

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: WEST LYNN CREAMERY, INC., ET AL., Petitioners
v. JONATHAN HEALY, COMMISSIONER OF
MASSACHUSETTS DEPARTMENT OF FOOD AND
AGRICULTURE

CASE NO: No. 93-141

PLACE: Washington, D.C.

DATE: Wednesday, March 2, 1994

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 WEST LYNN CREAMERY, INC., ET AL., :

4 Petitioners :

5 v. : No. 93-141

6 JONATHAN HEALY, COMMISSIONER OF :

7 MASSACHUSETTS DEPARTMENT OF FOOD :

8 AND AGRICULTURE :

9 - - - - - X

10 Washington, D.C.

11 Wednesday, March 2, 1994

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States at
14 11:01 a.m.

15 APPEARANCES:

16 STEVEN J. ROSENBAUM, ESQ., Washington, D.C.; on behalf of
17 the Petitioners.

18 DOUGLAS H. WILKINS, ESQ., Assistant Attorney General of
19 Massachusetts, Boston, Massachusetts; on behalf of
20 the Respondent.

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1 PROCEEDINGS

2 (11:01 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 93-141, West Lynn Creamery v. Jonathan
5 Healy. Mr. Rosenbaum.

6 ORAL ARGUMENT OF STEVEN J. ROSENBAUM

7 ON BEHALF OF THE PETITIONERS

8 MR. ROSENBAUM: Mr. Chief Justice, and may it
9 please the Court:

10 This case involves a pricing order issued by the
11 Massachusetts Commissioner of Agriculture. We submit that
12 this order violates the Commerce Clause of the United
13 States Constitution because it restrains competition
14 between in-state and out-of-state dairy farmers, blatantly
15 discriminates against out-of-state dairy farmers, and
16 prevents milk processors from taking advantage of cheaper
17 out-of-state milk.

18 QUESTION: Mr. Rosenbaum, I'm wondering if -- if
19 all we have in the order was the requirement that there be
20 paid an assessment on all liquid milk sold in
21 Massachusetts, would that be a Commerce Clause violation?

22 MR. ROSENBAUM: If the assessment were to go
23 into the general revenues of the State, Your Honor, is
24 that the assumption I'm to be making? If that --

25 QUESTION: Nothing more than that. We have the

1 assessment on all liquid milk.

2 MR. ROSENBAUM: If the assessment goes to the
3 State and not to the farmers, that would not be a
4 violation of the Commerce Clause, because that would
5 simply be a tax.

6 QUESTION: Not -- if all we had was not an
7 assessment, but just money appropriated by the State to
8 give to Massachusetts dairy farmers to help them, would
9 that be a Commerce Clause violation?

10 MR. ROSENBAUM: This Court said in the New
11 Energy case that ordinarily a subsidy will not be a
12 violation of the Commerce Clause. The Court has never yet
13 actually addressed a case that had such facts, and
14 actually opined with specificity that such a regime is
15 constitutional.

16 QUESTION: Presumably that's okay. We have all
17 kinds of ways of helping local industries, don't we?

18 MR. ROSENBAUM: Yes, pre --

19 QUESTION: And we've never held that's a
20 violation of the Commerce Clause.

21 MR. ROSENBAUM: Presumably money appropriated
22 from the general revenues of the State of Massachusetts
23 going to Massachusetts dairy farmers would be
24 constitutional.

25 QUESTION: Well, if both of those acts can be

1 constitutional, then what makes it unconstitutional when
2 you put them together, in your view?

3 MR. ROSENBAUM: Well, this Court held in New
4 Energy explicitly that merely because a State could
5 achieve its goals through a subsidy did not mean other
6 methods of achieving that goal would be constitutional.
7 And that is the situation here. Here, we, the processors,
8 the buyers, are being required to pay additional sums to
9 the in-state farmers. There is no subsidization going on.
10 This is a pricing order, as the title of the -- of the
11 document makes clear.

12 Subsidies, of course, are different. Those come
13 from the general revenues, as a whole. They are subject
14 to the political processes of the requirement that dairy
15 farmers fight it out with firemen or policemen or anyone
16 else who wants those funds. And they're unlikely to be a
17 substantial problem for that reason.

18 This, though, is a very different system. This
19 is a system that was put in place by the Commissioner
20 explicitly because he believed that Massachusetts dairy
21 farmers were, quote, being overrun, end quote, by
22 out-of-state dairy farmers, because those dairy farmers
23 had, as he said, huge herds, vast acreage, and ready
24 availability of supply and labor.

25 QUESTION: Well, that purpose would not be

1 invalidating so long -- you -- I think you've said -- so
2 long as the subsidy were applied in some other way, right?

3 MR. ROSENBAUM: The -- the only way --

4 QUESTION: I can -- I can want to protect or --
5 or compensate Massachusetts dairy farmers for their
6 inefficiency if I want to, right?

7 MR. ROSENBAUM: I believe the only method by
8 which that should be permitted is if it's a direct subsidy
9 from the general revenues of the State.

10 QUESTION: All right. So, all that has to be
11 done in this case is to provide -- provide the same tax,
12 but the funds, instead of going into this segregated fund,
13 go into general revenues, and that'll do it?

14 MR. ROSENBAUM: No, Your Honor, that's not my
15 point.

16 QUESTION: That's not?

17 MR. ROSENBAUM: I'm assuming, in this --

18 QUESTION: Why wouldn't that do it?

19 MR. ROSENBAUM: Well, because I'm assuming --
20 because, in that hypothetical, if the money were still
21 being raised through the assessment on milk processors,
22 running it through the general revenues would not make a
23 difference. I'm assuming -- I was assuming, in response
24 to Justice O'Connor's question, that there is no specific
25 or special assessment or tax being placed on my clients

1 that is funding this process.

2 QUESTION: Oh.

3 MR. ROSENBAUM: Because the effect would be the
4 same.

5 QUESTION: You -- you can't tax milk processors
6 separately? This is a category of taxation that you can't
7 use?

8 MR. ROSENBAUM: Milk processors or of course
9 subject to the same taxes as anyone else, but if the --

10 QUESTION: But you can't pick that out? You
11 can't pick that out?

12 MR. ROSENBAUM: You -- you could not single out
13 milk processors for a special tax and simultaneously
14 provide the proceeds of that tax to the dairy farmers.

15 QUESTION: No, no, not the proceeds of the tax,
16 the tax goes into general revenues. And then, in a
17 totally different bill the State votes out of general
18 revenues money that could be given to, you know, to
19 elderly and little children, and they say, we're going to
20 give it instead to inefficient milk producers; they make
21 that decision to take the money out of general revenues.
22 You say that is still bad?

23 MR. ROSENBAUM: If the processors are being
24 subjected to a tax different from other people similarly
25 situated, I think that is still bad, because, in essence,

1 you're still providing the same sum of money that you
2 would be providing under this scheme.

