No. 01-950

IN THE

Supreme Court of the United States

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

Petitioners,

v.

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

Respondents.

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

BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

WARREN W. GOEDERT
NEVADA STATE DAIRY COMMISSION
4600 Kietzke Lane
Building A, Suite 107
Reno, NV 89502
(775) 688-1211

FRANKIE SUE DEL PAPA*
Attorney General, State of Nevada
100 North Carson Street
Carson City, NV 89701-4717
(775) 684-1100

* Counsel of Record

Attorneys for *Amicus Curiae* State of Nevada, and Nevada State Dairy Commission

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTIONS PRESENTED FOR REVIEW

I. Whether section 144 of the 1996 Farm Bill exempts California's "pooling and pricing" regulations, which are unrelated to milk composition and labeling, from the dormant Commerce Clause of the United States Constitution.

II. Whether Congressional intent to exempt "pooling and pricing" regulations, which are unrelated to milk composition and labeling, can be determined by reliance upon legislative history.

LIST OF PARTIES

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

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COMES now the Nevada State Dairy Commission (hereafter "Commission") by and through its counsel and the Attorney General for the State of Nevada ("Nevada") and files the following Amicus Curiae brief in support of Petitioners', Hillside Dairy Inc., A&A Dairy, L&S Dairy, and Milky Way Farms, Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

INTERESTS OF *AMICUS CURIAE*

Nevada and the Commission have an interest in maintaining satisfactory marketing conditions and the reasonable stability of production and marketing of fluid milk. NRS 584.410(4). Pursuant to Supreme Court Rule 37.2, both of the above parties submit this Amicus Curiae Brief in support of Petitioners' efforts to reverse the summary judgment entered against them by the district court.

The Commission is a state agency that was created by the Nevada State Legislature in 1955 to: (1) Promote production and marketing of milk; (2) Eliminate unfair or destructive trade practices; (3) Ensure an adequate and continuous supply of fresh milk to consumers; and (4) Protect the health and welfare of the people of Nevada. The Commission functions under the provisions set forth in Nevada Revised Statutes 584 and Nevada Administrative Code 584. Presently, the Commission regulates 181 licensees, approximately two-thirds of which are out-of-state.

Nevada and its Commission have declared a public interest in the production and distribution of fluid milk. NRS 584.390. In the exercise of its police powers and in furtherance of the health and welfare of its citizens, Nevada enacted legislation for the stabilization and marketing of fluid milk. NRS 584.325 to NRS 584.690 inclusive. One of Nevada's articulated purposes is to ". . . enable the dairy industry with the aid of the state to correct existing evils, develop and maintain satisfactory marketing conditions and bring about a reasonable amount of stability and prosperity in the production and marketing of fluid milk and fluid cream." NRS 584.410(4).

Nevada and its Commission are interested in preserving the benefits of unobstructed commerce between states including California and Nevada. Nevada takes seriously the mandate of the "dormant Commerce Clause" and endeavors to promul-

gate and administer regulations in a manner that does not place parochial interests ahead of the National interest in unobstructed interstate commerce.

SUMMARY OF ARGUMENT

The exclusion provided in § 144 of the Federal Agriculture Improvement and Reform Act of 1996 (FAIR) was intended to provide California with ". . . an exemption from the preemption provisions of any Federal law respecting standards of identity and labeling for fluid milk." FAIR, Conference Report to Accompany H.R. 2854, 104th Cong., 2d Sess. at 338-339 (Mar. 25, 1996).[1] Neither the language

[1] (38) Effect on fluid milk standards in the State of California;

"The House bill provides that nothing in this Act or any other provision of law shall preempt, prohibit, or otherwise limit the authority of the State of California from establishing or continuing 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. (Section 204)

The Senate amendment has no provision.

The Conference substitute adopts the House provision. 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 fluid milk standards were adopted by the State legislature and any revision of these standards must be approved by the state legislature. 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)"

contained in § 144, nor any expression articulated by Congress evidences an intention to extend this exemption to "pooling and pricing" laws. It is the expansive interpretation of § 144 to include "pooling and pricing" laws, first articulated in *Shamrock Farms v. Veneman*, 146 F.3d 1177 (9th Cir. 1998), *cert. denied*, 119 S.Ct. 872 (1999), that most concerns Nevada and its dairy producers.

