BEFORE THE UNITED STATES DEPARTMENT OF AGRICULTURE AGRICULTURAL MARKETING SERVICE

In the Matter of Milk in California; Notice of Hearing on a Proposal to Establish a Federal Milk Marketing Order	7 CFR Part 1051 Docket No.: AO-15-0071; AMS-DA-14-0095

Fresno, California, November 2015

Exhibits of Gino Tosi

In Support of Proposal 4 of Ponderosa Dairy,

Ponderosa Dairy

Proposal to Establish a Federal Milk Marketing Order for the

State of California

Exhibit A

tion for certiorari." *Blessing v. Freestone*, 520 U.S. 329, 340, n. 3, 117 S.Ct. 1353, 137 L.Ed.2d 569 (1997).

Petitioners' second constitutional claim, like their statutory one, is subject to plain-error review. "No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before [890] a tribunal having jurisdiction to determine it." *Yakus v. United States*, 321 U.S. 414, 444, 64 S.Ct. 660, 88 L.Ed. 834 (1944); *Johnson*, 520 U.S., at 465, 117 S.Ct. 1544. See also *Cotton*, 535 U.S., at 631–633, 122 S.Ct. 1781 (applying plain-error review to a claimed violation of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 231, 115 S.Ct. 1447, 131 L.Ed.2d 328 (1995) ("[T]he proposition that legal defenses based upon doctrines central to the courts' structural independence can never be waived simply does not accord with our cases"); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848–849, 106 S.Ct. 3245, 92 L.Ed.2d 675 (1986) ("[A]s a personal right, Article III's guarantee of an impartial and independent federal adjudication is subject to waiver, just as are other personal constitutional rights that dictate the procedures by which civil and criminal matters must be tried").

Assuming, *arguendo*, that petitioners could satisfy the first three elements of the plain-error inquiry, see *Olano*, 507 U.S., at 732, 113 S.Ct. 1770; *supra*, at 2139, their constitutional claim fails for the same reason as does their statutory claim: Petitioners have not shown that the claimed error seriously affected the fairness, integrity, or public reputation of judicial proceedings. See *supra*, at 2140. I would therefore affirm the judgment of the Court of Appeals.

539 U.S. 59, 156 L.Ed.2d 54

HILLSIDE DAIRY INC., A&A Dairy, L&S Dairy, and Milky Way Farms, Petitioners,

v.

William J. LYONS, Jr., Secretary, California Department of Food and Agriculture, et al.

Ponderosa Dairy, Pahrump Dairy, Rockview Dairies, Inc., and D. Kuiper Dairy, Petitioners,

v.

William J. Lyons, Jr., Secretary, California Department of Food and Agriculture, et al.

Nos. 01–950, 01–1018.

Argued April 22, 2003.

Decided June 9, 2003.

Out-of-state dairies that sold raw milk to processors in California brought action challenging provisions of California's milk pricing and pooling regulations as violative of rights which they enjoyed under the Commerce, Equal Protection, and Privileges and Immunities Clauses. The United States District Court for the Eastern District of California, Garland E. Burrell, J., dismissed, and dairies appealed. The Court of Appeals, Sedwick, District Judge, sitting by designation, 259 F.3d 1148, affirmed. Certiorari was granted. The Supreme Court, Justice Stevens, held that: (1) regulations were not exempt from Commerce Clause scrutiny, and (2) regulations were not exempt from Privileges and Immunities Clause challenge.

Vacated and remanded.

Justice Thomas concurred in part, dissented in part, and filed opinion.

1. Commerce ⇐60(2)

Food ⇐1.9(2)

California's milk pricing and pooling regulations do not come within exemption

from Commerce Clause scrutiny granted by statute authorizing state to regulate composition and labeling of fluid milk products. U.S.C.A. Const. Art. 1, § 8, cl. 3; Federal Agriculture Improvement and Reform Act of 1996, § 144, 7 U.S.C.A. § 7254.

2. **Commerce** ⇐12

Congressional authorization of state regulations that burden or discriminate against interstate commerce must be clearly expressed. U.S.C.A. Const. Art. 1, § 8, cl. 3.

3. **Constitutional Law** ⇐207(2)
Food ⇐1.9(2, 3)

Absence of express statement in California milk pricing laws and regulations identifying out-of-state residency or citizenship as a basis for disparate treatment did not, without more, preclude out-of state producers' Privileges and Immunities Clause challenge. U.S.C.A. Const. Art. 4, § 2, cl. 1.

