

1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - -X

3 HILLSIDE DAIRY, INC. , A&A :
4 DAIRY, L&S DAIRY, AND MILKY :
5 WAY FARMS, :
6 Petitioners :

7 v. : No. 01-950

8 WILLIAM J. LYONS, JR. , :
9 SECRETARY, CALIFORNIA :
10 DEPARTMENT OF FOOD AND :
11 AGRICULTURE, ET AL. ; :
12 and :

13 PONDEROSA DAIRY, PAHRUMP :
14 DAIRY, ROCKVIEW DAIRIES, :
15 INC. , AND D. KUIPER DAIRY, :
16 Petitioners :

17 v. : No. 01-1018

18 WILLIAM J. LYONS, JR. , :
19 SECRETARY, CALIFORNIA :
20 DEPARTMENT OF FOOD AND :
21 AGRICULTURE, ET AL. :

22 - - - - -X

23 Washington, D. C.
24 Tuesday, April 22, 2003
25 The above-entitled matter came on for oral

1 argument before the Supreme Court of the United States at
2 11:10 a.m.

3 APPEARANCES:

4 ROY T. ENGLERT, JR., ESQ., Washington, D.C.; on behalf of
5 the Petitioners.

6 BARBARA B. McDOWELL, ESQ., Assistant to the Solicitor
7 General, Department of Justice, Washington, D.C.; on
8 behalf of the United States, as amicus curiae,
9 supporting the Petitioners.

10 MARK J. URBAN, ESQ., Deputy Attorney General, Sacramento,
11 California; on behalf of the Respondents.

12

13

14

15

16

17

18

19

20

21

22

23

24

25

| | | |
|----|--|------|
| 1 | C O N T E N T S | |
| 2 | ORAL ARGUMENT OF | PAGE |
| 3 | ROY T. ENGLERT, JR., ESQ. | |
| 4 | On behalf of the Petitioners | 4 |
| 5 | BARBARA B. McDOWELL, ESQ. | |
| 6 | On behalf of the United States, | |
| 7 | as amicus curiae, supporting the Petitioners | 12 |
| 8 | MARK J. URBAN, ESQ. | |
| 9 | On behalf of the Respondents | 19 |
| 10 | REBUTTAL ARGUMENT OF | |
| 11 | ROY T. ENGLERT, JR., ESQ. | |
| 12 | On behalf of the Petitioners | 38 |
| 13 | | |
| 14 | | |
| 15 | | |
| 16 | | |
| 17 | | |
| 18 | | |
| 19 | | |
| 20 | | |
| 21 | | |
| 22 | | |
| 23 | | |
| 24 | | |
| 25 | | |

1 P R O C E E D I N G S

2 (11:10 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 01-950, the Hillside Dairy, Inc. v. William
5 J. Lyons, Jr., and a companion case.

6 Mr. Englert.

7 ORAL ARGUMENT OF ROY T. ENGLERT, JR.

8 ON BEHALF OF THE PETITIONERS

9 MR. ENGLERT: Thank you, Mr. Chief Justice, and
10 may it please the Court:

11 This is a case of inventive statutory
12 interpretation by the Ninth Circuit. The statute at issue
13 directs the courts how to construe this act or any other
14 provision of law, yet the Ninth Circuit interpreted the
15 statute rather inventively as an exemption from a
16 provision of the Constitution. The statute protects
17 California statutes and regulations regarding two aspects
18 of California's composition regulation of packaged fluid
19 milk, yet the Ninth Circuit interpreted the statute,
20 rather inventively, as an exemption for all aspects of
21 California's economic regulation of raw milk.

22 Inventiveness may have a role to play in some
23 cases of statutory interpretation, but not when the
24 governing legal standard requires that Congress has made
25 its intent unmistakably clear. The Ninth Circuit's

1 statutory holding should be reversed.

2 There is also a constitutional issue before the
3 Court involving the Privileges and Immunities Clause of
4 Article 4. The Ninth Circuit should be reversed on that
5 issue as well, but not because it was overly inventive.
6 The Ninth Circuit simply ignored, with no explanation at
7 all, binding precedent from this Court requiring that
8 courts look beyond the face of the statute to determine
9 whether, in practical effect, it draws a distinction based
10 on citizenship or residency.

11 The California statutes and regulations at issue
12 in this case draw a distinction based on where milk is
13 produced, and 93 percent of dairy farmers live on their
14 farms. To draw a distinction based on the State of
15 production is, in effect, to draw a distinction based on
16 the State of residency, and the distinction should be
17 subject to scrutiny under the Privileges and Immunities
18 Clause. We do not --

19 QUESTION: But as far as that clause is
20 concerned it wouldn't help you with the corporate, if you
21 had a corporate farmer. It would only work for
22 individuals.

23 MR. ENGLERT: Only the individual petitioners
24 are entitled to invoke the Privileges and Immunities
25 Clause, yes, and there are individual petitioners.

1 QUESTION: There are two individual petitioners
2 I think in this group, is that so?

3 MR. ENGLERT: A -- a husband and wife, Darrel
4 and Diane Kuiper, yes.

5 Let me return to the statutory issue. This act
6 or any other provision of law in section 144 means
7 statutory or regulatory law, not the Constitution. Why do
8 I say that? Number 1, section 144 is phrased as a
9 directive to courts about how to construe particular
10 bodies of law. Congress doesn't have the power to tell
11 courts how to construe the Constitution.

12 It does have the power to tell courts how to
13 construe congressional silence or inaction, and the
14 McCarran-Ferguson Act is a good example of the kind of
15 phraseology Congress uses when it wants to enact a
16 Commerce Clause exemption, but section 144 is a poor
17 candidate from the outset.

18 Number 2, the canons of construction applied in
19 numerous decisions of this Court, most recently the
20 Keffler case in February, required that a general phrase
21 like, other provision of law, be construed by reference to
22 the phrases that came before. Federal statutory and
23 regulatory law is naturally paired with this act, but
24 would be very odd to throw the Constitution in as an
25 afterthought through use of the phrase, other provision of

1 law.

2 Number 3, the legislative history is devastating
3 to respondents' position. The absence of a single
4 reference to the Constitution anywhere in the legislative
5 history is quite significant, but it's not the strongest
6 refutation of respondents' argument in the legislative
7 history. Rather, the very first paragraph of explanation
8 of section 144 in the conference report describes it as,
9 quote, an exemption from the preemption provisions of any
10 Federal law respecting standards of identity and labeling
11 for fluid milk, close quote. That can be found on page 33
12 of the blue brief.