The court did not reach the factual issue of whether California's "pooling and pricing" laws discriminated against interstate commerce. Instead the court relying upon *Shamrock* case held that California's "pooling and pricing" laws were exempt from the Commerce Clause by virtue of § 144. *Shamrock*, 146 F.3d at 1182. The *Shamrock* holding presumptively permits California to institute "pooling and pricing" laws that discriminate against out-of-state dairy producers and in favor of local producers, even when such discrimination would ordinarily violate the commerce clause. Nevada objects to this overly broad interpretation of § 144.

The issue raised in this appeal is whether the § 144 exemption allows California to discriminate in favor of California dairy producers to the economic disadvantage of Nevada dairy producers. Nevada contends that the holding in *Shamrock* should be limited to only "pooling and pricing" that has a direct bearing upon milk composition and labeling standards as opposed to "pooling and pricing" that unduly discriminates against interstate commerce.

ARGUMENT

The Commerce Clause authorizes Congress to regulate Commerce among the several states. U.S. Const. Art. I, § 8, cl. 3. When Congress fails to exercise the full extent of its power to regulate interstate commerce, states are free to regulate if their regulations are not discriminatory in nature, or impose an undue burden on interstate commerce. *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 154,

83 S.Ct. 1210, 10 L.Ed.2d 248 (1963). If state regulations are nothing more than economic protectionism they are invalid. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471, 101 S.Ct. 715, 66 L.Ed.2d 659 (1981). Even when state regulation imposes only an incidental burden it can still be unconstitutional if it imposes an excessive burden on interstate commerce. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970).

Despite the limitations imposed on states under the "dormant Commerce Clause", Congress has the authority to exempt state law from the commerce clause even when it interferes with interstate commerce. *Western & Southern Life Ins. Co. v. State Bd. Of Equalization*, 451 U.S. 648, 653, 101 S.Ct. 2070, 68 L.Ed.2d 514 (1981). Under § 144 of FAIR it is clear that Congress intended to insulate California's milk composition and labeling standards from federal regulation. What is unclear is whether Congress intended § 144 of FAIR to immunize California from the Commerce Clause with regard to "pooling and pricing" that is unrelated to milk composition and labeling.

It is Nevada's position that Congress' intent to limit California's exemption to milk composition and labeling standards is clearly stated in § 144 of FAIR. If there is doubt as to Congress' intent after considering § 144, then the intent expressed in the Conference Report is the next best indication of what Congress intended. If after considering § 144 and the Conference Report Congress' intent is still unclear, then Congress has not expressed a manifest intent to exempt California from the Commerce Clause with regard to "pooling and pricing" unrelated to milk composition and labeling standards.

A. Statutory Interpretation

The first canon of statutory interpretation is always the language of the statute itself. We start by presuming that Congress says what it means and means what it says. When the language of a statute is unambiguous judicial inquiry is limited to the statute itself. "When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.' *Connecticut National Bank v. Germain*, 503 U.S. 249, 253, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992).

Although the language of § 144 creates a broad based exclusion for California's milk compositional and labeling standards, it does not appear to provide California with an exemption from "pooling and pricing" that violates the Commerce Clause. It is not necessary to challenge the *Shamrock* court's holding ". . . that the milk compositional standards are immune from Commerce Clause challenge. . . ." *Shamrock*, 146 F.3d at 1182. Nevada is focused on a narrower issue. That is, whether Congress intended § 144 to exempt "pooling and pricing" that is unrelated to milk compositional and labeling standards from the Commerce Clause. A fair reading of § 144 discloses only an intention to exempt California's compositional and labeling standards.[2]

The court in *Shamrock* acknowledged that § 144 does not mention or refer to pricing and pooling laws. *Shamrock*, 146 F.3d at 1182. Although the court in *Shamrock* recognized that § 144 does not specifically refer to pricing and pooling laws, the court nonetheless concluded that ". . . pricing and

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[2] § 144 provides: "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."

pooling provisions fall under the ambit of the prohibition against indirect limitations on laws, regulations, or requirements regarding milk standards." *Shamrock*, 146 F.3d at 1182. The court made this conclusion based upon Shamrock Farms' concession during oral argument and the hearing testimony of the Honorable Bill Thomas and Craig S. Alexander. *Shamrock*, 146 F.3d at 1182.

