No. 98-1338

In the Supreme Court of the United States

OCTOBER TERM, 1998

TEXAS ASSOCIATION OF DAIRYMEN, ET AL.,
PETITIONERS

v.

MINNESOTA MILK PRODUCERS ASSOCIATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
DAVID W. OGDEN
Acting Assistant Attorney General
BARBARA C. BIDDLE
JEFFREY CLAIR
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the district court abused its discretion in denying petitioners' motion to intervene as untimely.

2. Whether dairy farmers have standing or a right of action under the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 601 *et seq.*, to challenge marketing orders applicable outside their own marketing areas.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-1338

TEXAS ASSOCIATION OF DAIRYMEN, ET AL.,
PETITIONERS

v.

MINNESOTA MILK PRODUCERS ASSOCIATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A26) is reported at 153 F.3d 632. The opinion of the district court granting summary judgment (Pet. App. A42-A51) is reported at 981 F. Supp. 1224. The opinion of the district court denying petitioners' motion to intervene after judgment (Pet. App. A27-A41) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 13, 1998. A petition for rehearing was denied on November 20, 1998 (Pet. App. A61). The petition for a writ of certiorari was filed on February 16, 1999. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 601 *et seq.*, authorizes the Secretary of Agriculture to issue marketing orders that set the minimum prices that must be paid to dairy farmers for milk in defined geographic areas. As the Court has recognized, "[t]he 'essential purpose [of this milk market order scheme is] to raise producer prices,' and thereby to ensure that the benefits and burdens of the milk market are fairly and proportionately shared by all dairy farmers." *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 342 (1984) (quoting S. Rep. No. 1011, 74th Cong., 1st Sess. 3 (1935)).

2. In 1990, respondent Minnesota Milk Producers Association (MMPA), an association of Minnesota dairy farmers, commenced this action challenging the Secretary's pricing scheme for fluid, or "Class I," milk. Pet. App. A6. MMPA contended that the Secretary had set minimum prices for fluid milk too high in most marketing areas outside the Upper Midwest, thereby encouraging excessive milk production and harming the competitive position of dairy farmers, including MMPA's members, in the Upper Midwest. *Id.* at A7. In particular, MMPA sought to invalidate the "Class I price differentials" used in the milk marketing orders. *Id.* at A5. The Class I price differential is a component of the minimum price that dairy farmers are to receive for fluid milk. It is intended to reflect the costs and competitive effects of transporting the milk into a marketing area from sources of supply outside the marketing area. The specific dollar amounts of the Class I price differentials at issue in this case were

fixed by Congress on an interim basis in 1985. *Ibid*.; see 7 U.S.C. 608c(5)(A).

The district court initially dismissed the case on two grounds: that producers such as MMPA do not have a right of action under the Agricultural Marketing Agreement Act, or standing under Article III, to challenge provisions of milk marketing orders applicable outside their own marketing areas. A divided panel of the court of appeals reversed. Pet. App. A52-A60.

In the meantime, the Secretary had commenced a rulemaking on whether to revise the Class I price differentials. The Secretary ultimately decided that the Class I price differentials should be maintained at the levels specified in 7 U.S.C. 608c(5)(A). *Milk in the New England and Other Marketing Areas*, 58 Fed. Reg. 12,634 (1993); see Pet. App. A7.

In 1997, after twice remanding that decision to the Secretary for further consideration, the district court granted summary judgment in favor of MMPA. The court held that the Secretary had acted arbitrarily and capriciously in not adjusting the Class I price differentials in most marketing areas to take into account certain factors, such as local supply and demand conditions, enumerated in 7 U.S.C. 608c(1). The court accordingly invalidated, and enjoined the enforcement of, the Class I price differentials in those marketing areas. Pet. App. A42-A51.

After the district court had entered final judgment, various associations of dairy farmers outside the Upper Midwest, including petitioners here, moved to intervene as defendants, pursuant to Federal Rule of Civil Procedure 24(a), for purposes of appealing the judgment. The court denied the motions as untimely. The court rejected the associations' arguments that they had not previously had notice of the case. The court

observed that in response to its earlier remand orders, the Secretary had issued two amplified decisions, both of which were published in the *Federal Register* and specifically referred to the case. The court deemed it "hard to believe" that the associations, as "entities committed to furthering the interests of their respective dairy clientele," would not have been aware of the Secretary's published decisions. The court also concluded that MMPA would be prejudiced by the association's intervention at that late stage, because the proceedings would be delayed and new (and, the court believed, "meritless") arguments would have to be addressed. Pet. App. A35-A38.