13 Number 4, and this is merely the clincher that
14 builds on the first three points, the standard is whether
15 Congress has been unmistakably clear in passing a Commerce
16 Clause exemption. The evidence is so strongly the other
17 way that one might call it unmistakably clear that
18 Congress did not pass a Commerce Clause exemption, but
19 it --

20 QUESTION: This argument's probably better
21 addressed to the respondents than -- than you, but do you
22 understand the respondents to argue that the percentage
23 of -- of milk solids which is one, and labeling, which is
24 the second part of the statute, simply will cease to exist
25 if -- if this pricing regulation is not upheld?

1 MR. ENGLERT: No, that -- I don't understand
2 that to be their contention.

3 QUESTION: I -- I thought that that was going to
4 be -- when I got into the case I thought, well, they're
5 going to say that it's just impossible to have the
6 labeling, but I -- I don't understand them to argue that.
7 I can ask them, of course, but --

8 MR. ENGLERT: I -- I don't understand them to
9 argue that either, Justice Kennedy. I think the strongest
10 form their argument takes is, there is a relationship
11 between economic regulation of raw milk and compositional
12 regulation of packaged fluid milk, and any relationship is
13 enough to satisfy this statute.

14 QUESTION: Well, is it true that the pricing and
15 pooling laws were adopted to help the milk producers
16 comply with the fluid milk content provisions?

17 MR. ENGLERT: I -- I don't think that's
18 factually accurate, Your Honor.

19 QUESTION: That was what the attorney in the
20 Shamrock case conceded.

21 MR. ENGLERT: Not -- not --

22 QUESTION: You don't agree?

23 MR. ENGLERT: I'm sorry, Justice O'Connor. He
24 did not concede that. What he did concede was that the
25 fortification allowance --

1 QUESTION: Yes.

2 MR. ENGLERT: -- which is a particular provision
3 of the stabilization plan, that is the pricing plan, not
4 the pooling plan, was adopted to help compliance with
5 California's composition standards.

6 QUESTION: And section 7254 does use the word
7 indirectly.

8 MR. ENGLERT: It does, Your Honor, but it's very
9 interesting to look at the parallel phrasing of section
10 144 of the Farm Bill, 7 U.S.C. 7254, and the preemption
11 provision of the Nutrition Labeling and Education Act,
12 which is 21 U.S.C. section 343-1. Both use the phrase
13 directly or indirectly.

14 QUESTION: Yes.

15 MR. ENGLERT: In the preemption provision of the
16 NLEA, Congress was talking about was -- what was
17 preempted, and it was saying anything a State does
18 directly or indirectly to have labeling requirements
19 different from Federal law is preempted.

20 What section 144 of the Farm Bill does is, it
21 unpreempts California's standards for milk.

22 QUESTION: Right.

23 MR. ENGLERT: Now, unless California is prepared
24 to say that it's entire pooling and pricing plans were
25 preempted by the NLEA in 1990, which I don't think you're

1 going to hear from Mr. Urban, the entire pooling and
2 pricing plans weren't preempted by section 144 of the
3 Farm Bill, either.

4 Let me turn to the Privileges and Immunities
5 Clause issue.

6 QUESTION: Just -- just before you get there --
7 well, maybe it's a part -- does -- do Nevada producers
8 have a -- a Federal marketing order?

9 MR. ENGLERT: Nevada, yes.

10 QUESTION: And Arizona as well?

11 MR. ENGLERT: Yes.

12 QUESTION: They -- they -- do they opt out of it
13 if they want to sell the milk to -- to California
14 producers, or --

15 MR. ENGLERT: Yes. The sales to California --
16 or, to California processors, excuse me, are not regulated
17 by those milk marketing orders. The -- the seller and the
18 buyer would both have to be within the marketing order for
19 it to be governed by the Federal milk marketing order, I
20 believe.

21 QUESTION: I see, and -- and so far as the
22 Nevada and Arizona dairy farmers are concerned, they can
23 sell to California without implicating any mechanisms
24 under the Federal marketing order?

25 MR. ENGLERT: That's correct.

1 QUESTION: Now, the court below didn't deal with
2 the Privileges and Immunities issue, right?

3 MR. ENGLERT: Oh, it did actually, Justice
4 O' Connor.

5 QUESTION: It did.

6 MR. ENGLERT: It affirmed the Rule 12(b)(6)
7 dismissal.

8 QUESTION: Okay.

9 MR. ENGLERT: It's on page A14 --

10 QUESTION: Okay.

11 MR. ENGLERT: -- of the petition appendix.

12 QUESTION: All right.

13 MR. ENGLERT: And its only reasoning was, the
14 statutes and regulations do not, on their face, refer to
15 citizenship or residency. The controlling precedent that
16 absolutely precludes that reasoning is the Chalker case
17 from this Court in 1919, and respondents frankly have not
18 even made an argument for why Chalker should be overruled.
19 Our own submission is that the 84 years since Chalker was
20 decided have strengthened its underpinnings a great deal,
21 rather than undermining them

22 The Camden case from 1984 reinforces Chalker by
23 rejecting a formalistic approach to the threshold question
24 of discrimination, and the Lunding case from just 5 years
25 ago stresses the concern with, quote, practical effect,

1 close quote, in this Court's Privileges and Immunities
2 Clause jurisprudence. There's just nothing to justify the
3 Ninth Circuit's disregard of this Court's cases.

4 I'd like to reserve the balance of my time for
5 rebuttal.

6 QUESTION: Very well, Mr. Englert.

7 Ms. McDowell.

8 ORAL ARGUMENT OF BARBARA B. McDOWELL

9 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

10 SUPPORTING THE PETITIONERS

11 MS. McDOWELL: Thank you, Mr. Chief Justice, and
12 may it please the Court:

13 Section 144 does not indicate with unmistakable
14 clarity that Congress meant to exempt from the Commerce
15 Clause any California laws, much less to exempt the
16 particular raw milk pooling regulations at issue here.
17 Indeed, section 144 is most naturally read as protecting
18 only a narrow set of California's fluid milk composition
19 and labeling laws from invalidation only under Federal
20 statutes and regulations, not under the Constitution.

21 First, Congress did not state or even imply that
22 the Commerce Clause is among the provisions of law from
23 which section 144 provides protection. Section 144
24 directs how those provisions of law shall be construed,
25 and Congress ordinarily does not direct this Court and the

1 lower Federal courts how to construe the Constitution, and
2 under the canon that general words are known by their more
3 specific companions, the words, any other provision of law
4 is understood to refer to the preceding words, this act,
5 to refer only to Federal statutes and regulations
6 implementing them

7 Section -- second, section 144 protects only
8 California laws regarding two specifically defined
9 subjects, the percentage of milk solids, and solid not --
10 solids not fat in fluid milk products sold at retail, and
11 the labeling of those products. The laws challenged here
12 do not concern either subject. They instead concern how
13 California handlers account to the California equalization
14 pool for purchases of out-of-State raw milk which may or
15 may not ultimately be processed into fluid milk products
16 subject to the composition and labeling requirements.