It is clear that § 144 says nothing about exempting pricing and pooling provisions from federal statutes and regulations let alone from the Commerce Clause. In interpreting a statute the presumption is that the legislature says what it means and means what it says. *Connecticut National Bank*, 503 U.S. at 253. In keeping with the Supreme Court's admonition to give effect to the plain meaning of statutes, silence is a compelling indication of an intent not to include.

B. Legislative History

Aided by Shamrock Farms' concession during oral argument, the court concluded ". . . the pricing and pooling laws were adopted in order to assist milk producers in complying with milk content provisions." *Shamrock*, 146 F.3d at 1182. The court in *Shamrock* held this concession was ". . . amply supported by the legislative history surrounding the passage of § 144 of the Farm Bill, which 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." *Shamrock*, 146 F.3d at 1182. The legislative history the court relied upon was the testimony of Honorable Bill Thomas, a California Congressman, and Craig S. Alexander, Executive Director of the Dairy Institute of California. *Shamrock*, 146 F.3d at 1182. The court in *Shamrock* considered this testimony as evidence of Congress' intent to include "pooling and pricing" within the exemption covered by § 144. *Shamrock*, 146 F.3d at 1182.

Nevada suggests that the best indication of Congress' intent is contained in statements of Congress itself, and not those of interested witnesses before committees and/or subcommittees. The intent of § 144 is best set forth in the Conference Report for the Federal Agriculture Improvement and Reform Act of 1996. "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 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." The Conference Report says and Nevada submits that the expressed intent of Congress was to provide California with an exemption ". . . respecting standards of identity and labeling for fluid milk . . . ." Nothing in the Conference Report on § 144 indicates an intention to exempt pooling and pricing from federal statutes, regulations, or the Commerce Clause. What Congress expressed was intent to exempt "standards of identity and labeling."

To reach its decision, the court in *Shamrock* concluded that various elements of the milk fortification scheme are interrelated and mutually interdependent on the pricing and pooling provisions, ergo pooling and pricing were also exempt. *Shamrock*, 146 F.3d at 1182. This conclusion was based upon Shamrock Farms' concession and the statements of Honorable Bill Thomas and Craig S. Alexander. *Shamrock*, 146 F.3d at 1182. This conclusion reads far more into § 144 than was ever expressed by Congress.

C. Manifest Intent

Nevada agrees that for Congress to authorize state laws that violate the Commerce Clause, its intent must be manifest and unmistakably clear. *C & A Carbone, Inc., v. Town of*

Clarkston, 511 U.S. 383, 408, 114 S.Ct. 1677, 128 L.Ed.2d 399 (1994). Congress' intent can be gleaned from the statute, if unambiguous, and/or the legislative history, if ambiguous. *Sporhase v. Nebraska ex rel Douglas*, 458 U.S. 941, 960, 102 S.Ct. 3456, 73 L.Ed.2d 1254 (1982).

Here California has the burden of proving Congress intended to exempt its pooling and pricing laws from the Commerce Clause. *Shamrock Farms v. Veneman*, 146 F.3d at 1180. If California fails to show a manifest intent, the Commerce Clause stands unabated.

For the reasons expressed above Nevada does not believe California has made such a showing regarding pooling and pricing laws that are unrelated to milk composition and labeling standards. § 144 provides little if any help in deciphering Congress' intent with regard to pooling and pricing laws. The testimony of two individuals to a congressional subcommittee is insufficient to evidence a "manifest intent" of Congress, nor does that testimony rise to a level above that expressed by Congress in its Conference Report. On balance California fails to make a convincing case as to Congress' intent to exempt it from the Commerce Clause.

CONCLUSION

California's pooling and pricing discrimination against out-of-state producers flies in the face of the Commerce Clause. If § 144 permits economic protectionism then not only will out-of-state producers suffer, but California consumers will suffer as well. Without Congress' clearly expressed intent, § 144 should not be expanded to exempt California's pooling and pricing laws that are unrelated to the composition and labeling of fluid milk. For these reasons we urge the judgment of the district court be reversed and remanded for further proceedings.

Respectfully submitted,

WARREN W. GOEDERT
NEVADA STATE DAIRY COMMISSION
4600 Kietzke Lane
Building A, Suite 107
Reno, NV 89502
(775) 688-1211

FRANKIE SUE DEL PAPA *
Attorney General, State of Nevada
100 North Carson Street
Carson City, NV 89701-4717
(775) 684-1100

* Counsel of Record

Attorneys for *Amicus Curiae* State of Nevada, and
Nevada State Dairy Commission

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