3 QUESTION: They're not being -- they're not
4 being taxed from other -- differently from other people
5 similarly situated. All milk processors are taxed the
6 same way.

7 MR. ROSENBAUM: Well --

8 QUESTION: I mean, taxes are imposed that way.
9 You pick a class of people and you say, you know, we're
10 going to have a -- a lawyers tax, a milk processors --
11 gee, we tax all sorts of little individual groups.

12 MR. ROSENBAUM: But the impact of such a regime
13 would be the same as the pricing order -- and let me turn
14 --

15 QUESTION: So, you are complaining about a
16 subsidy then? You're saying --

17 MR. ROSENBAUM: I --

18 QUESTION: You -- you acknowledge that taxing
19 milk processors alone would be okay. It -- however, if
20 you do that, you're saying, you cannot have a subsidy to
21 Massachusetts inefficient milk producers?

22 MR. ROSENBAUM: You can tax milk processors as
23 you would tax any other businessman involved in business
24 in Massachusetts. But if you were to place a special tax
25 on milk processors and simultaneously provide special

1 funds to the milk farmers of Massachusetts, one would have
2 achieved the same goals as the pricing order. And that,
3 we submit, would be unconstitutional. That -- that is the
4 not the facts before this case.

5 In this case, the --

6 QUESTION: Suppose you just did it in a separate
7 time period, two different acts. One is just the tax on
8 all dealers who sell fresh milk, and then, another one is,
9 out of general revenues, there's going to be a subsidy for
10 Massachusetts dairy farmers, two discrete acts?

11 MR. ROSENBAUM: Well, I think --

12 QUESTION: I thought your position was that that
13 -- that you were, at least not -- that your argument here
14 was not dependent upon that being unconstitutional.

15 MR. ROSENBAUM: My -- my argument is certainly
16 not dependent upon that being unconstitutional. Those are
17 --

18 QUESTION: So, could you distinguish that from
19 what we have before us?

20 MR. ROSENBAUM: Well --

21 QUESTION: Why -- why isn't it, as one of the
22 briefs said, that's just a matter of form?

23 MR. ROSENBAUM: Well, I do believe that would be
24 unconstitutional. It's not necessary to reach that result
25 here, because, of course, those are not the facts before

1 this Court. What is before this Court is a situation in
2 which the State of Massachusetts feels its dairy farmers
3 are not capable of achieving sufficient price based on
4 market prices. They want to increase that price. And
5 they have required my clients to pay more money on the
6 milk they receive from Massachusetts farmers.

7 If they only went that far, they would be acting
8 constitutionally under the Nebbia rule. But the concern
9 of Massachusetts is that my clients and other processors
10 would then turn to the milk of out-of-state farmers, which
11 would be cheaper if it were not subject to that same
12 premium price. What they have done here is said, we will
13 require the same premium, the same extra price, to be paid
14 on out-of-state milk, as well, to prevent out-of-state
15 farmers from taking advantage of the fact that their
16 prices are lower than the prices required by the pricing
17 order to be paid to Massachusetts farmers.

18 The State has gone one step further than that,
19 and said that although this premium price must be paid on
20 out-of-state milk, the recipients of that out-of-state
21 milk will not be -- of that price -- will not be the
22 out-of-state farmer. Instead, we will take that money and
23 transfer it to the in-state farmer, as well.

24 QUESTION: Well, I thought the assessment was on
25 all milk from any source.

1 MR. ROSENBAUM: That's correct, Your Honor.

2 QUESTION: It just so happens that a high
3 percentage of the milk is purchased from out of State.

4 MR. ROSENBAUM: The assessment is on milk of any
5 source. But any source, obviously, encompasses both
6 in-state and out-of-state milk. In that sense, this is
7 comparable to the situation in the Baldwin case, where the
8 minimum price that was established applied to all milk.
9 It --

10 QUESTION: Well, do you take the position that
11 if all we had before us was an assessment on the sale in
12 Massachusetts of all liquid milk from any source, that
13 that would be a violation of Baldwin -- that it would fall
14 under the Baldwin principle and be invalid?

15 MR. ROSENBAUM: If the assessment -- no, Your
16 Honor. You have to look at who gets the money. If -- if
17 the assessment were just to go to support road building or
18 the general needs of the State, there would not be a
19 displacement of interstate competition because the
20 in-state farmer and out-of-state farmer, despite the
21 assessment, are still receiving the pre-assessment amounts
22 of money.

23 So, if the out-of-state farmer has a cost
24 advantage over the in-state farmer, which was the finding
25 that the Massachusetts Commissioner reached, he will still

1 have that price advantage afterwards.

2 QUESTION: But you say that if they both, impose
3 that tax and also subsidize Massachusetts producers, then
4 it becomes bad?

5 MR. ROSENBAUM: Yes, Your Honor.

6 QUESTION: What if they only subsidized
7 Massachusetts producers in two-thirds of the amount that
8 they -- that they garner from this tax?

9 MR. ROSENBAUM: That would, of course, be a
10 different case. It seems to -- and I think, as I said
11 before, this Court has not yet had before it a case
12 involving a challenge to a subsidy coming from general
13 revenues. And how close one has to get to that situation
14 for it to be unconstitutional is not now before the Court.

15 QUESTION: Well, I --

16 MR. ROSENBAUM: I think a bright line --

17 QUESTION: I don't want to have to play
18 two-thirds, four-fifths and whatnot, which makes me think,
19 if it comes out of general revenues, it's okay. And if I
20 think that it's okay when it comes out of general
21 revenues, why isn't it okay when it comes out in your
22 case? Why is your case so different from general
23 revenues?

24 MR. ROSENBAUM: I don't think that that would be
25 the appropriate point to draw the line in your

1 hypothetical.

2 QUESTION: But assume that I'm -- I'm stupid --
3 and that's -- that's how I feel about it. Why is your
4 case different from general revenues?

5 MR. ROSENBAUM: Well, there is a difference
6 between general revenues and this scheme. This scheme is
7 imposed by the Massachusetts Commissioner of Agriculture.
8 Through a one-time action, he can require this price to be
9 paid forever. Monies coming from general revenues are
10 subject to political constraints of the need that this
11 money be reviewed on a repeated basis for a determination
12 of whether it's better for these monies to go to support
13 Massachusetts farmers or --

14 QUESTION: Or the elderly and children.

15 MR. ROSENBAUM: Or the elderly.

16 QUESTION: And that it happen every year.

17 MR. ROSENBAUM: And that would happen on a
18 regularized basis.

19 QUESTION: So, you'd pay a political price for
20 it?

21 MR. ROSENBAUM: You would pay a political price
22 for it.

23 QUESTION: Mr. Rosenbaum, isn't there another --
24 and maybe I'm just missing something here -- but it isn't
25 merely whether it's out of general revenues or not, but,

1 rather, whether the computation of the amount of the
2 subsidy is dependent upon the amount collected from all
3 the dealers?