3. While the case was pending in the district court, Congress enacted legislation directing the Secretary to undertake a comprehensive review and reform of existing milk marketing orders. Agricultural Market Transition Act, Pub. L. No. 104-127, Title I, § 143(a), 110 Stat. 915-916 (codified at 7 U.S.C. 7253 (Supp. III 1997)). That statute required the Secretary to consolidate the 32 existing marketing orders into no more than 14 marketing orders (7 U.S.C. 7253(a)(1)), authorized the Secretary to consider new pricing methodologies (7 U.S.C. 7253(a)(3)), and stated that the Secretary "may not consider, or base any decision on" the statutory schedule of Class I price differentials challenged by MMPA in this case (7 U.S.C. 7253(a)(4)). Congress instructed the Secretary to propose consolidation and any pricing reform within two years and to implement any pricing reform within three years, *i.e.*, by April 4, 1999. 7 U.S.C. 7253(b)(2).[1]

---

[1] Congress subsequently enacted legislation barring the Secretary from implementing any new marketing order rules before October 1, 1999. Agriculture, Rural Development, Food and Drug

The Secretary, in accordance with the statutory directive, issued for public comment a proposed rule that would effect major changes in the milk marketing program. See *Milk in the New England and Other Marketing Areas*, 63 Fed. Reg. 4802 (1998). The Secretary proposed to consolidate the existing milk marketing areas into 11 areas, establish a new basic formula price predicated on the actual sales price of various milk components used in manufactured products, and overhaul substantially the Class I price differentials. The public comment period on the rule closed on April 30, 1998, and the Secretary issued a final rule on April 2, 1999. *Milk in the New England and Other Marketing Areas*, 64 Fed. Reg. 16,026.

4. The court of appeals meanwhile reversed the district court's judgment and injunction against the Secretary and affirmed the denial of petitioners' motion for intervention. Pet. App. A1-A26.

As a threshold matter, the court of appeals reaffirmed its earlier decision that MMPA's claims were justiciable. It therefore rejected the Secretary's contentions that MMPA lacked both standing under Article III and a cause of action under the Agricultural Marketing Agreement Act. Pet. App. A9.

On the merits, the court of appeals held that "the Secretary's decision to maintain the current system for pricing Class I milk was within his discretion." Pet. App. A3. The court concluded that the Secretary's construction of the complex milk pricing provisions of the Agricultural Marketing Agreement Act was entitled to "especial deference." *Id.* at A13-A14 (citing *Chevron U.S.A. Inc.* v. *Natural Resources Defense*

Administration, and Related Agencies Appropriations Act, 1999, Pub. L. No. 105-277, § 738, 112 Stat. 2681-30.

Council, Inc., 467 U.S. 837 (1984), and *Blair* v. *Freeman*, 370 F.2d 229, 232 (D.C. Cir. 1996)). The court explained that MMPA's challenge focused on the Class I price differentials for fluid milk, the specific dollar amounts of which were fixed by Congress in 7 U.S.C. 608c(5), and which must therefore be "presume[d]" to be "lawful and effective to reach the statute's goals." Pet. App. A13. The court accordingly held that the proper inquiry in such circumstances "is not whether the Secretary established that the [Class I] differentials should remain unchanged, but whether the MMPA established that they should not." *Id.* at A14. The court then held that the Secretary had not acted arbitrarily and capriciously in concluding that the existing Class I price differentials continued to achieve the statutory goal of ensuring an adequate supply of milk in each marketing area. *Id.* at A14-A19.

Finally, the court of appeals held that the district court had permissibly exercised its discretion in determining that petitioners' motion to intervene was untimely. The court of appeals concluded that the district court had appropriately based its determination on an evaluation of the procedural posture of the case, the prospective intervenors' prior knowledge of the pendency the case, the reasons for their delay in moving to intervene, and the potential for prejudice to the existing parties. Pet. App. A21-A22.