Syllabus *

In most of the country, but not California, the minimum price paid to dairy farmers producing raw milk is regulated pursuant to federal marketing orders, which guarantee a uniform price for the producers, but through pooling mechanisms require the processors of different classes of dairy products to pay different prices. California has adopted a similar, although more complex, program to regulate the minimum prices paid by California processors to California producers. Three state statutes create California's milk marketing structure: 1935 and 1967 Acts establish milk pricing and pooling plans, while a 1947 Act governs the composition of milk products sold in the State. Under the state scheme, California processors of fluid milk pay a premium price (part of which goes into a price equalization pool) that is higher than the prices paid to producers. During the 1990's, it became profitable for some California processors to buy raw milk from out-of-state producers. In 1997, the California Department of Food and Agriculture amended its regulations to require contributions to the price equalization pool on some out-of-state purchases. Petitioners, out-of-state dairy farmers, brought these suits, alleging that the 1997 amendment unconstitutionally discriminates against them. Without reaching the merits, the District Court dismissed both cases. The Ninth Circuit affirmed, holding, *inter alia*, that a 1996 federal statute immunized California's milk pricing and pooling laws from Commerce Clause challenge, and that the individual petitioners' Privileges and Immunities Clause claims failed because the 1997 amendment did not, on its face, create classifications based on any individual's residency or citizenship.

Held:

1. California's milk pricing and pooling regulations are not exempted from Commerce Clause scrutiny by § 144 of the Federal Agriculture Improvement and Reform Act of 1996, 7 U.S.C. § 7254, which provides: [60]"Nothing in this Act ... shall be construed to ... limit the authority of ... California ... to ... effect any law ... regarding ... the percentage of milk solids or solids not fat in fluid milk products sold ... in [that] State ...; or ... the labeling of such fluid milk products ...." Section 144 plainly covers California laws regulating the composition and labeling of fluid milk products, but does not mention pricing laws. This Court will not assume that Congress has authorized state regulations that burden or discriminate against interstate commerce unless such an intent is clearly expressed. *South—Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 91, 104 S.Ct. 2237, 81 L.Ed.2d 71. Because § 144 does not ex-

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

press such an intent with respect to California's pricing and pooling laws, the Ninth Circuit erred in relying on that section to dismiss petitioners' Commerce Clause challenge. Pp. 2146–2147.

2. The Ninth Circuit's rejection of the individual petitioners' Privileges and Immunities Clause claims is inconsistent with *Chalker v. Birmingham & Northwestern R. Co.*, 249 U.S. 522, 527, 39 S.Ct. 366, 63 L.Ed. 748, in which this Court held that the practical effect of a Tennessee tax—which did not on its face draw any distinction based on citizenship or residence, but did impose a higher rate on persons having their principal offices out of State—was discriminatory, given that an individual's chief office is commonly in the State of which he is a citizen. In these cases as well, the absence of an express statement in the California laws and regulations identifying out-of-state residency or citizenship as a basis for disparate treatment is not a sufficient basis for rejecting petitioners' claim. In so holding, this Court expresses no opinion on the merits of that claim. P. 2147.

259 F.3d 1148, vacated and remanded.

STEVENS, J., delivered the opinion of the Court, Parts I and III of which were unanimous, and Part II of which was joined by REHNQUIST, C. J., and O'CONNOR, SCALIA, KENNEDY, SOUTER, GINSBURG, and BREYER, JJ. THOMAS, J., filed an opinion concurring in part and dissenting in part, *post*, p. 2147.

Barbara B. McDowell, for United States as amicus curiae, by special leave of the Court, supporting the petitioners.

[61] Mark J. Urban, for respondents.

Lawrence S. Robbins, Roy T. Englert, Jr., Robbins, Russel, Englert Orseck & Untereiner LLP, Washington, D.C., Charles M. English, Jr., Wendy M. Yoviene, Nicholas C. Geale, Thelen Reid & Priest, LLP, Washington, D.C., John H. Vetne, St. Amesbury, MA, Richard Hesse, Concord, NH, for Petitioners.

Bill Lockyer, Attorney General of the State of California, Manuel M. Medeiros, State Solicitor General, Richard M. Frank, Chief Assistant Attorney General, Linda L. Berg, Bruce F. Reeves, Mark J. Urban, Sacramento, CA, Steefel, Levitt & Weiss, A Professional Corporation, Andrea Hackett, San Francisco, CA, for Respondents.

For U.S. Supreme Court briefs, see:

2003 WL 554456 (Pet.Brief)

2003 WL 1785763 (Resp.Brief)

2003 WL 1922432 (Reply.Brief)

Justice STEVENS delivered the opinion of the Court.

In most of the United States, not including California, the minimum price paid to dairy farmers producing raw milk is regulated pursuant to federal marketing orders. Those orders guarantee a uniform price for the producers, but through pooling mechanisms require the processors of different classes of dairy products to pay different prices. Thus, for example, processors of fluid milk pay a premium price, part of which goes into an equalization pool that provides a partial subsidy for cheese manufacturers who pay a net price that is lower than the farmers receive. See *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 189, n. 1, 114 S.Ct. 2205, 129 L.Ed.2d 157 (1994).

The California Legislature has adopted a similar program to regulate the minimum prices paid by California processors to California producers. In the cases before us today, out-of-state producers are challenging the constitutionality of a 1997 amendment to that program. They present us with two questions: (1) whether § 144 of the Federal Agriculture [62] Improvement and Reform Act of 1996, 110 Stat. 917, 7 U.S.C. § 7254, exempts California's milk pricing and pooling regulations from scrutiny under the Commerce Clause; and (2) whether the individual petitioners' claim under the Privileges and Immunities Clause is foreclosed because

those regulations do not discriminate on their face on the basis of state citizenship or state residence.