17 QUESTION: Ms. McDowell, as to the exemption
18 from the National -- from the Nutrition and Labeling Act,
19 is this -- is this a special exemption that California
20 has, or do a number of States have congressional
21 exemptions from the Nutrition and Labeling Act?

22 MS. McDOWELL: Well, this specific provision,
23 section 144, applies only to California.

24 QUESTION: Yes, but are there similar exemptions
25 in -- in effect in other States?

1 MS. McDOWELL: Well, the Nutrition and Labeling
2 Act does contain an exemption for maple syrup composition
3 and labeling that might have been designed to benefit the
4 particular States where maple syrup is produced. I'm not
5 aware of the particular background of that provision.

6 There's also an adjoining provision of the 1996
7 Farm Bill that provides further indication that Congress
8 didn't intend section 144 to apply to all of the pricing
9 and pooling laws. That's section 143(b) on page 17 of the
10 joint appendix, which authorizes the promulgation of a
11 Federal milk marketing order for California if California
12 dairy farmers approve of one.

13 Such a Federal milk marketing order would have
14 contained its own separate Federal pricing and pooling
15 provisions. It would necessarily have superseded the
16 California pricing and pooling provisions at issue here.
17 It seems unlikely that Congress intended in section 144 to
18 preserve the very pricing and pooling laws that section
19 143(b) and the Federal marketing order would supersede.

20 The legislative history reinforces --

21 QUESTION: But there -- but there was no -- but
22 there is no Federal marketing order that supersedes it, or
23 am I wrong there?

24 MS. McDOWELL: No, it authorized the
25 promulgation of one if California dairy farmers approved.

1 California dairy farmers have not asked for a Federal
2 marketing order at this point.

3 Under a Federal marketing order, by the way,
4 handlers are required to treat milk from sources inside
5 and outside the marketing order, marketing area similarly,
6 so the same minimum pricing requirements that would apply
7 to a dairy farmer within the marketing area would also
8 apply if milk came in from -- from outside that area.

9 QUESTION: Is the Federal --

10 QUESTION: Why doesn't that resolve this case?

11 MS. McDOWELL: Because there -- there is no
12 Federal marketing order that applies to California, and of
13 course the --

14 QUESTION: Oh, I -- I see. In other words it
15 would have to be a California marketing order treating
16 Nevada milk, not -- not a Nevada marketing order saying
17 what happens when you go to California. All right.

18 MS. McDOWELL: Well, if there was a Federal milk
19 marketing order for California, milk from Nevada would be
20 treated the same as milk from California. Of course,
21 Federal milk marketing orders aren't subject to the
22 constraints of the Commerce Clause, as are the California
23 orders.

24 QUESTION: Has Congress ever provided a -- an
25 exemption for anything that looks like this California

1 pricing and pooling scheme?

2 MS. McDOWELL: Not that I'm aware of, Your
3 Honor. And this is a particularly unusual Commerce Clause
4 exemption because it does benefit only one State. It
5 seems particularly appropriate in that circumstance to
6 apply the clear statement rules and -- and to require an
7 affirmative indication that Congress wanted to allow
8 California and only California to burden out-of-State
9 interests.

10 QUESTION: I thought the only thing Congress had
11 ever -- maybe there's something else. I thought it was
12 only insurance that Congress had performed the
13 extraordinary act of waiving the Commerce Clause. Isn't
14 that right?

15 MS. McDOWELL: That's certainly one of the most
16 familiar instances of this --

17 QUESTION: It's the only one I -- only one I
18 know of. Is there another one?

19 MS. McDOWELL: There are other instances in
20 which Congress has affirmatively authorized particular
21 action by States. For example, the Northeast Bancorp case
22 involved a -- an authorization for States to essentially
23 discriminate against interstate commerce to prohibit
24 acquisitions of local banks by out-of-State holding
25 companies, and when Congress enacts an affirmative

1 authorization one would think that then Congress is
2 removing any impediments that Congress can remove from
3 State regulation, but that's not the forum of the
4 provision at issue here. Rather, it applies only to this
5 act and other provisions of law which are naturally
6 understood to be Federal statutes and regulations.

7 With respect to the Privileges and Immunities
8 Clause, we agree that the court of appeals erred in
9 suggesting that a statute can violate that clause only if
10 it discriminates on its face based on citizenship and --
11 or residency. In Chalker, the Court recognized that a
12 statute could also violate that clause if it discriminates
13 based on some factor closely related to citizenship, such
14 as the location of a person's chief business office. The
15 distinction drawn by the California regulations are
16 somewhat similar.

17 The lower courts didn't consider whether that
18 distinction is closely enough related to State citizenship
19 to implicate the Privileges and Immunities Clause.
20 Accordingly, we would ask that the judgment of the Ninth
21 Circuit be reversed with respect to both the Commerce
22 Clause and the Privileges and Immunities Clause question,
23 and that the case be remanded.

24 QUESTION: May I ask just one just one factual
25 question?

1 MS. McDOWELL: Yes.

2 QUESTION: Am I correct in thinking California
3 is the only State that does not have a Federal order?

4 MS. McDOWELL: That's not entirely correct,
5 Justice Stevens. There are portions of other States that
6 are not included in Federal marketing orders, either, I --
7 I believe, and perhaps the entire State of Maine is not.
8 California is unique, however, in, to the extent that it
9 has its own freestanding marketing program and, of
10 course --

11 QUESTION: Of its own, yes.

12 MS. McDOWELL: -- California is the largest
13 economy.

14 QUESTION: And my other question is, do you --
15 does the Government think we have to reach the Privilege
16 and Immunities issue to decide the case?

17 MS. McDOWELL: Well, the Court granted
18 certiorari on the Privileges and Immunities question.
19 It's a narrow question. Ultimately, on remand, the
20 Privileges and Immunities claim may not have to be decided
21 because a ruling in petitioners' favor on the Commerce
22 Clause issue would provide them all of the relief that
23 they're seeking.

24 QUESTION: And it wouldn't take care of the --
25 the ruling on the statute would take care of everything,

1 but not Privileges and Immunities, because that covers
2 only individual persons, not corporations.

3 MS. McDOWELL: That's correct. What we're
4 saying is that the entire case needs to be remanded for
5 consideration of the Commerce Clause claim on the merits,
6 as well as the Privileges and Immunities Clause claim, and
7 if the Commerce Clause question is decided in petitioner's
8 favor, all of the petitioners would benefit from that
9 ruling, so there might not be occasion to consider the
10 Privileges and Immunities Clause as well.