4 MR. ROSENBAUM: Yes.

5 QUESTION: That's the key, isn't it, rather than
6 -- it doesn't matter whether you fund through general
7 revenue or have two separate bills. But if it's so
8 separate that the one can go up and the other remain
9 constant, then you'd have a different case?

10 MR. ROSENBAUM: I think you would have a
11 different case there. And at that point you would want to
12 address the -- the comparability of what -- what was
13 happening.

14 QUESTION: So, four-fifths is okay, so long as
15 it isn't tied to the other one?

16 MR. ROSENBAUM: I'm not certain, Your Honor,
17 that any percentage is okay. That's not to say a State
18 could not achieve this goal simp -- they could have a tax
19 on all commercial operations in the State and raise money
20 in that fashion, and support their dairy farmers if they
21 so chose.

22 QUESTION: Well, why is it key that it's this
23 precise correspondence that you talk about?

24 MR. ROSENBAUM: There is precise corres --

25 QUESTION: I know. But why is that so critical?

1 MR. ROSENBAUM: Your Honor, I don't believe it
2 would be critical.

3 QUESTION: I thought in your answer to Justice
4 Stevens you said it was.

5 MR. ROSENBAUM: Your Honor, what I was
6 suggesting was that if there were so little correlation
7 between the two that they could be viewed as wholly
8 separate, then perhaps at that point this Court would find
9 it to be acceptable. But, as a general rule, certainly
10 here, where you do have direct correlation between the
11 two, this is an unconstitutional scheme.

12 QUESTION: But isn't -- isn't it because the
13 correlation is directly to a source of revenue which is
14 not subject to political responsiveness within the State?
15 Isn't that the key to your argument?

16 MR. ROSENBAUM: Your Honor, I believe that is
17 certainly a key to our argument. And how far this Court
18 would choose to go if there were repeated --

19 QUESTION: Well, why is it any concern of this
20 Court interpreting the Commerce Clause as to whether the
21 milk commissioner in Massachusetts or the -- what do you
22 call it, the general court, the body that passes laws --
23 makes the decision? I mean, the organization of State
24 government is purely a matter of State law, isn't it?

25 MR. ROSENBAUM: It is a matter of State law,

1 Your Honor. But there are practical limitations that will
2 result from it coming from general revenues. I think --

3 QUESTION: We ought to somehow fuse those into
4 our Commerce Clause analysis?

5 MR. ROSENBAUM: Well, Your Honor, this Court has
6 recognized that a State -- recognized explicitly in the
7 New Energy case -- that a State could achieve, at times,
8 the same goals of protecting its in-state citizens through
9 a subsidy that it might also be able to achieve through an
10 unconstitutional restraint on interstate commerce. But
11 this Court held that that fact did not lead to what would
12 otherwise be an unconstitutional constraint being deemed
13 constitutional.

14 MR. ROSENBAUM: Well, I -- I agree with your
15 reading of that case. But I don't think the New Energy
16 opinion suggests that it would make a great deal of
17 difference whether the levy or the dispensation was made
18 directly by the legislature or by the milk commissioner
19 being authorized by the legislature.

20 MR. ROSENBAUM: The difference is that under
21 this scheme, what is happening is Massachusetts dairy
22 farmers who are inefficient and not able to compete are
23 being given a preferential status, as compared to
24 out-of-state dairy farmers who have lower costs and
25 competitive advantages.

1 QUESTION: But -- but that would happen whether
2 it was done by the Massachusetts legislature or by the
3 milk board.

4 MR. ROSENBAUM: Well, if -- if we are talking
5 about monies coming from the general revenues of the
6 State, then there in fact is no regulation being placed
7 upon the transaction between processors and out-of-state
8 farmers. In this case, processors are being told, if you
9 are buying out-of-state milk, you must pay a premium for
10 that. If the money were coming from the general revenues,
11 there is no such regulation of interstate commerce going
12 on.

13 QUESTION: But you --

14 MR. ROSENBAUM: That transaction -- the price of
15 that transaction is wholly unaffected.

16 QUESTION: But in answering Justice O'Connor's
17 question, I thought you said that simply a levy on the
18 processors, without any ensuing subsidy, would be
19 unobjectionable?

20 MR. ROSENBAUM: If the levy were what I would
21 think of as being a pure tax, a dollar tax, going to the
22 general revenues, there would not be any
23 unconstitutionality there. That is nothing different than
24 any other tax. The reason is that a one doll -- if the
25 price today is \$12 to in-state and out-of-state farmers,

1 and a \$1 tax were imposed, the price being received by
2 in-state and out-of-state farmers is still \$12. Their
3 relative competitive situation remains unaffected.
4 Processors desire to buy from in-state and out-of-state
5 farmers remains unaffected.

6 But that is wholly upset by this scheme. In
7 this scheme, in-state farmers are receiving a premium
8 price. We, the processors, would like to respond to that
9 scheme by buying more milk out of State, as was the
10 situation in Baldwin. We are prevented from doing so as a
11 practical matter of economics, however, because the
12 premium that we are having to pay on in-state milk we're
13 also having to pay on out-of-state milk. And so, we
14 cannot take advantage of the cheaper out-of-state milk.

15 QUESTION: Well, I have difficulty putting your
16 case into the Baldwin framework. Because in Baldwin,
17 there was almost a violation of the State's jurisdiction.
18 It was predicating its act on occurrences that were
19 outside of the State. Here the act is key simply to an
20 in-state Massachusetts transaction. That's all that's
21 happening. I don't think it's necessarily fatal to your
22 case, but I just do not see the applicability of Baldwin
23 here at all.

24 MR. ROSENBAUM: Your Honor, Baldwin was limited
25 to sales taking place in the State of New York. The

1 Baldwin law is identical in --

2 QUESTION: No. But the -- the law could not
3 operate unless the milk commission, or whoever the State
4 enforcing agency was in that case, took notice of a price
5 of a transaction of an occurrence that happened outside
6 the State.

7 MR. ROSENBAUM: Yes, but --

8 QUESTION: And that is not this case.

9 MR. ROSENBAUM: Well, I think it is this case.
10 The Massachusetts Commissioner must note not only the
11 sales that have taken place in Massachusetts, which
12 triggers the law, just as it triggered the law in Baldwin,
13 but must also determine how much of that milk came from
14 in-state and out of State, and then compute how much money
15 goes to in-state farmers as a result.