I

Government regulation of the marketing of raw milk has been continuous since the Great Depression.[1] In California, three related statutes establish the regulatory structure for milk produced, processed, or sold in California. First, in 1935, the State enacted the Milk Stabilization and Marketing Act, Cal. Food & Agric. Code Ann. §§ 61801–62403 (West 2001), "to establish minimum producer prices at fair and reasonable levels so as to generate reasonable producer incomes that will promote the intelligent and orderly marketing of market milk...." § 61802(h). Then, California created requirements for composition of milk products in the Milk and Milk Products Act of 1947. §§ 32501–39912. The standards created under this Act mandate minimum percentages of fat and solids-not-fat in dairy products and often require fortification of milk by adding solids-not-fat. In 1967, California passed another milk pricing Act, the Gonsalves Milk Pooling Act, §§ 62700–62731, to address deficiencies in the existing pricing scheme. Together, these three Acts (including numerous subsequent revisions) create the state milk marketing structure: The 1935 and 1967 Acts establish the milk pricing and pooling plans, while the 1947 Act governs the composition of milk products sold in California.

While it serves the same purposes as the federal marketing orders, California's regulatory program is more complex. 163 Federal orders typically guarantee all producers the same minimum price and create only two or three classes of end uses to determine the processors' contributions to, or withdrawals from, the equalization pools, whereas under the California scheme some of the farmers' production commands a "quota price" and some receives a lower "overbase price," and the processors' end uses of the milk are divided into five different classes.

The complexities of the California scheme are not relevant to these cases; what is relevant is the fact California processors of fluid milk pay a premium price (part of which goes into a pool) that is higher than either of the prices paid to the producers.[2] During the early 1990's, market conditions made it profitable for some California processors to buy raw milk from out-of-state producers at prices that were higher than either the quota prices or the overbase prices guaranteed to California farmers yet lower than the premium prices they had to pay when making in-state purchases. The regulatory scheme was at least partially responsible for the advantage enjoyed by out-of-state producers because it did not require the processors to make any contribution to the equalization pool on such purchases. In other words, whereas an in-state purchase of raw milk resold as fluid milk required the processor both to pay a guaranteed minimum to the farmer and also to make a contribution to the pool, an out-of-state purchase at a higher price would often be cheaper because it required no pool contribution.

In 1997, the California Department of Food and Agriculture amended its plan to require that contributions to the 164 pool be made on some out-of-state purchases.[3] It

1. The history and purpose of federal regulation of milk marketing is described in some detail in *Zuber v. Allen*, 396 U.S. 168, 172–187, 90 S.Ct. 314, 24 L.Ed.2d 345 (1969).

2. Because processors of fluid milk typically manufacture some other products as well, their respective pool contributions reflect the relative amounts of those end uses. Each processor's mix of end uses produces an individual monthly "blend price" that is multiplied by its total purchases. Under federal orders the term "blend price" has a different meaning; it usually refers to the price that the producer receives. See *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 189, n. 1, 114 S.Ct. 2205, 129 L.Ed.2d 157 (1994).

3. After the 1997 amendment, processors whose blend price exceeds the quota price must make contributions to the pool on their

is the imposition of that requirement that gave rise to this litigation. Petitioners in No. 01–950 operate dairy farms in Nevada; petitioners in No. 01–1018 operate such farms in Arizona. They contend that the 1997 amendment discriminates against them. In response, the California officials contend that it merely eliminated an unfair competitive advantage for out-of-state producers that was the product of the regulatory scheme itself.

Without reaching the merits of petitioners' constitutional claims, the District Court dismissed both cases and the Court of Appeals for the Ninth Circuit affirmed. 259 F.3d 1148 (2001). Relying on its earlier decision in *Shamrock Farms Co. v. Veneman*, 146 F.3d 1177 (C.A.9 1998), the court held that a federal statute enacted in 1996 had immunized California's milk pricing and pooling laws from Commerce Clause challenge. It also held that the corporate petitioners had no standing to raise a claim under the Privileges and Immunities Clause, and that the individuals' claim under that Clause failed because the 1997 plan amendments did not, "on their face, create classifications based on any individual's residency or citizenship." 259 F.3d, at 1156. We granted certiorari to review those two holdings, 537 U.S. 1099, 123 S.Ct. 818, 154 L.Ed.2d 766 (2003), but in doing so we do not reach the merits of either constitutional claim.