11 If there are no further questions --

12 QUESTION: Thank you, Ms. McDowell.

13 Mr. Urban, we'll hear from you.

14 ORAL ARGUMENT OF MARK J. URBAN

15 ON BEHALF OF THE RESPONDENTS .

16 MR. URBAN: Thank you, Mr. Chief Justice, and
17 may it please the Court:

18 There are two distinct and separate inquiries in
19 construing section 7254. First, does it create a Dormant
20 Commerce Clause exemption for any California law, and
21 second, what laws are within the scope of section 7254?
22 As regards the first step, it is unmistakably clear that
23 Congress in adopting section 7254 intended to provide a
24 Dormant Commerce Clause exemption for at least
25 California's milk content and labeling laws.

1 As regards the second step, the scope of section
2 7254 encompasses not just the milk content and labeling
3 laws themselves, but also the various means that
4 California uses to continue those laws in effect.

5 QUESTION: How do you respond to your
6 adversary's contention that when you use the word
7 construe, Congress does not ordinarily tell this Court how
8 to construe a provision of the Constitution?

9 MR. URBAN: First of all, in the
10 McCarran-Ferguson Act statutes the Court found that there
11 was a Dormant Commerce Clause exemption. In that case
12 they used the term construe. Second of all, I don't know
13 that Congress is aware of the niceties of the difference
14 between construe and interpret --

15 QUESTION: Well --

16 MR. URBAN: -- or it would have used both of
17 those words.

18 QUESTION: Well, certainly, looking over a large
19 group of statutes that Congress has enacted, there may be
20 something to what you say.

21 (Laughter.)

22 QUESTION: But I -- I do think the -- the word
23 construed is simply out of place when Congress is saying
24 something to this Court about how to -- how to interpret
25 the Constitution.

1 MR. URBAN: But beyond that, Your Honor, the --
2 they then say, construe to preempt, prohibit, or otherwise
3 limit. If they wanted to limit the scope of the
4 protection of section 7254 merely to preempt, they
5 wouldn't have added two additional phrases, and in
6 addition to that, many of the preemption savings statutes
7 use the term, this act or other -- any other act of
8 Congress, or lists a set of acts or regulations. They
9 don't simply have the statement of one act and then a -- a
10 general term like, any other provision of law.

11 QUESTION: Of course, Congress is sort of at a
12 loss for words, because it -- it's only the Commerce
13 Clause -- that's the only provision of the Constitution
14 that Congress can instruct us not to apply, so it's
15 understandable. Maybe out of respect for the rest of our
16 body of law they -- they might use the word construe,
17 right? I mean, we don't have any other examples of
18 where -- unless it was the -- the Religious Freedom
19 Restoration Act, which -- which we did not uphold.

20 MR. URBAN: That's -- that's correct, Your
21 Honor. There's two ways that Congress can act to save
22 State laws. One is by a preemption savings statute, and
23 the other is by a Dormant Commerce Clause exemption. And
24 beyond that, Congress can't affect the State exercise of
25 authority through any means that involves the

1 Constitution, and that, the -- the first question then is,
2 does section 7254 create a Dormant Commerce Clause
3 exemption.

4 And then, as I indicated, the choice really is,
5 is it preemption only or something more and the statute
6 itself, by using the terms, prohibit or otherwise limit,
7 suggests that it is, or states directly that it is
8 something more. If they just simply wanted to have this
9 as a preemption savings statute they would have stopped at
10 preemption.

11 And again, the argument was raised, well, why
12 didn't they mention the Constitution directly. None of
13 the two areas where there have been cases in which the
14 Court has found a Dormant Commerce Clause exemption, one
15 of which is the McCarran-Ferguson Act and the other of
16 which is the Northeast Bancorp case, was there mention of
17 the Constitution. They -- they looked at -- at the total,
18 at what the statute said, at what the context was in which
19 those statutes were adopted, and -- and from that
20 concluded that Congress had intended to fully regulate in
21 those areas or to provide a Dormant Commerce Clause
22 exemption.

23 The petitioners have tried to use a doctrine of
24 *adjustum generis*, the laws are interpreted in the company
25 they keep. I've never seen an application of that

1 doctrine where all you have is one statute or one item
2 mentioned, and then you say any others. Usually that
3 doctrine's applied when you have three or four items.

4 QUESTION: Mr. Urban, the problem, as I see it,
5 is not whether they -- you might construe the language as
6 broad enough to cover the Dormant Commerce Clause, but the
7 thing it saves is, legislation regarding milk solids and
8 fats and so forth, and doesn't say anything about saving
9 pricing legislation.

10 MR. URBAN: That -- that's true, Your Honor.
11 That's the second inquiry, what is the scope of the
12 statute, and they are distinct inquiries, and it would be
13 possible for the Court to determine that the statute
14 doesn't cover pooling and pricing laws --

15 QUESTION: Right.

16 MR. URBAN: -- and still protect the Dormant
17 Commerce Clause exemption from milk content and labeling
18 laws.

19 QUESTION: In -- although you would not prevail
20 if we so held.

21 (Laughter.)

22 MR. URBAN: We -- if you so held, we would be
23 back to the district court on the question of whether
24 there's a Dormant Commerce Clause violation for the milk
25 pricing and pooling laws, but the core intent of Congress

1 in enacting section 7254, which was to protect and allow
2 State milk content and labeling laws to have full effect,
3 that would be protected, because we have the Shamrock
4 Farms case from the Ninth Circuit that held that there was
5 a Dormant Commerce Clause exemption created for those
6 laws.

7 I want to --

8 QUESTION: I thought those laws weren't directly
9 before the court in Shamrock. I thought the fortification
10 provision was.

11 MR. URBAN: What was directly before the Court
12 in the Shamrock case, Your Honor, was a challenge to the
13 milk content and labeling laws, and then the -- the other
14 item that was before the court that was specific was the
15 fortification allowance, which is a small part of the milk
16 pricing and pooling laws, and then there was a general
17 allegation involving milk pooling and pricing that, upon
18 which there was an admission made about the laws being --
19 I think it was something, interwoven.

20 QUESTION: But -- but surely we're not bound by
21 Shamrock if -- if we consider it not to be sound, not to
22 have sound reasoning.

23 MR. URBAN: That -- that's correct, Your Honor.
24 If the Court believes that there's no Dormant Commerce
25 Clause exemption at all --

1 QUESTION: And I -- I -- and I must say, without
2 knowing many of the details of -- of the pricing scheme,
3 it seems to me that the labeling and -- and requirements
4 for fortification with, I guess, nonfat solids can exist
5 perfectly well without your pricing scheme.

6 MR. URBAN: Your Honor, as a general matter, you
7 can have composition and labeling laws without a pricing
8 scheme. California's composition standards are unique
9 because they require fortification. That produces several
10 features. One is that there's not a ready market to sell
11 into California with complying milk.