16 QUESTION: Well, that's only for purposes of the
17 -- of the subsidy, not for the tax.

18 MR. ROSENBAUM: Well, if all the milk in the
19 Baldwin situation had come from New York, there would be
20 no triggering of that statute, either. That's the same
21 situation as we have here. But of course in both cases,
22 there were, and are, substantial amounts of milk coming in
23 from out of State.

24 I think it's important to bear in mind here the
25 implications of this regime. Although we're dealing with

1 milk and perhaps a somewhat complex Federal milk order
2 system, this regime could apply to any product whatsoever.
3 It doesn't have to be milk. Any State that determined
4 that its in-state manufacturers were at a competitive
5 disadvantage to the manufacturers of out-of-state people,
6 could simply say, well, what's the difference in their
7 costs? Is it 25 cents? Fine. We will place a 25-cent
8 assessment on the sales in our State coming from both
9 in-state manufacturers and out-of-state manufacturers.

10 QUESTION: Well, in that -- in that connection,
11 is it any part of your case -- perhaps it is not -- but is
12 it any part of your case that the invalidity of this
13 scheme is triggered by the fact that it, in effect,
14 piggy-backs off a regional milk-pricing scheme?

15 MR. ROSENBAUM: Well, we do think, Your Honor,
16 that it's clear that the purpose, of course, of the
17 Federal order system is to establish a minimum price to be
18 paid to farmers in that region. And this scheme certainly
19 upsets that regime. But we --

20 QUESTION: Not only does it upset, but it -- it
21 uses it as a formula, as a base.

22 MR. ROSENBAUM: Yes --

23 QUESTION: And that seems to me somewhat
24 suspect.

25 MR. ROSENBAUM: Yes, Your Honor. It takes what

1 the Federal Government has determined should be an
2 appropriate minimum price in the area and, instead,
3 establishes a higher minimum price with respect to the
4 farmers of Massachusetts.

5 QUESTION: Would you say the same about a State
6 income tax law which used the Federal income tax return as
7 the form, and then computed the State income tax on the
8 basis of that?

9 MR. ROSENBAUM: No, Your Honor, I don't think
10 so. But in the hypothetical you're --

11 QUESTION: What's the difference?

12 MR. ROSENBAUM: Well, I don't think this --
13 because this is a system devised to upset the competitive
14 relationship between farmers in Massachusetts and in other
15 States --

16 QUESTION: Are you saying that it's preempted by
17 the Federal system?

18 MR. ROSENBAUM: No, Your Honor. We have not
19 asserted a preemption argument in this case.

20 QUESTION: Well, then, what is your response to
21 Justice Kennedy? Is that simply a neutral factor or -- I
22 understood you to say that it was perhaps kind of suspect,
23 without being more definite than that.

24 MR. ROSENBAUM: I think that's probably a fair
25 way to put it.

1 QUESTION: Well, what does that mean?

2 MR. ROSENBAUM: Well, what it means is that it
3 makes clear -- makes perfectly clear what the State of
4 Massachusetts is up to -- namely, they are not happy with
5 the minimum price that their farmers receive under the
6 Federal Government system. They want to -- and what they
7 are doing is piggy-backing on that system so that
8 out-of-state farmers, who will continue to be subject to
9 the Federal order system, will always be receiving a price
10 subject to the Federal regime --

11 QUESTION: But it does no more than perhaps show
12 motive, is that what you're saying?

13 MR. ROSENBAUM: Well, it shows motive, plus it
14 ensures the effect. I think that's the point -- namely,
15 the out-of-state farmers will always be receiving a -- a
16 price that's lower than the price that the Massachusetts
17 farmers are receiving, because the amounts received by the
18 out-of-state farmers are dictated by the lower Federal
19 minimum price.

20 QUESTION: So, without the Federal minimum, it
21 would just be a less-efficient mechanism of doing what
22 it's doing, for the State to do what it's doing?

23 MR. ROSENBAUM: Well, a State could come up with
24 the same --

25 QUESTION: The -- the Federal minimum gives the

1 scheme a great potency, which it would not otherwise have
2 --

3 MR. ROSENBAUM: Yes, that -- that's --

4 QUESTION: A potent effect on the market, which
5 it would not otherwise have?

6 MR. ROSENBAUM: That's correct. That's correct.
7 That is the basis -- that -- although we are not asserting
8 that this is unconstitutional under preemption, we are
9 asserting that the potency of the system is established by
10 the fact that out-of-state farmers will always be subject
11 to a lower price and Massachusetts farmers will always be
12 receiving a higher price, because it is the -- they always
13 track in unison. That's how the Massachusetts price is
14 established.

15 Indeed, in many respects, this is no different
16 from a scheme in which a State were to put a \$1 tax on
17 both in-state and out-of-state goods, and then rebate the
18 tax paid on in-state goods. In fact, this system is worse
19 than that, in that it not only gives the money raised on
20 in-state milk to in-state farmers, but it takes the money
21 from out-of-state farmers and transfers that money, as
22 well.

23 The practical effect is that, on any given day,
24 an out-of-state farmer's milk truck who pulls up at my
25 client's place of business will receive, for example, \$12

1 for his milk, while an in-state farmer, pulling up to my
2 client's plant with the same amount of milk, which goes to
3 the same use and goes to the same buyer, will receive \$15
4 for that milk. That is an openly blatant discrimination.
5 And it is funded from my clients, not from the general
6 revenues of the State.

7 QUESTION: It was not clear to me why you have
8 the motive to prefer one truck over the other.

9 MR. ROSENBAUM: Your Honor, we would -- what --
10 what we are losing here is two things. First, as in
11 Baldwin, if the higher price only applied to in-state
12 milk, which is constitutional under Nebbia, we would
13 prefer the out-of-state milk, because that out-of-state
14 milk would not be subject to the lower prices -- to the
15 higher prices and, therefore, it would be cheaper.

16 That is to say, if the pricing order only
17 applied to Massachusetts-produced milk, then the higher
18 price would only be applicable to that milk, and we would
19 buy more out-of-state milk. But, beyond that, according
20 to the Commissioner, under the current situation, in-state
21 farmers are losing sales to out-of-state farmers because
22 out-of-state farmers have cheaper costs and, therefore,
23 can make a go of it at the current market prices, while
24 in-state farmers cannot.

25 Their ability to displace -- the out-of-state

1 farmers' ability to displace the less efficient in-state
2 farmers is lost, because the in-state farmers are
3 receiving the extra money to prop up their inefficient
4 operations. Indeed, the amount of the subsidy is
5 explicitly tied to the Commissioner's determination as to
6 how much Massachusetts farmers needed to cover their cost
7 of operation, explicitly recognizing that the market price
8 was lower than that because out-of-state farmers had lower
9 costs and could sell milk at the lower market price.