II

In some respects, the State's composition standards set forth in the 1947 Act exceed those set by the federal Food and Drug Administration (FDA). For example, California's minimum standard for reduced fat milk requires that it contain at least 10 percent solids-not-fat (which include protein,[65] calcium, lactose, and other nutrients). Cal. Food & Agric. Code Ann. § 38211 (West 2001). Federal standards require that reduced fat milk contain only 8.25 percent solids-not-fat. See 21 CFR §§ 131.110, 101.62 (2002). Some of California's standards were arguably pre-empted by Congress' enactment of the Nutrition Labeling and Education Act of 1990, 104 Stat. 2353, which contains a prohibition against the application of state quality standards to foods moving in interstate commerce. See 21 U.S.C. § 343–1(a). The District Court so held in *Shamrock Farms Co. v. Veneman*, No. Civ–S–95–318 (E.D.Cal., Sept. 25, 1996). In response to that decision, California sought an exemption from both the FDA and Congress. See *Shamrock Farms*, 146 F.3d, at 1180. Before the FDA acted, Congress responded favorably with the enactment of the statute that governs our disposition of these cases. That statute, § 144 of the Federal Agriculture Improvement and Reform Act of 1996, 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." 7 U.S.C. § 7254.

[1] Thereafter, Shamrock Farms brought another suit against the Secretary of the California Department of Food and Agriculture challenging the validity of both the State's compositional standards and its milk pricing and pooling laws. In that case, the Court of Appeals held that § 144 had immunized California's marketing programs as well as the compositional standards from a negative Commerce Clause challenge.[66] *Shamrock Farms*, 146 F.3d, at 1182. In adhering to that ruling in the cases before us today, the Ninth Circuit erred.

65. out-of-state purchases as well as their in-state purchases.

[2] The text of the federal statute plainly covers California laws regulating the composition and labeling of fluid milk products, but does not mention laws regulating pricing. Congress certainly has the power to authorize state regulations that burden or discriminate against interstate commerce, *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 66 S.Ct. 1142, 90 L.Ed. 1342 (1946), but we will not assume that it has done so unless such an intent is clearly expressed. *South—Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 91–92, 104 S.Ct. 2237, 81 L.Ed.2d 71 (1984). While § 144 unambiguously expresses such an intent with respect to California's compositional and labeling laws, that expression does not encompass the pricing and pooling laws. This conclusion is buttressed by the separate California statutes addressing the composition and labeling of milk products, on the one hand, and the pricing and pooling of milk on the other. See *supra*, at 2145–2146, 2147. The mere fact that the composition and labeling laws relate to the sale of fluid milk is by no means sufficient to bring them within the scope of § 144. Because § 144 does not clearly express an intent to insulate California's pricing and pooling laws from a Commerce Clause challenge, the Court of Appeals erred in relying on § 144 to dismiss the challenge.

III

[3] Article IV, § 2, of the Constitution provides:

> "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

Petitioners, who include both individual dairy farmers and corporate dairies, have alleged that California's milk pricing laws violate that provision. The Court of Appeals held that the corporate petitioners have no standing to advance such [67]a claim, and it rejected the individual petitioners' claims because the California laws "do not, on their face, create classifications based on any individual's residency or citizenship." 259 F.3d, at 1156. Petitioners do not challenge the first holding, but they contend that the second is inconsistent with our decision in *Chalker v. Birmingham & Northwestern R. Co.*, 249 U.S. 522, 39 S.Ct. 366, 63 L.Ed. 748 (1919). We agree.

In *Chalker*, we held that a Tennessee tax imposed on a citizen and resident of Alabama for engaging in the business of constructing a railroad in Tennessee violated the Privileges and Immunities Clause. The tax did not on its face draw any distinction based on citizenship or residence. It did, however, impose a higher rate on persons who had their principal offices out of State. Taking judicial notice of the fact that "the chief office of an individual is commonly in the State of which he is a citizen," we concluded that the practical effect of the provision was discriminatory. *Id.*, at 527, 39 S.Ct. 366. Whether *Chalker* should be interpreted as merely applying the Clause to classifications that are but proxies for differential treatment against out-of-state residents, or as prohibiting any classification with the practical effect of discriminating against such residents, is a matter we need not decide at this stage of these cases. Under either interpretation, we agree with petitioners that the absence of an express statement in the California laws and regulations identifying out-of-state citizenship as a basis for disparate treatment is not a sufficient basis for rejecting this claim. In so holding, however, we express no opinion on the merits of petitioners' Privileges and Immunities Clause claim.

* * *

The judgment of the Court of Appeals is vacated, and these cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

[68]Justice THOMAS, concurring in part and dissenting in part.

I join Parts I and III of the Court's opinion and respectfully dissent from Part

II, which holds that § 144 of the Federal Agriculture Improvement and Reform Act of 1996, 7 U.S.C. § 7254, "does not clearly express an intent to insulate California's pricing and pooling laws from a Commerce Clause challenge." *Ante*, at 2147. Although I agree that the Court of Appeals erred in its statutory analysis, I nevertheless would affirm its judgment on this claim because "[t]he negative Commerce Clause has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application," *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 610, 117 S.Ct. 1590, 137 L.Ed.2d 852 (1997) (THOMAS, J., dissenting), and, consequently, cannot serve as a basis for striking down a state statute.