12 If you didn't have pricing and pooling laws and
13 you went back to the free market, you'd be subject to the
14 same boom-bust cycle that led to the creation of these
15 pricing and pooling laws in the first place, and when
16 you'd reached the point where the prices were very high
17 and supplies were low, I think the -- the inevitable
18 result of that would be that the composition standards
19 would be undone and they'd simply revert to the Federal
20 standards.

21 QUESTION: But -- but if that's so inevitable,
22 it seems to me it would have been in 7254.

23 MR. URBAN: I -- I don't agree with that, Your
24 Honor, because I think that what Congress did in 7254, and
25 this goes to the scope of the statute, is that they

1 protected the composition and labeling laws themselves,
2 and they also, by using terms like, directly or
3 indirectly, establish or continue in effect, regarding
4 rather than regulating, referred to something more, and
5 that something more are the means that California uses to
6 enable the laws to continue in effect.

7 QUESTION: That's an ingenious argument, but I
8 mean, if I understand it what you're saying is that if
9 we -- if you didn't have the price controls, then
10 competition would break out, and competition breaking out
11 would mean in -- if we were back in the thirties, that
12 eventually everybody would go out of business but for one
13 giant milk seller who then would raise the price so high
14 that the people really getting angry at him, as opposed to
15 only paying \$18, which is considerably above the market
16 level, they might have to pay \$24, even more.

17 They'd really get angry, and this time, though
18 they don't get angry at the \$18 price, they'd start really
19 shipping milk in from Arizona, and once they shipped in
20 milk from Arizona, maybe that wouldn't have the fortified
21 stuff in it and they'd -- they'd amend the law so that you
22 could bring it in from Arizona and down would go the
23 labeling requirement as it stands today.

24 Do I understand the argument correctly? I've
25 parodied a little, but I don't think I've parodied it that

1 much.

2 MR. URBAN: You did, Your Honor.

3 (Laughter.)

4 QUESTION: I did. Yes, I did.

5 MR. URBAN: The -- milk is an -- is an unusual
6 commodity because it can't be stored, and like any
7 commodity, it's subject to periods, and we have this a lot
8 with agricultural pricing, where you have periods of
9 low -- you have high supply and therefore you'll have a
10 low price. People leave the industry and then the cycle
11 will reverse, and it's when you reverse the cycle -- and
12 that's -- that is what happened with -- with milk that led
13 to the --

14 QUESTION: I thought that's --

15 MR. URBAN: -- formation of those laws, and it's
16 also what occurs frequently with agricultural commodities.
17 I mean, they're -- they're subject to a boom-bust cycle,
18 and at some point in that cycle you're going to have
19 prices that are very high, and we -- we've had that happen
20 in California to some extent for other --

21 QUESTION: Like --

22 MR. URBAN: -- other reasons, and -- and you --
23 and at that point, and it did happen in California in '99,
24 as we've cited in the brief, there is a lot of pressure to
25 undo the standards because they are -- they are more

1 expensive and you'll have limited supplies. I mean,
2 that's -- that's the connection.

3 QUESTION: May I ask, though, are the -- the
4 percentage of solids in the -- in the milk, is that
5 something -- that's something that's not determined by the
6 farmer. That's determined by the processor, isn't it?

7 MR. URBAN: The raw milk that comes to a -- a
8 processing plant varies to some extent in the amount of
9 fat and solids not fat.

10 QUESTION: Right.

11 MR. URBAN: Then the processor -- this is how
12 California's processors are different from other
13 States' -- adds in solids not fat in order to meet the
14 standards, and they have -- you know, this is all
15 mechanized.

16 QUESTION: And that is done even if the milk
17 when it left the farm was deficient in fat solids.

18 MR. URBAN: Correct.

19 QUESTION: Yes.

20 QUESTION: Generally speaking, what percentage
21 of the raw milk comes in from out of State to California,
22 of the total?

23 MR. URBAN: My recollection is somewhere around
24 10 to 15 percent, most of which comes to fluid milk
25 plants, which are the class 1 plants.

1 QUESTION: So it's generally a small percentage.
2 I'm -- I'm not sure that I think that you're dire
3 consequences scenario would play out.

4 Do milk prices tend to rise and fall over a wide
5 region of the United States at the same time, or does it
6 tend to be very spotty?

7 MR. URBAN: California's prices rise and fall as
8 an independent market. I don't know what happens in other
9 parts of the United States, and I want to -- aside from
10 the sort of economic theory of the boom-bust cycle, it is
11 a fact that California's own laws say that the purpose of
12 the pooling and pricing laws is to provide supply and
13 price stability in order to allow for adequate supplies of
14 fluid milk at -- at prices that are reasonable to
15 consumers, and that the purpose of --

16 QUESTION: How -- how does the latter part come
17 in? I mean, if we have to write this, as I understand it,
18 and I'd just as soon you correct, because I don't want to
19 say something if it isn't right. This is actually a
20 simple system, it's not so complicated, and at the heart
21 of it is simply, we could pretend that they want to pay
22 the dairy \$16 a hundredweight indefinitely. That's
23 stable.

24 And now the problem is, although you can say to
25 everybody, pay, a handler is paid \$16, when they do that

1 they're going to discover cheese coming in from Wisconsin,
2 and the cheesemakers are not going to be able to compete
3 and still pay \$16, so they figured out in California,
4 here's how we keep our cheesemakers in business. We
5 subsidize them. We pay them \$2 because they can only sell
6 at \$14. Where do we get the money from? We get it from
7 the milk sellers.

8 So they pay \$18 to pay the cheesemakers \$14 so
9 that all can pay \$16 to the dairies. That way, the
10 cheesemakers stay in business despite Wisconsin, and the
11 milk sellers, unfortunately the retailers have to charge
12 more and the mothers have to pay more for their milk, but
13 that in a way helps the people who want to eat a lot of
14 cheese. We don't know what happens to them if they eat
15 too much cheese, but --

16 (Laughter.)

17 QUESTION: -- there we are.

18 But I mean, that seemed to me the essence of the
19 system, and since that's the model that's in my mind, and
20 since it could become relevant, I'd like you to correct me
21 if I'm not right.

22 MR. URBAN: That -- that's -- that is the wrong
23 model.

24 QUESTION: All right.

25 (Laughter.)

1 MR. URBAN: The --

2 QUESTION: And what is the right model?

3 MR. URBAN: The right model is that the -- the
4 prices are generally set, and they're recalibrated
5 regularly, based on certain free market markers, like
6 various cheese exchanges, et cetera, and then there are
7 ways for each of the prices to be adjusted, the class 1,
8 class 2, class 3, class 4 prices to be adjusted so that
9 they're -- they reflect in a sense an -- a open market,
10 and there's also a desire to have these prices be
11 comparable to the prices that are being paid on the, in
12 the Federal marketing orders so that that doesn't produce
13 problems, so there's not a subsidy from one class of use
14 to another class of use.