Judge Loken concurred in the judgment. Pet. App. A22-A25. He expressed concern that "the existing Class I differentials do not reflect current supply/demand conditions in the various local milk marketing areas." *Id.* at A23. He noted, however, that Congress had recently directed the Secretary to undertake an extensive review and reform of the national milk

marketing order program. He therefore believed it to be "time for the judiciary to stay its hand." *Id.* at A25.

ARGUMENT

1. Petitioners contend that the court of appeals erred in affirming the denial of their motion to intervene and in concluding that this case is justiciable. But the court of appeals decided the case on the merits in favor of the position that petitioners sought to advance. Petitioners therefore are not adversely affected, in any concrete way, by the decision rendered by the court of appeals.

Petitioners sought to intervene in this case in order to support the Secretary of Agriculture's position that the existing marketing orders are valid. Accordingly, in appealing from the district court's denial of their motion to intervene, petitioners asked that the "case be reversed and remanded to the district court for dismissal." Pet. C.A. Br. 49. The court of appeals, in reversing the district court's judgment and injunction, granted essentially that relief. Pet. App. A22. The Minnesota Milk Producers Association (MMPA), the unsuccessful party in the court of appeals, has not sought review of any aspect of that court's decision.

Petitioners would not have been entitled to any greater relief on the merits if they had prevailed below on either the intervention issue or the justiciability issue. Indeed, the court of appeals could not have reached the merits of the case, and adopted the position favored by petitioners, if the court had adopted petitioners' position on the threshold justiciability issue. Neither issue presented by petitioners, therefore, is appropriate for the Court's review. See Robert L. Stern et al., *Supreme Court Practice* 45 (7th ed. 1993) (although "[t]he literal language of the [28 U.S.C.

1254(1)] reference to 'any party' is broad enough to encompass the successful or prevailing party before the court of appeals," "there appears to be no recorded instance where the Court * * * has granted a petition filed by a party who prevailed on the merits in the court of appeals").[2]

2. In any event, the court of appeals' affirmance of the denial of petitioners' motion to intervene is correct, is consistent with the decisions of this Court and other circuits, and turns on the particular facts of this case. It therefore does not warrant further review.

Contrary to petitioners' suggestion (Pet. 9-10), the court of appeals did not hold that a motion for intervention is untimely per se if not filed until after judgment. Rather, the court held that a district court has the discretion to determine whether such a motion is timely, taking into account such factors as the stage of the case, the movant's reasons for not seeking to intervene earlier, and the potential prejudice to the existing parties. Pet. App. A21; accord *NAACP* v. *New York*, 413 U.S. 345, 366 (1973) ("Timeliness [of a motion to intervene] is to be determined from all the circumstances. And it is to be determined by the court in the exercise of its sound discretion.").

Nothing in the court of appeals' decision on the intervention issue conflicts with any decision of this Court or any other court of appeals. In *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385, 394 (1977), for

---

[2] In analogous circumstances, the Court has declined to entertain appeals by parties who obtain a final judgment in their favor in the lower court. See, *e.g.*, *Public Serv. Comm'n* v. *Brashear Freight Lines, Inc.*, 306 U.S. 204, 206 (1939); cf. *Forney* v. *Apfel*, 118 S. Ct. 1984, 1997 (1998) (a party "ordinarily can appeal a decision 'granting in part and denying in part the remedy requested'") (quoting *United States* v. *Jose*, 519 U.S. 54, 56 (1996)).

example, the Court held that post-judgment intervention was proper because the intervenor had sought to enter the case as soon it became clear that the named parties could not adequately represent her interests. No such circumstances were found to exist here. The district court determined that petitioners were aware, or reasonably should have been aware, of the case and its potential adverse effects on their interests well before judgment was entered. Nor was there any suggestion that the Secretary could not adequately represent his and petitioners' mutual interest in defending the existing milk pricing system.