539 U.S. 90, 156 L.Ed.2d 84

DESERT PALACE, INC., dba Caesars Palace Hotel & Casino, Petitioner,

v.

Catharina F. COSTA.

No. 02–679.

Argued April 21, 2003.

Decided June 9, 2003.

Female former employee sued former employer for gender discrimination and sexual harassment under Title VII. The United States District Court for the District of Nevada, David W. Hagen, J., dismissed harassment claim and entered judgment on jury verdict in favor of employee on discrimination claim. Employer appealed. The United States Court of Appeals for the Ninth Circuit, 268 F.3d 882, vacated judgment. On en banc rehearing, the Court of Appeals, 299 F.3d 838, reinstated the judgment. Certiorari was granted. The United States Supreme Court, Justice Thomas, held that direct evidence of discrimination is not required in order to prove employment discrimination in mixed-motive cases under Title VII, abrogating *Mohr v. Dustrol, Inc.*, 306 F.3d 636, *Fernandes v. Costa Bros. Masonry, Inc.*, 199 F.3d 572, *Trotter v. Board of Trustees of Univ. of Ala.*, 91 F.3d 1449, *Fuller v. Phipps*, 67 F.3d 1137.

Judgment affirmed.

Justice O'Connor concurred and filed an opinion.

1. Statutes ⇐190

Where the words of the statute are unambiguous, the judicial inquiry is complete.

2. Civil Rights ⇐1544

Direct evidence of discrimination is not required in order to prove employment discrimination in mixed-motive cases under Title VII; statute imposes no special or heightened evidentiary burden on a plaintiff in a mixed-motive case; abrogating *Mohr v. Dustrol, Inc.*, 306 F.3d 636, *Fernandes v. Costa Bros. Masonry, Inc.*, 199 F.3d 572, *Trotter v. Board of Trustees of Univ. of Ala.*, 91 F.3d 1449, *Fuller v. Phipps*, 67 F.3d 1137. Civil Rights Act of 1964, § 703(m), 42 U.S.C.A. § 2000e–2(m).

3. Civil Rights ⇐1544

Conventional rule of civil litigation, which requires a plaintiff to prove his case by a preponderance of the evidence, using direct or circumstantial evidence, generally applies in Title VII cases. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

4. Evidence ⇐587

Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence.

Exhibit B

limited to the administrative record. *See* 42 U.S.C. § 9613(j)(1). Therefore, pursuant to the language in section 9613(j)(1), this court will not look past the administrative record in determining whether Plaintiff DTSC deviated from the NCP in responding to contamination at the Site.

Finally, Defendants also argue that Plaintiff produced the administrative record too late. However, the administrative record was produced on November 13, 2003, nearly four months prior to the filing date of the instant motion. Trial is presently set for August 08, 2004. Defendants have more than enough time to review the record.[4]

IV. *RULING*

Plaintiff State of California Department of Toxic Substances Control's Motion for Summary Judgment as to the Appropriate Scope and Standard of Review of Agency Action is hereby GRANTED.

4. Defendants raise two other arguments: (1) that Plaintiff failed to meet and confer prior to the filing of the instant motion; and (2) the instant motion is untimely because it should be brought as a motion *in limine*. It is the court's understanding that the parties discussed the filing and briefing of the instant motion in the presence of the court months in advance. As a result, the first argument lacks merit. On the second point, Rule 56 of the Federal Rules of Civil Procedure provides no such limit on issues raised through motions for summary judgment. *See* Fed.R.Civ.P. Rule 56. Indeed, the question presented in the instant motion is suitable for resolution at an early stage because it is a purely legal question and it would be waste of resources for the court and the parties to engage in useless discovery when judicial review will be limited at trial to the administrative record.

HILLSIDE DAIRY, INC., et al. Plaintiffs,

v.

A.G. KAWAMURA, Secretary, California Department of Food & Agriculture, et al., Defendants.

Ponderosa Dairy, et al. Plaintiffs,

v.

A.G. Kawamura, Secretary, California Department of Food & Agriculture, et al., Defendants.

Nos. CV–S–97–1179 GEB JFM, CV–S–97–1195–GEB JFM.

United States District Court, E.D. California.

May 7, 2004.

Background: After remand, 71 Fed.Appx. 757, milk producers in two actions moved for summary judgment on their facial challenge to sections of California Food & Agricultural Code and certain amendments to the California Department of Food and Agriculture pooling plan for market milk, arguing that those statutes and the amendments were unconstitutional under the Commerce Clause.

Holdings: The District Court, Burrell, J., held that:

(1) it would be inappropriate to pass upon the constitutionality of the statutes because the suit was not adversary, and there was no actual antagonistic assertion of rights, and

(2) amendment to pooling plan requiring certain California processors who bought raw milk from out-of-state producers to make a payment to an equalization pool from which disbursements were made to various California raw milk producers and processors violated Commerce Clause.

Motions granted in part.

1. **Injunction** ⇐14

Before a permanent injunction issues, plaintiffs have to demonstrate a likelihood of substantial and immediate irreparable injury.