15 What there was was then a blending when you come
16 to the producers of their revenues, and that's the pool,
17 and that blending of revenues, they adopted a two-tiered
18 system. One was a quota system, and one was all other
19 prices, and that really was set up because the
20 quota-holders had contracts and commercial dealings with
21 class 1 dealers which -- for which they got a higher
22 price, and the goal was to protect those -- those rights
23 and reflect those rights in the difference between a quota
24 price and an everything-else price.

25 QUESTION: Is it true that in-State producers of

1 raw milk are guaranteed a minimum price for their milk
2 under the California scheme, but out-of-State producers
3 are not?

4 MR. URBAN: That -- that's exactly right. The
5 in-State producers are regulated. They get a guaranteed
6 minimum price. Out-of --

7 QUESTION: Yes, and the out-of-State producers
8 are not.

9 MR. URBAN: Right.

10 QUESTION: They're at a disadvantage to that
11 extent.

12 MR. URBAN: They're at both an advantage and a
13 disadvantage. They're not regulated, so they have the
14 disadvantage that they don't have a guaranteed minimum
15 price, but they have the advantage that they can compete
16 on price, so if they want to be efficient and undersell
17 California producers they can do that, so they have both a
18 benefit and -- both sides have a benefit and burden. One
19 is of regulation versus nonregulation.

20 I want to go into the legislative history of
21 section 7254, which was mentioned. When section 7254 was
22 adopted, the Federal law NLEA preempted California milk
23 content standards, but that law only applied to fluid milk
24 in interstate commerce. The House conference committee
25 report which petitioners cite not only described the

1 preemption issue, but it also said that the purpose of
2 adoption of 7254 was to allow California to fully enforce
3 and apply its -- its standards.

4 It would have made little sense, in light of
5 that congressional intent, for Congress to on the one hand
6 allow for a exemption from preemption but at the same time
7 allowed the exact same body of law to be subject to a
8 Dormant Commerce Clause challenge, which is, in fact, what
9 happened in the Shamrock case, yet that would occur, that
10 undermining of Congress' intent to have California be able
11 to fully enforce its own milk content standards, if
12 section 7254 were held to be only a preemption savings
13 statute.

14 We've touched on the issue of the scope of
15 section 7254, and we're not claiming that the unmistakably
16 clear standard applies to the scope, and we're certainly
17 not claiming that it's unmistakably clear that section
18 7254 applies separately to pricing and pooling laws. What
19 we're claiming is that section 7254 not only covers the
20 laws themselves, but the means to keep those laws in
21 effect, and in answer to questions --

22 QUESTION: Who's your authority for that, for
23 the extension of the unmistakably clear principle?

24 MR. URBAN: That it doesn't extend to --

25 QUESTION: Yes.

1 MR. URBAN: First of all, we couldn't find a
2 single case where the Court has come back, after it's
3 determined there's a Dormant Commerce Clause exemption,
4 for example with the business of insurance, come back and
5 each time it decides what is the business of insurance,
6 that it says this is a Dormant Commerce clause exemption
7 so we have to use an unmistakably clear standard.

8 The Court has interpreted, after it's found a
9 general area of law that -- in which there's a Dormant
10 Commerce Clause exemption, that it's interpreted then what
11 is within that area of the law using standard rules of
12 statutory construction, and -- and --

13 QUESTION: And the cases would be what,
14 Benjamin, something like that?

15 MR. URBAN: Yes. Yes, Prudential Insurance v.
16 Benjamin, but then when the Court's come back, for
17 example, in Royal Drug to look at what's the business of
18 insurance, they've used standard -- you've used standard
19 rules of -- of statutory construction.

20 And you know, that -- that makes a certain
21 amount of sense here, because you know, you have both a
22 preemption savings statute and a Dormant Commerce Clause
23 exemption in the same statute, which is the case -- if you
24 have a Dormant Commerce Clause exemption you'd have to
25 essentially have two sets of rules as to how you interpret

1 the, what is being affected by that -- that exemption, one
2 for preemption and one for a Dormant Commerce Clause
3 exemption.

4 That -- that doesn't -- doesn't seem logical.
5 They should -- whatever Congress intended be covered by
6 the law should be interpreted the same, whether it's a
7 Commerce Clause exemption or a preemption exemption.

8 The second issue before the Court is the
9 Privileges and Immunities Clause, and when this issue was
10 considered by the Ninth Circuit they ruled that because
11 the out-of-State dairy producers were not being regulated
12 based on their residency, but that the regulatory scheme
13 involved place of production, that the -- that the
14 Privileges and Immunities Clause didn't apply.

15 That is fairly unexceptional, because the
16 purpose of the Privilege and Immunities Clause is that it
17 applies when a State law deprives a nonresident who enters
18 a State to engage in some protective privilege, that
19 they're entitled to the same privilege and immunities as a
20 resident of that State. There's no entry into the State
21 by -- by the dairy farmers from Arizona -- if they came
22 into the State to produce milk, they'd be treated exactly
23 the same as --

24 QUESTION: What do you do with the Chalker case?

25 MR. URBAN: The Chalker case is a case where

1 there's -- there was different regulation when you came
2 into the State. There was a tax if you did business in --
3 you came into Tennessee and did business. There, the
4 question was, they -- they didn't say residency per se.
5 They said --

6 QUESTION: Chief office.

7 MR. URBAN: -- place of -- yes, chief office of
8 business, and I think the Court correctly found, based on
9 their common experience and knowledge, that that was
10 simply a pretext or a surrogate or a proxy for residency.
11 That's not the case here. Here, it's a shipment of goods,
12 milk into a State. It's -- it's a State regulatory --
13 economic regulatory scheme, essentially, that's affecting
14 the goods themselves, and that's nothing like what's
15 happened in Chalker.

16 QUESTION: Well, do you support the Ninth
17 Circuit's view that to be covered by the Privileges and
18 Immunities Clause it has to be facially discriminatory?

19 MR. URBAN: In the -- in the context of the
20 statutes that they had before them, yes. Whether that is
21 a --

22 QUESTION: I -- I would have thought that broad
23 statement was not accurate in light of Chalker, that it
24 doesn't have to be facially discriminatory to be covered.

25 MR. URBAN: The distinction in Chalker, what was

1 the discrimination was facial. It was based on where your
2 place of -- of business was.