10 So, that competition has been wholly displaced.
11 That is to say, as this Court held in Baldwin, one of the
12 key incidents of competition, interstate, is that citizens
13 of one State, who have lower cost, are entitled to
14 displace sales by citizens of another State who have
15 higher costs, because they can sell at a lower price.

16 Massachusetts is explicitly attempting to block
17 that from occurring. They couldn't be clearer.

18 QUESTION: But you -- you acknowledge that they
19 -- you acknowledge that that's perfectly okay, so long as
20 they do it by a general subsidy. They could have the same
21 motive: we have inefficient producers. We want to keep
22 those inefficient producers in business. We are going to
23 carefully calculate how much money we have to give them to
24 keep them in business. They can do that.

25 MR. ROSENBAUM: It -- it is a --

1 QUESTION: So, you're just complaining about the
2 tax, really?

3 MR. ROSENBAUM: No, I believe it's more than
4 that, Your Honor. From money coming from the general
5 subsidies, as described by this Court in New Energy, is a
6 very limited exception to the Commerce Clause rules that
7 prevent interference with interstate competition. The
8 State has not acted in that fashion here. We believe
9 there are constraints that make it unrealistic that they
10 ever would be able to act in that fashion. And for that
11 reason this is a very different situation.

12 I would like to reserve the balance of my time.

13 QUESTION: Very well, Mr. Rosenbaum.

14 Mr. Wilkins, we'll hear from you.

15 ORAL ARGUMENT OF DOUGLAS H. WILKINS

16 ON BEHALF OF THE RESPONDENT

17 MR. WILKINS: Mr. Chief Justice, and may it
18 please the Court:

19 The main issue here is whether this
20 Massachusetts law is, per se, illegal. We submit that the
21 way this law operates in this particular market shows two
22 things, both of which rebut that claim. The first is that
23 this order is nothing more than a combination of two
24 elements that ordinarily are lawful under the dormant
25 Commerce Clause; and, second, we have not found a way to

1 avoid the political process. We have not avoid a way --
2 found a way to avoid accountability and responsibility to
3 the citizens of the Commonwealth.

4 On that latter point, it is significant that
5 West Lynn testified that it in fact passes on 50 percent
6 of its assessment to its customers. West Lynn absorbs 50
7 percent of the -- of the assessment. And so, there are
8 two constituencies, both dealers and either retailers or
9 consumers, who are well represented in Massachusetts, who
10 have every incentive, if they disagree with this
11 disposition of money, to complain. The record shows that
12 they accept this program. And that is why we have this
13 law, not because we've found a way to insulate ourselves
14 from the political process.

15 Now, the context is important. And we submit
16 that instead of bolstering the Petitioners' argument here,
17 the Federal context actually supports our position. This
18 is a highly regulated market, and the regulation extends
19 to regulation of price -- prices charged by farmers and
20 paid by dealers.

21 The farmer, therefore, cannot significantly
22 reduce its price in order to effectively pass through this
23 subsidy to the processor.

24 QUESTION: You're saying Massachusetts is not
25 doing anything worse than what the Federal Government is

1 doing, right?

2 MR. WILKINS: I'm sure that's true, Your Honor.

3 QUESTION: The same thing -- the Federal
4 Government just -- just isn't giving enough of a subsidy
5 to inefficient producers to carry the Massachusetts
6 people. It's just carrying people from other States?

7 MR. WILKINS: Well, we believe that the Federal
8 system allows us the flexibility to do this. And, in
9 fact, there is no preemption of our ability to do this, as
10 we argued in our brief. The Federal Government intends to
11 permit the States to enact this kind of law.

12 QUESTION: The theory of the Commerce Clause is
13 not that you can't subsidize inefficiency. It's that only
14 -- or favor in-state inefficiency -- that isn't the theory
15 of it. The theory of the Commerce Clause is that only the
16 Federal Government can favor in-state inefficiency, and
17 not the States.

18 MR. WILKINS: Well, I disagree with it to the
19 extent we are talking about subsidies, Your Honor. The
20 dormant Commerce Clause permits the States to exercise its
21 spending power through subsidies in order to favor its --
22 its producers. And, in this case, it's not a matter of
23 inefficiency of the producers. The producers themselves
24 are efficient, but there are higher costs.

25 QUESTION: So, what about the sales tax

1 hypothetical that your -- your colleague put to us? You
2 impose a sales tax on in-state and out-of-state goods, and
3 rebate the full amount to all the in-state people. That's
4 bad, I suppose. Why? Because it's a rebate.

5 MR. WILKINS: If we're talking about a true
6 rebate.

7 QUESTION: Okay. So, we don't call -- no, this
8 is not a true rebate. It's going to be called a subsidy.
9 It happens to be in the same amount as the tax that you
10 paid; that's okay?

11 MR. WILKINS: Well, it's not because we call it
12 a subsidy. It's because we are not paying the money back
13 to the same people who paid it in. Our subsidy is not a
14 rebate, because the dealers pay the assessment and we
15 subsidize the farmers.

16 And, in fact, because of the Federal system and
17 because of the facts developed before the Commissioner
18 regarding this market, that is a -- is a particularly
19 meaning distinction in this industry, because there is
20 virtually no likelihood that the farmers will in fact pass
21 that money along. The Federal minimum price prevents them
22 from doing that, to a large extent. And, in fact, the --
23 the dire situation of the farmers which led to the
24 enactment of this law suggests strongly that these farmers
25 need to dig themselves out from debt. They need to

1 invest.

2 And, indeed, that is why the Supreme Judicial
3 Court of Massachusetts said the purpose of this law is to
4 prevent the collapse of the dairy farms.

5 QUESTION: I don't know what you mean when you
6 say there's no chance that they're going to pass it along.
7 I don't under -- would you explain that?

8 MR. WILKINS: Well, the farmer is greatly
9 restricted in reducing price. So, if the farmer was going
10 to use this subsidy to reduce price, the Federal law
11 restricts that, and the farmer's own circumstances, given
12 the need to pay back debt and to invest in feed and
13 fertilizer, makes that a virtual impossibility.

14 QUESTION: He doesn't use it to reduce price, he
15 uses it to increase sales. Since everybody has to pay
16 this tax, and only he gets it back, he can make more
17 sales. Otherwise, he couldn't afford to sell at those
18 prices.

19 MR. WILKINS: Well, we believe that the farmer
20 is able to survive because of this. In terms of
21 increasing --

22 QUESTION: I have no doubt about that.

23 MR. WILKINS: Excuse me?

24 QUESTION: I have no doubt about that. But
25 maybe he shouldn't -- he shouldn't be able to survive. I

1 mean, that's -- you know, that's the theory of the free
2 market.