2. **Constitutional Law** ⇐46(1)

Where California Department of Food and Agriculture had not applied challenged statutes to out-of-state raw milk producers, it would be inappropriate to pass upon the constitutionality of the statutes because the suit was not adversary, and there was no actual antagonistic assertion of rights; speculation that Department could eventually alter its position on enforcement of those statutes was insufficient to justify judicial relief. U.S.C.A. Const. Art. 3, § 1 et seq.; West's Ann.Cal. Food & Agric. Code §§ 62077, 62078.

3. **Commerce** ⇐54.1

If a restriction on commerce is discriminatory, it is virtually per se invalid. U.S.C.A. Const. Art. 1, § 8, cl. 3.

4. **Commerce** ⇐60(2)
Food ⇐1.9(3)

Amendment to California Department of Food and Agriculture pooling plan for market milk requiring certain California processors who bought raw milk from out-of-state producers to make a payment to an equalization pool from which disbursements were made to various California raw milk producers and processors violated Commerce Clause; facial requirement in the pooling plan prescribing that payment be made constituted a monetary assessment on interstate raw milk sales for the economic protection of California dairy businesses, which discriminated against interstate raw milk sales. U.S.C.A. Const. Art. 1, § 8, cl. 3.

5. **Commerce** ⇐54.1

Commerce Clause requires that any justification advanced for a discriminatory restriction on commerce pass the strictest scrutiny. U.S.C.A. Const. Art. 1, § 8, cl. 3.

Rebecca Michelle Ceniceros, Livingston and Mattesich, Sacramento, CA, Patrick Martin Ryan, Thelen Reid and Priest LLP, San Francisco, CA, Wendy M. Yoviene, Ober Kaler Grimes and Shriver, Washington, DC, Charles M English, Thelen Reid and Priest LLP, Washington, DC, for Plaintiffs.

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ORDER

BURRELL, District Judge.

Plaintiffs in both actions move for summary judgment on their facial challenge to California Food & Agricultural Code §§ 62077 and 62078, and certain 1997 amendments to the California Department of Food and Agriculture Pooling Plan for Market Milk ("Pooling Plan"), arguing these statutes and the amendments are unconstitutional under the Commerce Clause. Defendants oppose the motion, except for the portion that seeks to enjoin

Defendants from enforcing §§ 62077 and 62078 on interstate raw milk sales.

CHALLENGE TO 62077 AND 62078

[1] Defendants state the Department of Food and Agriculture has not applied §§ 62077 and 62078 to out-of-state raw milk producers, "does not intend to do so in the future, and ... does not object to a permanent injunction prohibiting the Department from enforcing these provisions on out-of-state dairy farmers...." (Defs.' Supp. Brief in Opp'n to Pls.' Joint Mot. for Summ. J., filed April 5, 2004, at 2.) In light of Defendants' position, it must be determined whether Plaintiffs need an injunction preventing Defendants from doing what they say they have not done and will not do; specifically, Defendants state they have not applied and will not apply §§ 62077 and 62078 to interstate raw milk sales. Before a permanent injunction issues, Plaintiffs have to demonstrate a likelihood of substantial and immediate irreparable injury. *See Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1495 (9th Cir.1996) ("The requirements for the issuance of a permanent injunction are 'the likelihood of substantial and immediate irreparable injury and the inadequacy of remedies at law.' ").

[2] Plaintiffs contend even though Defendants state they do not intend to enforce §§ 62077 and 62078 on interstate raw milk sales, Defendants lack authority under Article III, section 3.5(a) of the California Constitution to "refuse to enforce a statute ... unless an appellate court has made a determination that such statute is unconstitutional...." (Pls.' Supp. Memo. of P. & A. at 19.) Therefore, Plaintiffs contend an injunction is required because the Department of Food and Agriculture "may [eventually] attempt to enforce" these statutes on interstate raw milk purchases. (*Id.*) But speculation that Defendants may eventually alter their position on enforcement of these statutes is insufficient to justify injunctive relief. Since Defendants have agreed not to enforce these statutes on interstate raw milk sales, it is inappropriate to "pass upon the constitutionality of [the statutes because the] suit ... is not adversary, [and] there is no actual antagonistic assertion of rights." *Congress of Indus. Orgs. v. McAdory*, 325 U.S. 472, 475, 65 S.Ct. 1395, 89 L.Ed. 1741 (1945) (holding that no decision should be reached on the constitutionality of a statute, since the government agreed not to enforce it). Therefore, Plaintiffs' challenge to these statutes is dismissed. *See generally Enrico's, Inc. v. Rice*, 730 F.2d 1250, 1253–55 (9th Cir.1984) (dismissing appeal after government ceased enforcing challenged regulations, since Article III jurisdiction ceased to exist).