3 If the Ninth Circuit opinion is being
4 interpreted, or would be interpreted to say that if you
5 had some transparent proxy for place of residence, like
6 they did in Chalker, that that would somehow be foreclosed
7 by the Ninth Circuit's decision, I think that would be a
8 misreading of what the Ninth Circuit did. They took a
9 statute that, as they indicate, merely regulated based on
10 place of production, not on residency.

11 QUESTION: The two sentences -- I hadn't
12 understood that. They wrote two sentences on this in the
13 opinion, and you're saying it's really the first sentence
14 that is the holding, that there is no violation with
15 respect to the individual dairy owners because the
16 classifications the pooling plan amendments create are
17 based on the location where milk is produced, and the next
18 sentence is sort of a throw-away, and there's nothing in
19 the statute to the contrary.

20 MR. URBAN: That's correct, Your Honor.

21 QUESTION: That's how you -- I see.

22 MR. URBAN: In -- in summation, there -- the two
23 issues involving the section 7254 before the Court are
24 first whether it establishes an exemption and second, its
25 scope.

1 On the first issue we believe it's unmistakably
2 clear that there is an exemption established by 7254 to
3 the Dormant Commerce Clause. As to the second issue, we
4 believe that California's milk pooling and pricing laws
5 are within the scope of section 7254.

6 QUESTION: Thank you, Mr. Urban.

7 MR. URBAN: Thank you.

8 QUESTION: Mr. Englert, you have 11 minutes
9 left.

10 REBUTTAL ARGUMENT OF ROY T. ENGLERT, JR.

11 ON BEHALF OF THE PETITIONERS

12 QUESTION: It -- it seems to me, Mr. Englert, it
13 make -- does make a certain amount of sense to say that
14 you should have one rule of construction for preemption
15 and for Dormant Commerce Clause, and you don't have two
16 different rules for interpreting congressional intent with
17 the same statute.

18 MR. ENGLERT: Well, Justice Kennedy, the Court
19 has said very consistently in its Dormant Commerce Clause
20 jurisprudence that the intent of the Congress must be
21 unmistakably clear.

22 QUESTION: Were -- were those statutes
23 preemption statutes as well? You see, here you have a
24 preemption statute --

25 MR. ENGLERT: In -- in some instances, they

1 were.

2 QUESTION: -- and -- and the argument is that --
3 but let's say that it was simply a preemption case that,
4 well, directly or indirectly Congress doesn't want have to
5 spell out everything, so it says indirectly, so this -- so
6 this is not preempted. Then you have a Dormant Commerce
7 Clause and you say, well, we have a different rule for
8 that. That seems a little odd.

9 MR. ENGLERT: Well, that's what the Court did in
10 New England Power Company v. New Hampshire, and the
11 statute being construed, the provision of the Federal
12 Power Act being construed in that case, like the statute
13 being construed in this case, was not so much a preemption
14 clause as an unpreemption clause.

15 The typical statute that comes before this Court
16 alleged to be a Dormant Commerce Clause exemption is one
17 that says certain State laws are protected, or are
18 allowed, and in many of those cases the Court has said,
19 and New England Power v. New Hampshire is a good example,
20 the Court has often said yes, those State laws are not
21 subject to preemption under Federal law, but there is no
22 unmi-stakably clear Dormant Commerce Clause exemption.

23 So the -- the Court's jurisprudence as I read it
24 is really rather consistent in setting a higher standard
25 for exemptions for the Dormant Commerce Clause, and

1 there's a reason for that, and the reason for that is that
2 the Commerce Clause is part of the -- is one of the
3 structural provisions of the Constitution and, as this
4 Court pointed out in the South-Central Timber case, the
5 particularly strong rule of construction ensures that all
6 States know what's going on and have their say in Congress
7 before the protections the States have vis-a-vis one or
8 another -- vis-a-vis one another are altered.

9 QUESTION: What is the answer to the last point
10 on privileges and immunities? I hadn't taken that in, and
11 I -- I think it's been argued on -- on your side as if
12 what the Court had said was, well, the statute doesn't
13 create a classification on its face, doesn't create a
14 classification based on an individual's residency or
15 citizenship, which certainly it doesn't, and then you say
16 quite right, but of course a statute nonetheless could do
17 that in effect, and -- and thereby have the same violation
18 that it would have had if it had been on its face, but
19 that isn't their point, and as I reread this they're
20 saying -- I think it does say what they say it said.

21 What the judge was saying is, wait a minute,
22 there -- there's no -- nobody here could say they're --
23 they're discriminating on the basis of residency or
24 citizenship. That's not what the statute says. It's
25 discriminating on the basis of where the milk is produced.

1 We don't care if he's a California resident or a -- or an
2 Alaska resident, it's where the milk is produced, and
3 there's nothing in the statute as I read it, says the
4 judge, i.e. on its face, that says anything to the
5 contrary.

6 Now, what's the answer to that argument?

7 MR. ENGLERT: It's all true. It's -- it's --
8 but it was just as much of a sin for the Ninth Circuit to
9 ignore the 93 percent correlation between where dairy
10 farmers reside and where milk is produced as it was to
11 say, we don't look beyond the face of the statute.

12 QUESTION: I see, you're saying it might violate
13 the Privileges and Immunities Clause even if -- or, why?

14 MR. ENGLERT: It's -- it's exactly --

15 QUESTION: The -- what -- it's a violation of
16 the Privileges and Immunities Clause for a State to
17 discriminate against out-of-State commerce, because after
18 all, out-of-State commerce is mostly produced by
19 out-of-State residents?

20 MR. ENGLERT: I -- I'm not making that broad an
21 argument, Justice Breyer.

22 QUESTION: Then what is --

23 MR. ENGLERT: I'm saying that in this case, as
24 in the Chalker case, there is an extremely high
25 correlation between place of business and residency or

1 citizenship of individuals, and just as this Court said,
2 we don't care that someone from Alabama could have a
3 principal place of business in Tennessee, because most
4 people from Alabama don't have a principal place of
5 business in Tennessee --

6 QUESTION: Yes.

7 MR. ENGLERT: -- so too, here, the Ninth Circuit
8 should not have cared that Nevadans could have -- could
9 produce milk in California when 93 percent of all dairy
10 farmers do produce milk in the State and, indeed, on the
11 very farm where they reside.

12 QUESTION: So if Massachusetts passes a
13 statute -- you know this area better than I at the moment,
14 but if Massachusetts passes a statute and it says, we're
15 fed up with nectarines from California, they're too
16 woolly, and therefore no more nectarines from California
17 coming into Massachusetts, it's absolutely true, every
18 nectarine farm down there is owned by a California
19 resident, none by Massachusetts residents. That violates
20 the Privileges and Immunities provision, in your opinion,
21 as far as individuals own the farms?