3 MR. WILKINS: Well, yes, but the dormant
4 Commerce Clause does not enact free market principles. It
5 -- it allows free trade, so that boundaries between States
6 are -- are irrelevant. But it does not prevent the State
7 from deciding, here is an industry or a segment of an
8 industry that provides us many benefits. It provides us
9 diversity, with respect to our agricultural base. It
10 provides us other benefits -- cultural, social,
11 educational, et cetera. And to preserve those benefits,
12 the dormant Commerce Clause recognizes that the States may
13 use their spending powers -- not their regulatory powers
14 -- to preserve those benefits.

15 QUESTION: You're saying that the dormant
16 Commerce Clause, Mr. Wilkins, does not enact Herbert
17 Spencer's social status?

18 MR. WILKINS: I think that would be a good way
19 to put it, Your Honor, yes.

20 And, indeed, the economic burden falls upon the
21 consumers and dealers of Massachusetts. So, this is a
22 situation where it's a -- a contest between competing
23 groups within the Commonwealth, all of whom have a say in
24 the political process that created the laws.

25 QUESTION: Well, on that point -- and I'm not

1 sure it determines anything under the Commerce Clause --
2 but I assume that if the proposition had to go before the
3 legislature every year, of whether the State should be
4 paying out so much cash to dairy farmers, that might be
5 tough sledding. But where it can be packaged in a deal,
6 where the legislature is told, look, you only have to
7 decide this one time. If you let the agricultural
8 secretary impose this order, 90 percent of the cost is
9 going to fall on out-of-staters, and we can help our dairy
10 farmers at no cost to in-staters, for all practical
11 purposes. That's an easy sell.

12 MR. WILKINS: Well, it would be an easy sell,
13 but only because we would have misrepresented what we are
14 doing. We are not passing on 90 percent of the costs to
15 out-of-staters. Now, it is true that 90 percent of the
16 milk -- the fluid milk -- does tend to come from out of
17 State, but that's not a particularly unusual situation,
18 where we are only one out of 50 States. In fact, that may
19 be a commodity that we produce proportionately more of
20 relative to most commodities. But --

21 QUESTION: Yes, but the practical effect here is
22 that 90 percent is coming from out of State, and -- and
23 milk sold from out of State is contributing the bulk of
24 the money that's being recycled in-state to local farmers.

25 MR. WILKINS: We don't view it that way, Your

1 Honor. We don't view it as the milk is contributing --
2 this -- this is a -- a dollar assessment that falls upon
3 dealers and consumers within Massachusetts, and they're
4 the ones who pay. So it's not that we're -- we're not --
5 we haven't found a way to export our tax burden. This is
6 a burden that --

7 QUESTION: Well, if I were a legislator up
8 there, I think I'd found a way.

9 MR. WILKINS: Well, Your Honor, I don't -- I
10 don't think it would be accurate. And I think what --
11 what we have done is found a way to make it palatable for
12 in-state interests to shoulder this burden. We have -- we
13 have said, basically, to the constituencies who are
14 affected by this that if you pay this money, here is where
15 it will go. We will not use it to build up a bloated
16 bureaucracy, if you will.

17 This kind of fund is a useful way, particularly
18 in hard fiscal times, to tell the electorate and the
19 people who are going to be shouldering these burdens that
20 we are going to be spending the money for a purpose, and
21 here is what the purpose is. And if you agree with us,
22 fine. And if you disagree with us, then you have a remedy
23 through the political process.

24 QUESTION: And do you think that we could,
25 consistent with our precedence, write in this opinion that

1 any State that wishes to impose a discriminatory tax may
2 do so by imposing a neutral tax and then rebating all
3 in-state payors their share of that tax?

4 MR. WILKINS: No, I do not, Your Honor.

5 QUESTION: Why is this case any different?

6 MR. WILKINS: Because this is not a rebate. We
7 are not paying money back to the in-state people who have
8 been assessed with this assessment. The -- the assessment
9 and the rebate take place at two separate levels. And the
10 people who are benefitted by this law are not the same
11 people who are burdened by it.

12 QUESTION: Does formalism count -- would
13 formalism count for everything here

14 MR. WILKINS: It doesn't count for everything,
15 Your Honor. It is important. But there is a substantive
16 difference, particularly within this industry, where there
17 is even -- although this may or may not be
18 constitutionally relevant -- there is even a -- a bar or
19 -- or a severe limit upon passing back this subsidy from
20 the farmer to the processor.

21 Now, the reason I say that may be of no
22 constitutional significance is because West Lynn, in its
23 reply brief, at page 13, note 10, says that what the
24 farmers do with the money is of no significance. I -- I
25 think that's a question that the Court doesn't have to

1 reach here, because we have an industry where the farmers
2 can't reduce their price below the Federal minimum, where
3 the farmers are required to pay off their debt and to
4 invest. And the record shows that they are very far
5 behind in those areas.

6 And, in addition, the order itself is crafted
7 with some limits to make sure that this does not get, if
8 you will, out of hand. It has a -- a limit upon the
9 subsidy. If the Zone 21 blend price gets to \$15, the
10 assessment and the subsidy vanish. So there's a
11 protection at that level.

12 And, in addition, there is a limit upon the
13 amount of the subsidy that can be granted. It's a 200,000
14 pound limit. And if the farmer produces more than the
15 200,000, the farmer will get no subsidy for the excess
16 amount.

17 So, we have -- it is a substantive, as well as a
18 formal, distinction in this particular case.

19 I would not advocate that we could assess our
20 in-state processors -- I'm sorry -- assess all processors
21 and merely give the money back to in-state processors. I
22 think that is a discriminatory tax by another name and it
23 ought to be treated as a discriminatory tax.

24 Now, the case has been argued on -- on the basis
25 that Baldwin applies here, and that, therefore, the law

1 is, per se, invalid. The distinctions between this case
2 and Baldwin are many, and they are fundamental. Under
3 this law, to the extent allowable by the Federal law, a
4 out-of-state farmer may increase or decrease his or her
5 price. They may import as much -- or export as much milk
6 as they wish. There is simply no barrier at the border
7 that prevents an out-of-state farmer from competing.

8 And, indeed, no in-state consumer or dealer has
9 an incentive to buy Massachusetts milk as a result of this
10 order, nor does any incentive to buy out-of-state milk
11 vanish as a result of this order.

12 And in this resp -- these respects, this case is
13 entirely different from Baldwin. Baldwin involved an
14 import ban, which is not here. And it involved a
15 condition which, as I think Justice Kennedy pointed out
16 earlier, a condition which injected New York's laws into
17 its neighboring States, to regulate the prices that were
18 being charged there.

19 To the extent that West Lynn argues that this is
20 price regulation and relies upon the use of that word, I
21 submit that the Supreme Judicial Court considered that
22 issue and said, at page 126 of the joint appendix, that
23 the pricing order does not establish a minimum price milk
24 dealers must pay for milk, regardless of point of origin.

