and regulatory activities.

3. During or about early November 1996, I was assigned responsibility to research and prepare a response to a request from Assembly Member John Burton for a written opinion concerning the constitutionality of proposed regulatory amendments to the California Milk Pooling Plan.

4. In the course of my duties relating to the opinion assignment, I contacted by telephone the Milk Pooling Branch of the California Department of Food and Agriculture to solicit information on the nature and purpose of the proposed amendments.

5. I was put in telephone contact with a pooling branch employee who identified himself as Mr. John Lee.

6. Mr. Lee told me that he was aware of and familiar with the pooling plan proposals to change regulatory treatment

of out-of-state milk. He told me that the proposals were intended to "keep those guys out." From the context of our conversation, I understood the comment to mean keeping out-of-state milk producers out of California.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 7th day of April, 1999.

/s/ Frances S. Dorbin

Frances S. Dorbin

Legislative Counsel of California

BION M. GREGORY

Sacramento, California
June 19, 1997

[reprinted from appendix to memorandum by plaintiffs Hillside Dairy, Inc., et al. in support of motion for preliminary injunction, filed in the district court June 27, 1997]

Honorable Charles M. Calderon
313 State Capitol

Milk Pooling - #12484

Dear Senator Calderon:

QUESTION

Would the amendments that are proposed to be made to the Pooling Plan For Market Milk that would restrict the price that out-of-state producers of milk could receive for that product to no more or less than the price received by in-state producers for market milk, if adopted, violate the Commerce Clause of the United States Constitution?

OPINION

The amendments that are proposed to be made to the Pooling Plan For Market Milk that would restrict the price that out-of-state producers of milk could receive for that product to no more or less than the price received by in-state producers for

market milk, if adopted, would violate the Commerce Clause of the United States Constitution.

ANALYSIS

Pursuant to the provisions governing the stabilization and marketing of market milk (Ch. 2 (commencing with Sec. 61801), Pt. 3, Div. 21, F.& A.C.[1]), the Secretary of Food and Agriculture (hereafter the secretary) is authorized to formulate stabilization and marketing plans for market milk (Sec. 61993). For the purposes of stabilization and market plans, market milk is classified as class 1, class 2, class 3, class 4a, and class 4b (see Art. 5 (commencing with Sec. 61931), Ch. 2, Pt. 3, Div. 21). The stabilization and marketing plans are required to contain provisions whereby the secretary establishes minimum prices to be paid by handlers to producers for market milk in the various classes (Sec. 62062). Prior to 1967, producers competed fiercely to supply bottling plants with class 1 milk, because class 1 milk commands the highest price (see Senate Floor Analyses, S.B. 688, June 8, 1993).

In 1967, the Legislature enacted the Gonsalves Milk Pooling Act (Ch. 3 (commencing with Sec. 62700), Pt. 3, Div. 21; (hereafter Chapter 3)), which contains a comprehensive scheme for milk pooling. Pursuant to Chapter 3, the secretary is authorized to develop a pooling plan (Sec. 62704) under which each producer is assigned a pool quota (subd. (d), Sec. 62707). A producer's quota determines the amount of class 1 milk the producer can sell to handlers within the pooling system. Milk sold in excess of quota receives the lowest base price, namely, that price for milk destined for class 4b products (Sec. 62711).

The current pooling plan only applies to producers who produce market milk in California (Sec. 104, Pooling Plan for

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[1] All section references are to the Food and Agricultural Code, unless otherwise specified.

Market Milk, as amended, effective April 1, 1997[2]). Producers who produce market milk outside of California and ship that milk into this state currently receive the plant blend price for that milk (see testimony of Glen Gleason, Chief, Milk Pooling Branch, Department of Food and Agriculture, before the Subcommittee on Livestock, Dairy and Poultry, United States House of Representatives, May 23, 1995).

Amendments have been proposed to the current pooling plan by referendum (hereafter the amendments) that would change the way certain milk is accounted for in the pool (Milk Pooling Branch, Pooling Plan for Market Milk, Explanation of Referendum). In particular, the proposed amendments would create a new category of milk known as "other source milk."[3] If the referendum is adopted, other source milk will never receive a pool credit greater than the monthly quota price or less than the nonquota price, adjusted by the pool price modification rate (Explanation of Referendum Ballots Mailed March 31, 1997). Thus, the amendments would set both a minimum and maximum price that a producer of other source milk could receive from a handler. In particular, under the proposed amendments, other source milk would receive the lower of the receiving plant's inplant usage credit for the month or the

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[2] All further references to the Pooling Plan for Market Milk are to that plan as amended, effective April 1, 1997.