22 MR. ENGLERT: I -- I certainly suspect it's a
23 violation, but we're we're not asking this Court actually
24 to hold that there's any --

25 QUESTION: No, no, I know that.

1 MR. ENGLERT: -- Privileges and Immunities
2 violation.

3 QUESTION: I know that, but there's nothing to
4 the contrary --

5 MR. ENGLERT: Just that there should be --

6 QUESTION: Okay.

7 MR. ENGLERT: -- substantive constitutional
8 scrutiny.

9 QUESTION: Yes.

10 MR. ENGLERT: The Ninth Circuit didn't give this
11 case any substantive constitutional scrutiny.

12 QUESTION: Yes, well, that's primarily the
13 Dormant Commerce Clause. I'm more familiar with the
14 Privileges and Immunity Clause argument. I'm less
15 familiar with how courts in this area --

16 MR. ENGLERT: Right, but on -- on both issues,
17 Justice Breyer, the Ninth Circuit declined to engage in
18 any substantive analysis --

19 QUESTION: I know. I know.

20 MR. ENGLERT: -- with respect to the Dormant
21 Commerce Clause on the erroneous ground that it was
22 unmi stakably clear that there was a Commerce Clause --

23 QUESTION: Yes, I -- I understand.

24 MR. ENGLERT: -- exemption, and with respect to
25 the Privileges and Immunities Clause on the ground that

1 location is not the same as residency or citizenship, and
2 we need not look behind location of production to ask
3 whether it is so closely correlated with residency or
4 citizenship as to create an improper -- a classification
5 that must be scrutinized under the Constitution.

6 Mr. Urban pointed out that the McCarran-Ferguson
7 Act uses the verb construe, and rightly so, but what it
8 says the Court is not to construe as forbidding State
9 regulation is Congress' silence. It is not a directive
10 how to construe the Constitution. It is a very proper
11 statute, perhaps the model for how a Dormant Commerce
12 Clause exemption should be written. Don't construe our
13 silence to mean we want to stop the States from doing
14 something. The statute here is very different. The
15 statute here says, construe this act or any other
16 provision of law in particular ways.

17 Mr. Urban, in talking about section 7254, said
18 at one point, the use of three different verbs, only one
19 of which is preempts, suggests that Congress' intent was
20 something more than merely to negate Federal preemption.
21 I respectfully submit that suggesting that Congress had
22 more in mind is not enough to meet the unmistakable
23 clarity standard. Under Gregory v. Ashcroft, an
24 unmistakable clarity standard means it would be plain to
25 anyone reading the act what Congress had in mind, and

1 merely saying the use of three verbs suggests something
2 does not make it plain to anyone reading the act.

3 I do think -- Justice Stevens asked Ms. McDowell
4 if the Court needs to reach the Privileges and Immunities
5 Clause claim I -- I believe the Court does need to reach
6 the Privileges and Immunities Clause claim in the limited
7 way we have suggested and that is because, although
8 Ms. McDowell correctly said the petitioners might prevail
9 on remand under the Commerce Clause and, indeed, I hope we
10 will, and if we do that will give all of my clients the
11 relief that they need, we also might not prevail under the
12 Commerce Clause, and I think we're entitled to pursue both
13 the Commerce Clause claim and, with respect to the
14 individual petitioners, the Privileges and Immunities
15 Clause claim on remand.

16 The -- Justice Kennedy asked me some questions
17 in my opening argument about the Federal marketing orders
18 in effect in Nevada and Arizona, and I -- I perhaps didn't
19 speak with sufficient clarity about two aspects of that.
20 The Federal milk marketing orders cover parts of Nevada
21 but not other parts. Some are and some are not covered by
22 Federal milk marketing orders, but in any event, it's
23 worth making clear that the marketing orders fundamentally
24 operate on the processors of milk, not on the producers of
25 milk, so when we say the Federal milk marketing orders

1 operate in parts of Nevada, we're really talking about
2 Nevada processors. If you ship your milk to a California
3 processor it -- it is at no point governed by a Federal
4 milk marketing order.

5 Whatever -- with respect to the unmistakably
6 clear standard, Mr. Urban made the argument that once
7 you've found an unmistakably clear Dormant Commerce Clause
8 exemption, the unmistakably clear standard has no more
9 role to play and it's just a matter of ordinary statutory
10 interpretation.

11 This Court's cases, I believe, do not support
12 that proposition, but he spoke specifically about the
13 McCarran-Ferguson Act cases in which the Court has
14 construed the phrase, business of insurance, without any
15 particular thumb on the scale. Well, that is how the
16 Court must construe the phrase, business of insurance,
17 because Congress has delegated authority over an entire
18 business to the States.

19 That's very different from this very precisely
20 drawn statute that speaks about two particular aspects of
21 California's compositional regulation of raw milk and
22 saying, well, let's just resort to ordinary principles of
23 statutory interpretation to determine whether that also
24 reaches economic regulation of fluid milk. The
25 unmistakably clear standard is still in effect, and

1 ingenious arguments about the relationship between
2 economic regulation of fluid milk and composition
3 regulation of raw milk are not enough to meet that
4 standard.

5 In particular, it cannot possibly be the case
6 that the 1997 amendments to California's pooling plan are
7 somehow necessary to effect composition regulation. The
8 main thing the 1997 amendments did was not negate the
9 possibility that out-of-State milk would flood California
10 to such an extent that there would be price effects that
11 ultimately would have -- would have sanitary effects.
12 What the 1997 amendments did essentially was say, we're
13 going to intercept some of the revenue that would
14 otherwise go to out-of-State processors at California's
15 border and redistribute it just to in-State interests.
16 We're going to take some of the money that they would
17 otherwise get in their milk transaction and say, it must
18 go to Californians, not to you out-of-Staters.

19 That's the essence of the Commerce Clause
20 violation in this case, and it's also inconceivable that
21 that kind of regulation could be protected by this
22 statute. If that kind of regulation is protected by this
23 statute, then a regulation that says 100 percent of every
24 milk check that would be written to a Nevadan must instead
25 go to a Californian is protected by this statute, i. e., no

1 out-of-State milk, and that can't possibly be the
2 unmistakably clear intent of Congress in section 7254.

3 One last detail, and it is just a detail.

4 Mr. Urban said that 10 to 15 percent of the milk that
5 comes into California is from out of State. I understand
6 from a publication that's cited at page 39 of our opening
7 brief called Dairy Profit Weekly that the actual number is
8 closer to 3 percent. When Congressman Bill Thomas spoke
9 at a field hearing -- thank you.

10 CHIEF JUSTICE REHNQUIST: Thank you,

11 Mr. Englert. The case is submitted.

12 (Whereupon, at 12:03 p.m., the case in the
13 above-entitled matter was submitted.)

14

15

16

17

18

19

20

21

22

23

24

25