The other appellate decisions cited by petitioners (Pet. 10-11) applied the same analysis as did the courts below in determining whether a motion to intervene was timely. Those courts, like the courts below in this case, considered such factors as "the point to which the suit has progressed," "the length of time preceding the application [to intervene] during which the applicant knew or reasonably should have known of its interest in the case," and "prejudice to the original parties due to the failure of the applicant to apply promptly for intervention." *Linton* v. *Commissioner of Health & Env't*, 973 F.2d 1311, 1317 (6th Cir. 1992); see also *Yniguez* v. *Arizona*, 939 F.2d 727, 735 (9th Cir. 1991); *Hodgson* v. *United Mine Workers*, 473 F.2d 118, 129-130 (D.C. Cir. 1972). Simply because intervention was allowed in those cases, which involved very different facts than those here, does not create a circuit conflict for purposes of this Court's Rule 10(a). Cf. *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U.S. Philips Corp.*, 510 U.S. 27, 33 (1993) (per curiam) (recognizing that "the decision on any particular motion to intervene * * * is always to some extent bound up in the facts of the particular case").

3. The second issue presented in the petition, whether producers have standing or a right of action under the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 601 *et seq.*, to challenge marketing orders outside their own marketing areas, does not warrant review in the circumstances of this case.

We do not dispute that the issue, in an appropriate case, could be a significant one. Dairy farmers have no express right of action under the Agricultural Marketing Agreement Act. The recognition of a right of action (whether under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, or implied from some other source) to contest marketing orders applicable to other marketing areas is inconsistent with the Agricultural Marketing Agreement Act, which prescribes regional marketing orders that must be defined on a relatively narrow geographic basis and approved by those who regularly engage in production of milk for sale within the marketing area. See 7 U.S.C. 608c(9)(B), 608c(11)(A) and (C); cf. *Block* v. *Community Nutrition Inst.*, 467 U.S. 340 (1984) (consumers have no right of action to challenge milk marketing orders).[3] But the issue is not suitable for the Court's review in this case for several reasons.

---

[3] Neither this Court nor any other court of appeals has recognized in producers a right of action to contest marketing orders outside their own marketing areas. But producers have sometimes been allowed to challenge provisions of marketing orders applicable to their own marketing areas. See *Stark* v. *Wickard*, 321 U.S. 288 (1944); *Farmers Union Milk Mktg. Coop.* v. *Yeutter*, 930 F.2d 466 (6th Cir. 1991), cert. denied, 516 U.S. 806 (1995); *Suntex Dairy* v. *Bergland*, 591 F.2d 1063 (5th Cir. 1979); cf. *Pescosolido* v. *Block*, 765 F.2d 827, 831-833 (9th Cir. 1985) (orange producers had no general cause of action to challenge marketing orders).

First, petitioners, having been denied leave to intervene below, do not have standing to press this issue unless the Court grants certiorari and reverses on the intervention issue. See *Izumi*, 510 U.S. at 34 ("Because we decline to review the propriety of the Court of Appeals' denial of intervention, petitioner lacks standing under § 1254(1) to seek review of the question presented in the petition for certiorari."). But the intervention issue does not warrant the Court's review for the reasons stated above.

Second, as previously noted, the court of appeals ruled in favor of the Secretary on the merits of MMPA's challenge to Class I price differentials in various milk marketing orders. Pet. App. A9-A21. MMPA has not petitioned or cross-petitioned for a writ of certiorari on that aspect of the court of appeals' decision. Any opinion from this Court on whether MMPA's challenge was justiciable would thus be advisory at this point in the case.

Finally, since the court of appeals issued its decision in this case, the Secretary, at the direction of Congress, has completed a nationwide rulemaking designed to reform the entire milk marketing order regime. *Milk in the New England and Other Marketing Areas*, 64 Fed. Reg. 16,026 (1999). Until the new regime is fully implemented and its effects are felt in a concrete way, questions concerning the scope of a dairy farmer's right to challenge marketing orders in other marketing areas are premature. No need therefore exists at this time for the Court again to "traverse the labyrinth of the federal milk marketing regulation provisions." *Zuber* v. *Allen*, 396 U.S. 168, 172 (1969).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
DAVID W. OGDEN
Acting Assistant Attorney General
BARBARA C. BIDDLE
JEFFREY CLAIR
Attorneys

APRIL 1999