[3] "Other source milk" is not currently defined in the Pooling Plan for Market Milk and it was not included in the referendum materials forwarded to us by the Milk Pooling Branch of the Department of Food and Agriculture. Kelly Jensen of your staff obtained additional materials from the Milk Pooling Branch that include a definition of "other source milk." According to that material, "other source milk" is "any market milk, skim or cream from a dairy ranch or milk plant not defined in this [plan]." Bob Horton of the Milk Pooling Branch informed Mr. Jensen that this definition is intended to apply to milk produced out of state.

announced monthly quota price plus the pool price modification rate (proposed subd. (d) (1), Sec. 900, the amendments). The amendments would also establish a minimum price for other source milk based on the current month's overbase fat price for the milk fat component and the current month's overbase solids not fat price plus the pool price modification rate (proposed subd. (d) (2), Sec. 900, the amendments).

Consequently, the net effect of these changes would be to restrict the price that an out-of-state producer may receive for market milk sold in this state to no greater or less than the price that an in-state producer receives for that product.

In that regard, however, the pooling plan also establishes a system of transportation allowances and credits for which the producers are eligible (see Article 9.2 (commencing with Section 920), Pooling Plan for Market Milk). The purpose of those allowances and credits is to provide an incentive for producers to make milk available to bottling plants (California Department of Food and Agriculture, Milk Pooling Branch, History of the Milk Pooling Program, undated, p. 5). These rates are calculated on the constructive miles from the dairy farm to the location of the plant of first receipt and apply to all pool milk (Sec. 921.2, Pooling Plan for Market Milk). The rates vary, depending on the location of the plant, and the distance the milk is shipped. For example, milk transported over 199 miles to plants located in the San Francisco bay area receiving area, which consists of the Counties of Alameda, Contra Costa, Santa Clara, Santa Cruz, San Francisco, and San Mateo, receives an allowance at the rate of $0.30 per hundred pounds of milk (para. (1), subd. (a), Sec. 921.2, Pooling Plan for Market Milk). On the other hand, milk transported 74 or fewer miles from the Counties of Fresno, Kern, Kings, and Tulare to plants located in the southern California receiving area, which consists of the Counties of Los Angeles, Orange, and Ventura, receives no allowance (para. (2), subd. (e), Sec. 921.1, Pooling Plan for Market Milk).

Under the amendments, producers of other source milk would not be eligible for the transportation allowances and credits, but the price they receive would be subject to the pool price modification rate. The pool price modification rate is an average rate calculated for each pool month by dividing the total value of the plant-to-plant transportation adjustments plus the total value for transportation allowances by the total pounds of solids not fat for receipts from producers and for other source milk (proposed Sec. 132, the amendments).

Thus, in summary, the amendments would restrict the price that an out-of-state producer may receive for market milk sold in this state to no greater than the price that an in-state producer receives for that product, as adjusted by an average amount for transportation costs. The amendments would also set a maximum price that an out-of-state producer may receive for market milk sold in this state.

The Commerce Clause of the United States Constitution grants to Congress the power "[t]o regulate Commerce with foreign nations, and among the several States ..." (Cl. 3, Sec. 8, Art. I, U.S. Const.), but places no express limits on the power of the states to regulate that commerce. "Nevertheless, the United States Supreme Court has repeatedly held for over a century that the commerce clause also limits the states' power to regulate both domestic interstate and foreign commerce, whether or not Congress has acted (citations omitted)" (Pacific Merchant Shipping Assn. v. Voss, 12 Cal. 4th 503, 514, cert. den. sub nom. Veneman v. Pacific Merchant Shipping Assn., 134 L. Ed. 2d 951.) As a consequence, any state statute or regulation that impacts domestic interstate or foreign commerce is subject to judicial scrutiny under the commerce clause unless the statute or regulation has been preempted, or unless explicitly authorized, by an act of Congress (Ibid.). The commerce clause's implicit, self-executing restriction on the states' power to regulate domestic interstate and foreign commerce is commonly referred to as the "negative" or "dormant" commerce clause

(Barclays Bank v. Franchise Tax Bd. of California, 129 L. Ed. 2d 244, 257 fn. 9).

In analyzing any law subject to scrutiny under the negative commerce clause, the threshold inquiry is whether the law "'regulates evenhandedly with only "incidental" effects on interstate commerce, or discriminates against interstate commerce.'" (Pacific Merchant Shipping Assn. v. Voss, supra, at pp. 513-514). In the context of a challenge to a statute on the basis of the commerce clause, "'discrimination' simply means differential treatment of in-state and out-of-state interests that benefits the former and burdens the latter [citation omitted]. Such discrimination may take any of three forms: first, the state statute may facially discriminate against interstate or foreign commerce; second, it may be facially neutral but have a discriminatory purpose; third, it may be facially neutral but have a discriminatory effect (citation omitted)" (Id., at p. 514). The party challenging the law's validity has the burden of showing discrimination (Ibid.).