25 And to the extent that characterization at the

1 State level by State officials is at all relevant here,
2 that characterization should control over the
3 characterization in the Commissioner's order, which,
4 incidentally, was enacted before the legislature passed a
5 statute placing this funds -- these funds within the
6 treasury. And once the legislature did that, and
7 appropriated these funds out on a continuing basis, that
8 was a modification of the order to that extent, and
9 certainly removes the analogy to a price.

10 The trust fund methodology that we have adopted
11 here is a fairly standard way for States, and even the
12 Federal Government, to structure spending. And it is
13 necessary for both State and Federal Government to have
14 the kind of flexibility to structure the laws in these
15 ways.

16 The best analogy that I can think of in this
17 area is the Court's recent decision, 1992, in New York v.
18 United States, particularly Part 3A of that opinion, which
19 was a unanimous holding of the Court, where the Court
20 viewed -- or analyzed a Federal escrow scheme that was
21 quite similar to the structure of what we have here.

22 There, money went into an escrow scheme through
23 -- through Federal taxation. It was specifically, by
24 statute, not deemed to be property of the United States.
25 And yet, when it was disbursed from this escrow fund, the

1 Court said that this was an exercise of spending power by
2 Congress, and said that the funds were Federal funds.

3 What we are saying here is something quite
4 similar. We are saying that we are using a -- a trust
5 fund, or analogous to the escrow fund, and that the funds,
6 even though they are held in -- in some kind of trust,
7 nevertheless, are spending, when they are disbursed, and,
8 therefore, fall within the market participation doctrine,
9 and, similarly, the funds continue to be States even
10 though they are held in a trust fund.

11 The use of a trust fund presents no issue under
12 the dormant Commerce Clause, because the dormant Commerce
13 Clause is concerned with free trade, not with how the
14 States structure the powers within their internal
15 governmental organs. And the Highland Dairy case is -- is
16 pertinent here, because it said that how power is
17 distributed by a State among its governmental organs is
18 commonly, if not always, a question for the State itself.

19 By insisting that a subsidy come out of the
20 general fund, West Lynn is asking the Court to evaluate
21 the efficacy of particular State mechanisms, such as
22 annual appropriations versus general laws versus
23 delegation of power to an executive agency. It's asking
24 the Court to analyze the purposes for which revenues are
25 raised and spent.

1 And, indeed, I think counsel's response to
2 Justice Scalia's questions in this regard suggest just how
3 deep that inquiry goes. Apparently, West Lynn would argue
4 that even if money is paid into the general fund, the
5 Court can still link that money with a subsequent subsidy
6 and declare it invalid.

7 QUESTION: I didn't understand it to be that. I
8 thought they were arguing that if the State itself linked
9 the two, by saying the amount of the subsidy would be
10 geared to the amount of the tax; that then it could be
11 challenged?

12 MR. WILKINS: Perhaps that's their argument. I
13 thought their reply brief was -- was broader than that.
14 But even if the question is the matter of linkage, we
15 think that the matter of linkage is, again, a matter that
16 does not involve questions of free trade among the States.
17 It is simply a matter of how the State structures its own
18 internal mechanisms for -- for assessing money and
19 spending it.

20 QUESTION: I hate to -- maybe you've answered
21 this, but you're saying that if they have a trust fund
22 which is supported entirely by revenues from members of an
23 industry, both in-state and out of State, and then the
24 proceeds of the trust fund are distributed entirely to the
25 in-state members of the industry, that that's strictly a

1 matter of State business?

2 MR. WILKINS: If the people who receive the
3 funds are at the same level of competition, if they're all
4 -- if they're in competition with each other, I think that
5 would be unlawful.

6 QUESTION: Oh.

7 MR. WILKINS: If they are not in competition, if
8 they're at a different level of the industry, particularly
9 here, where there are many reasons why there is -- not
10 even a reason -- no basis for reaching a pass-through
11 question, then there is in fact no protectionism, because
12 competitors are not being treated unlike, except --
13 except --

14 QUESTION: Well, what -- what if there is a
15 pass-through, and the effect is to let the Massachusetts
16 dairy farmers sell their milk more cheaply than
17 out-of-staters? I mean you might have a scheme where the
18 effect is just like imposing a tax on out-of-state milk.

19 MR. WILKINS: Well, ultimately, a subsidy could
20 have that effect. And I think that one of the --

21 QUESTION: And if it did, what's the result?

22 MR. WILKINS: Well, this -- this gets into, I
23 think, what is a very knotty area. The result, I think,
24 is that the plaintiff in such a case would have to make a
25 factual showing that in fact there was such a market

1 dislocation that the political process no longer was
2 effective. That is, Professor Regan's suggestion. And it
3 is a knotty question either way. Once you allow a
4 subsidy, do you get into that kind of -- of question?

5 QUESTION: Well, why do you say that inquiry
6 isn't required here?

7 MR. WILKINS: Well, because we never get to the
8 point of the pass-through, given the Federal minimum
9 price, given the farmers' need to dig themselves out from
10 -- from debt and to invest. And --

11 QUESTION: You don't think there are local dairy
12 farmers in Massachusetts that can lower their prices
13 because of this subsidy?

14 MR. WILKINS: Certainly, they can't do it
15 significantly because of the Federal minimum price. If
16 there's going to be price reduction, it would -- it would
17 be of a very minor nature. And -- and the third reason
18 why I think this issue is not here is because this --
19 that's not the theory upon which West Lynn has proceeded.
20 And so, there is no factual record, there are no findings,
21 that would allow us to get into that.

22 But I -- I think that Professor Regan is quite
23 correct in urging caution in this particular area.

24 QUESTION: But you do admit, Mr. Wilkins,
25 indeed, it's the whole purpose of the law that some dairy

1 -- some dairy farmers in Massachusetts stay in business,
2 who otherwise wouldn't be able to stay in business?

3 MR. WILKINS: Absolutely, Your Honor.

4 QUESTION: And that deprives out-of-state
5 farmers of an opportunity to sell more milk, doesn't it?

6 MR. WILKINS: Not necessarily, Your Honor, given
7 the --

8 QUESTION: It doesn't?

9 MR. WILKINS: Well, no. There's a surplus of
10 milk.

11 QUESTION: You mean when a dairy farmer goes out
12 of business in Massachusetts, the people of Massachusetts
13 stop drinking as much milk?

14 MR. WILKINS: No. But there is a surplus of
15 milk. So, it may simply mean that out-of-state dairy
16 farmers sell more of their milk in the high-paying
17 categories. It's a very complex system. But if somebody
18 in Massachusetts goes out of business, then the
19 out-of-state dealer may be --

20 QUESTION: It doesn't seem to me it makes any
21 difference whether they can raise their price or not raise
22 their price. If you're keeping somebody in business who
23 otherwise would be out of business, and an in -- an
24 in-state person in business who otherwise would be out of
25 business, you're affecting the opportunities of

1 out-of-state people to sell. It has to follow.