CHALLENGE TO 1997 POOLING PLAN AMENDMENT

Plaintiffs also seek to prevent Defendants' application of a 1997 amendment to the Pooling Plan, contending that it discriminates against some interstate raw milk purchases. The challenged 1997 amendment amends § 900 of Article 9 of the Pooling Plan to require certain California processors who buy raw milk from out-of-state producers to make a payment to an equalization pool ("the pool") from which disbursements are made to various California raw milk producers and processors. This payment is calculated as follows: First, the raw milk purchased is assigned a class price corresponding to the use made of that raw milk under § 900(a).[1]

1. California law establishes five classes of dairy products which California processors create from raw milk. *See* Food & Agric. Code §§ 61932–61935. The Pooling Plan "establishes minimum prices to be paid by handlers to producers for market milk in the various classes." *Id.* § 62062. But "[t]he price that a [California processor] pays for raw milk based upon its [class] does not nec-

Then, the lower of the "value based on the receiving plant's inplant usage" or a modified quota price is deducted from the class price assigned under § 900(a).[2] The remainder must be paid into the pool under § 1003.

Defendants explain the effect of this amendment as follows:

> Under the Pooling Plan, as amended, California processors account to the pool for their purchases of out-of-state milk based on the utilization of that milk. The quota and overbase pool prices [which are paid to California raw milk producers] are generated from that pool of revenue, whereas prior to the Amendments, the quota and overbase prices were calculated after the out-of-state milk had, in effect, been subtracted out of the pool. The effect of this change is that quota and overbase prices have increased.

(Defs.' Supp. Undis. Facts ¶ 6.) Plaintiffs contend this payment, which is made because of interstate raw milk sales and only disbursed to certain California dairy businesses for their benefit, is an unconstitutional tariff.

[3] The issue is whether the facial requirement in the Pooling Plan prescribing that this payment be made constitutes a monetary assessment on interstate raw milk sales for the economic protection of California dairy businesses, which discriminates against interstate raw milk sales. "[U]se [of] the term ... 'discrimination' simply means differential treatment of instate and out-of-state economic interests that benefits the former and burdens the latter. If a restriction on commerce is discriminatory, it is virtually *per se* invalid." *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality of the State of Oregon*, 511 U.S. 93, 99, 114 S.Ct. 1345, 128 L.Ed.2d 13 (1994).

[4] Under the Pooling Plan, when a California dairy products processor purchases raw milk from a California producer, the processor pays into the pool an "establishe[d] minimum price" set by Defendants. Cal. Food & Agric. Code § 62062. Plaintiff's competitor, a California raw milk producer, receives a guaranteed minimum raw milk price because of the Pooling Plan, irrespective of the dairy product to which the raw milk is converted, (Pls.' Undis. Facts ¶ 14), payment of its shipping costs, (Defs.' Opp'n to Pls.' Undis. Facts ¶ 7), and the right to vote on the manner in which the Pooling Plan operates. (Pls.' Undis. Facts ¶ 20.) When a California dairy products processor purchases raw milk from an out-of-state producer, § 900 requires the processor to pay the amount set by Defendants under § 900, regardless of the raw milk purchase price negotiated between the processor and producer. Although California processors, rather than out-of-state raw milk producers, make this payment, that is immaterial to the Commerce Clause analysis. *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 203, 114 S.Ct. 2205, 129 L.Ed.2d 157 (1994) ("The idea that a discriminatory

essarily equal the price that a [California producer] receives for the raw milk" under the Pooling Plan. (Pls.' Undis. Facts ¶ 13.) "Thus, for example, processors of fluid milk pay a premium price, part of which goes into an equalization pool that provides a partial subsidy for cheese manufacturers who pay a net price that is lower than the farmers receive." *Hillside Dairy, Inc. v. Lyons*, 539 U.S. 59, 123 S.Ct. 2142, 2145, 156 L.Ed.2d 54 (2003) (citation omitted).

2. The quota price, established by Defendants, is "compute[d] based on the weighted average classified prices of all raw milk purchases in the State." (Pls.' Undis. Facts ¶ 15.) The quota price is used to determine the price certain California raw milk producers receive when they sell raw milk to a California processor.

tax does not interfere with interstate commerce merely because the burden of the tax was borne by consumers in the taxing State [rather than out-of-state sellers has been] thoroughly repudiated....") (citation and quotation marks omitted). The payments by California processors for interstate raw milk purchases are pooled, and each California raw milk producer is paid "a weighted average 'pool price' " for all raw milk sold to California processors. (Defs.' Memo. of P. & A. at 10.) The face of the Pooling Plan reveals that out-of-state raw milk producers selling milk to California processors receive no benefit from the pool.

Plaintiffs contend the Pooling Plan is similar to the milk system considered in *West Lynn*, 512 U.S. at 190–91, 114 S.Ct. 2205, which was declared unconstitutional under the Commerce Clause. That system "require[d] every [milk] 'dealer' in Massachusetts to make a monthly 'premium payment' into the 'Massachusetts Dairy Equalization Fund' ... [based on] the amount ... of the dealer's [fluid milk] sales in Massachusetts [regardless of the state where that milk was produced]. Each month the fund [was] distributed to Massachusetts [raw milk] producers." *Id.* The Supreme Court stated this payment was "effectively a tax which makes milk produced out of State more expensive." *Id.* at 194, 114 S.Ct. 2205. The Court explained: "Massachusetts not only rebates to domestic milk producers the tax paid on the sale of Massachusetts milk, but also the tax paid on the sale of milk produced elsewhere." *Id.* at 197, 114 S.Ct. 2205.