The second step of the analytical process is the application of the appropriate level of scrutiny. If the state measure is discriminatory, it is subjected to the "strictest scrutiny," and the burden then passes to the state to justify the measure both in terms of the local benefits flowing from the statute and the unavailability of a nondiscriminatory alternative adequate to preserve the local interests at stake (SDDS, Inc. v. State of S.D. (8th Cir.), 47 F. 3d 263, 268, 271). If "other legislative objectives are credibly advanced and there is not patent discrimination against interstate trade," the measure is subjected to a more flexible balancing test, and will be upheld unless the burden imposed on interstate commerce is clearly excessive in relation to the putative local benefits (Pike v. Bruce Church, 25 L. Ed. 2d 174, 178).

In that connection, the United States Supreme Court has struck down numerous attempts by states to reserve the state's market for dairy products for its local dairy farmers. In Baldwin

v. Seelig, 79 L. Ed. 1032, for example, New York law prohibited the sale in New York of milk obtained by a distributor from other states unless the distributor had paid a price that would be lawful under New York price regulations. The Supreme Court struck down this provision as an impermissible burden on interstate commerce. After observing that the New York law was aimed at keeping "the system unimpaired by competition from afar" (Id., at p. 1036), the court noted:

> "Accepting those postulates [that New York could not directly outlaw the importation of milk from Vermont purchased at below New York prices], New York [nevertheless] asserts her power to outlaw milk so introduced by prohibiting its sale thereafter if the price that has been paid for it to the farmers in Vermont is less than would be owing in like circumstances for farmers in New York. . . . Such a power, if exerted, will set a barrier to traffic between one state and another as effective as if customs duties, equal to the price differential, had been laid upon the thing transported." (Id., at p. 1037.)

The court went on to state:

> "Nice distinctions have been made at times between direct and indirect burdens. They are irrelevant when the avowed purpose of the obstruction, as well as its necessary tendency, is to suppress or mitigate the consequences of competition between the states. . . . We are reminded ... that a chief occasion of the commerce clauses was 'the mutual jealousies and aggressions of the States, taking form in customs barriers and other economic retaliation' (citations omitted). If New York in order to promote the economic welfare of her farmers, may guard them against competition with the cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce

> between the states to the power of the nation." (Baldwin v. Seelig, supra, at p. 1038.)

In the subsequent case of Polar Ice Cream & C. Co. v. Andrews, 11 L. Ed. 2d 389, the United States Supreme Court invalidated Florida statutes and the regulations adopted pursuant to those statutes that required a Florida milk distributor to accept its total supply of class 1 milk at a fixed price from designated milk producers in its marketing area and that permitted the distributor to turn to out-of-state sources only after exhausting the supply offered by local producers. The court stated:

> "Florida has no power 'to prohibit the introduction within her territory of milk of wholesome quality acquired [in another State], whether at high prices or at low ones,' (citation omitted); the State may not, in the sole interest of protecting the economic welfare of its dairy farmers, insulate the Florida milk industry from competition from other States." (Polar Ice Cream & C. Co. v. Andrews, supra, at p. 399.)

We think that the courts would conclude that the proposed amendments to the pooling plan impermissibly burden interstate commerce and, therefore, are violative of the Commerce Clause of the United States Constitution in two respects. First, to the extent that the amendments set a maximum price that an out-of-state producer may receive for market milk sold in this state, but would not provide for the same transportation allowances and credits an in-state producer receives for that product, the amendments, on their face, are patently discriminatory against out-of-state producers. Secondly, to the extent that the amendments set a minimum price that an out-of-state producer must receive for market milk sold in this state, the amendments are analogous to those provisions of the New York Milk Control Act found by the United States Supreme Court to violate the Commerce Clause of the United States Constitution in Baldwin v. Seelig, supra.

Therefore, it is our opinion that the amendments that are proposed to be made to the Pooling Plan for Market Milk that would restrict the price that out-of-state producers of milk could receive for that product to no more or less than the price received by in-state producers for market milk, if adopted, would violate the Commerce Clause of the United States Constitution.

Very truly yours,

Bion M. Gregory
Legislative Counsel

By /s/ Frances S. Dorbin

Frances S. Dorbin
Deputy Legislative Counsel

FSD:lmd

[A similar letter dated December 5, 1996, also appears in the appendix to the preliminary injunction memorandum but has not been reprinted here. A similar letter dated November 18, 1996, was also prepared by the Legislative Counsel but was not submitted to the courts below.]