2 MR. WILKINS: Well, we're -- to the extent we
3 keep people in business, we're only affecting
4 opportunities by reason of paying a subsidy, by reason of
5 our spending program, which is -- is therefore not a --

6 QUESTION: That's -- that's a different
7 argument. That's different from the argument that there's
8 no harm done because these people can't lower their --
9 lower their prices anyway.

10 MR. WILKINS: That is a different argument, yes,
11 Your Honor. And I think the question about what would
12 happen if we had a different factual situation, where they
13 could lower their prices, would -- the answer, either way,
14 I think, is difficult for this Court. And I think that's
15 why Professor Regan urges caution in this area. And --
16 and I certainly agree with that; that there's no reason to
17 reach that kind of issue in this case.

18 Now, West Lynn has also arguing in its brief
19 that out-of-state farmers are going to receive less from
20 dealers. That is, that voluntary premiums, to the extent
21 they exist, are not going to be paid. This argument is
22 rebutted by the testimony of West Lynn's own President.
23 At page 59 of the joint appendix, he is talking about how
24 he is going to provide for the assessment.

25 And he says, we're putting in escrow 100 percent

1 of the money. So, 50 percent of the money is money we've
2 received from customers. The other 50 percent is money
3 we're receiving that we're putting in right out of our own
4 profits.

5 So, he's passing on 50 percent and he's taking
6 50 percent out of his profits. There's nothing left for
7 him to argue that he's paying less to out-of-state
8 farmers. And, in fact, West Lynn did not make such a
9 direct argument below. It based its argument upon an
10 assumption of increased production in Massachusetts, which
11 was speculative, given the limited duration of this order,
12 given the cap and, also, the time and investment it would
13 take to -- to increase a herd.

14 And, in addition, we believe this argument was
15 waived in Supreme Judicial Court for the reasons stated in
16 our brief at 38, note 35.

17 In short, this statute is not a tariff, because
18 a tariff is something that always affects the cost to the
19 buyers. It always creates a preference for in-state goods
20 over out-of-state goods. This law does not have that
21 effect, nor does it have the other effect of a tariff,
22 which is to raise revenue.

23 This -- this law is -- to the extent that we
24 have a fund that's limited to a particular purpose, is
25 actually, to that extent, a harder sell in the political

1 process, because with a tariff, the proponents of the
2 tariff can say, well, we have to raise money anyway, let's
3 raise it in a way that gives us ourselves an advantage.
4 That can't be said about this law. This law does not
5 defray general costs.

6 And so, to that extent, is less attractive than
7 a tariff.

8 In sum, West Lynn wants this Court to adopt a
9 new, per se, rule of illegality, even though the record
10 shows that our law is not a protectionist regulation.
11 There's no question that Massachusetts dairy farms are in
12 crisis. Our response to that crisis does not unlawfully
13 affect interstate commerce any more than an ordinary
14 subsidy and an evenhanded tax.

15 Our program should not be struck down upon the
16 new, per se, rule that runs counter to the record and
17 counter to the findings below.

18 We submit that the dormant Commerce Clause does
19 not hamper the States in fashioning programs like the one
20 we have adopted.

21 Thank you.

22 QUESTION: Thank you, Mr. Wilkins.

23 Mr. Rosenbaum, you have four minutes remaining.

24 REBUTTAL ARGUMENT OF STEVEN J. ROSENBAUM

25 ON BEHALF OF PETITIONERS

45

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1 MR. ROSENBAUM: This Court concluded in the
2 Baldwin case that a State could not place itself in a
3 position of economic isolation, quoting from page 527.
4 That is precisely what Massachusetts is seeking to do.

5 Today, Massachusetts farmers are less efficient.
6 They cannot sell at the market price. And they are losing
7 sales as a result. The pricing order has come into
8 effect. It requires we, the processors, to pay more money
9 to the Massachusetts farmers in order that they have
10 enough money in their pockets to meet their costs.

11 The necessary result is that out-of-state
12 farmers cannot displace in-state farmers as the Interstate
13 Commerce Clause guarantees. Justice Scalia is precisely
14 right, it makes no difference whether the effect of this
15 is to preserve sales that would otherwise be lost, or
16 increase sales. In either effect, the purposes of the
17 Interstate Commerce Clause are being thwarted because
18 interstate competition is being thwarted.

19 The technique being used here is somewhat
20 different than in Baldwin, but the effect is the same. In
21 Baldwin, the State required a higher price for its farmers
22 in order to keep cheaper milk from coming in from out of
23 State. They also required that higher price to be paid to
24 out-of-state farmers. That was deemed unconstitutional.

25 Here, the State is requiring a higher price to

1 be paid to Massachusetts farmers. And in order to prevent
2 us from buying cheaper milk, not subject to that
3 requirement, from out-of-state farmers, we are required to
4 pay the same premium -- that is to say, the same
5 difference between the market price and the state-mandated
6 price on that out-of-state milk. The difference is we are
7 being required to pay that money over to the in-state
8 farmers.

9 To the extent that that is a difference with
10 Baldwin, it's a difference that makes the system worse,
11 because in-state -- out-of-state farmers receive no
12 benefit whatsoever from this scheme.

13 This is not a subsidy. We are required to pay
14 this money the 25th of every month. On the 5th of the
15 next month, 10 days later, that money goes out to the out
16 -- to the in-state farmers. No money is going to the
17 general revenues. No money is coming out of the general
18 revenues. It is a price regime that is simply increasing
19 how much we are paying, and that is precisely the
20 description of the regime that the State sets forth in the
21 pricing order itself.

22 With respect to the question of what kind of
23 subsidy would or would not be appropriate, we submit that
24 issue is not before the Court today, as it was not before
25 the Court in New Energy, because we do not have a

1 situation here where monies are coming from the general
2 revenues of the State and going to support an in-state
3 industry. We do think that if there were a tightly
4 focused tax on a specific industry and a tightly focused
5 subsidy that reflected that tax that then went to someone
6 involved in that same industry, that would also be
7 unconstitutional, because that would have the same defects
8 of the pricing order. But that is not before the Court
9 today.

10 Unless there are any further questions, I will
11 complete my argument.

12 CHIEF JUSTICE REHNQUIST: Thank you,
13 Mr. Rosenbaum. The case is submitted.

14 (Whereupon, at 11:55 a.m., the case in the
15 above-entitled matter was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

WEST LYNN CREAMERY, INC., ET AL., Petitioners v. JONATHAN HEALY, COMMISSIONER OF MASSACHUSETTS DEPARTMENT OF FOOD AND AGRICULTURE
No. 93-141

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Ann Marie Federico-----

(REPORTER)

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