Defendants argue *West Lynn* is distinguishable, contending the Pooling Plan does not "require the out-of-state producer to accept [a] minimum price, [because] he can negotiate against [the minimum price applied to in-state raw milk sales], he can compete against his California counterparts but he isn't competing based on the minimum price for butter [sic], he's competing based on the higher minimum floor price that the department has given him...." (April 19, 2004, hearing transcript at 9.) But this argument is unpersuasive because as stated in *West Lynn*: "out-of-staters' ability to remain competitive by lowering their prices would not immunize a discriminatory measure" from being invalidated under the Commerce Clause. *Id.* at 195, 114 S.Ct. 2205.

Since the 1997 amendment to § 900 requires out-of-state raw milk producers to pay for benefits received exclusively by California dairy businesses, it is similar to the milk pricing order invalidated in *West Lynn*. Like the charge in *West Lynn*, this charge attendant to interstate milk sales, which is evident on the face of the Pooling Plan and just benefits certain California dairy businesses, renders § 900 discriminatory "because it, like a tariff, neutralizes advantages belonging to the place of origin." *West Lynn*, 512 U.S. at 196, 114 S.Ct. 2205 (citation and quotation marks omitted).

[5] Defendants argue notwithstanding this discriminatory effect, § 900 should not be invalidated because it "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Oregon Waste*, 511 U.S. at 101, 114 S.Ct. 1345. The Commerce Clause requires that any justification advanced for a discriminatory restriction on commerce "pass the strictest scrutiny." *Id.* (citation and quotation marks omitted).

Defendants assert the need to prevent "roundtripping" is a justification for § 900. "Roundtripping" refers to truckloads of raw milk exiting California and then turning around and re-entering California so that the raw milk could be reported as out-

of-state milk when it is sold to a California processor.[3] (Lombardo Decl. ¶ 6.)

At the hearing, Defendants' counsel was asked whether this practice could be halted by simply requiring California processors to swear under penalty of perjury whether the raw milk they purchased was produced in California. Defendants' counsel responded:

> Your Honor, that was what the department tried initially. And what happens is that a particular dairy, a particular co-op in California entered into an agreement with an out-of-state co-op whereby they sold their milk to the out-of-state co-op and the out-of-state co-op in turn sold approximately the same amount of milk into the state and gave the in-state dairy a kickback, which was the benefit of roundtripping. If the processor purchasing that milk had stated under penalty of perjury who it purchased that milk from, it would not be identified as round-tripping, it would be identified as a legitimate purpose, coming from out-of-state.

(April 19, 2004, hearing transcript at 54.) This argument is unpersuasive. Defendants have only addressed the effectiveness of requiring a California processor to identify the seller of the raw milk. Defendants have not shown that requiring California processors to state whether the raw milk they purchase was produced in California would be ineffective in preventing raw milk produced in California from being reported as produced elsewhere. Defendants have failed to carry their burden of showing the absence of reasonable, nondiscriminatory alternatives to § 900.

Since § 900 discriminates on its face against interstate raw milk sales and Defendants have not carried their burden of justifying this discrimination, § 900 violates the Commerce Clause. *See Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.* 520 U.S. 564, 581, 117 S.Ct. 1590, 137 L.Ed.2d 852 (1997) (holding a statute which discriminated against interstate commerce was "all but *per se* invalid" and violated the Commerce Clause). Therefore, Defendants are permanently enjoined from enforcing § 900 on interstate raw milk sales.[4]

The Clerk's Office shall enter judgment in accordance with this Order. Lastly, Plaintiffs' request for leave to file their respective motions for attorneys' fees within forty days of the date on which this Order is filed is granted.

3. It is assumed without deciding that preventing roundtripping is a legitimate local purpose.

4. Since this injunction remedies the harm to Plaintiffs at issue in this litigation, no injunctive relief regarding other sections of the Pooling Plan is warranted. *See Armstrong v. Davis*, 275 F.3d 849, 872 (9th Cir.2001) ("In determining the scope of injunctive relief that interferes with the affairs of a state agency, we must ensure, out of federalism concerns, that the injunction heels close to the identified violation and is not overly intrusive....") (citation and quotation marks omitted). Nor is Plaintiffs' request for a declaratory judgment granted. A federal court need not issue declaratory relief "[w]here a party [has obtained] ... a substantially similar alternative remedy such as an injunction." *Kinghorn v. Citibank, N.A.*, 1999 WL 30534, at *7 (N.D.Cal. Jan. 20, 1999); *see also Allis-Chalmers Corp. v. Arnold*, 619 F.2d 44, 46 (9th Cir.1980) (finding judge may refuse declaratory relief "[w]here more effective relief can be obtained by other proceedings").