No. 04-766

In the Supreme Court of the United States

LAMERS DAIRY, INC., PETITIONER

v.

DEPARTMENT OF AGRICULTURE

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record

PETER D. KEISLER
Assistant Attorney General

BARBARA C. BIDDLE
JEFFREY CLAIR
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

The Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 601 *et seq.*, authorizes the Secretary of Agriculture to establish a minimum price that "handlers" that purchase and process raw milk must pay to dairy farmers. Under Milk Marketing Order No. 30, which governs milk handlers in the upper Midwest, handlers purchasing milk for use in manufactured products, such as cheese, may participate or withdraw from the regulatory scheme voluntarily, but handlers purchasing milk for fluid consumption are required to comply with the minimum price regulations. The questions presented are:

1. Whether the Secretary has authority under 7 U.S.C. 608c(5) to permit handlers to withdraw from the uniform pricing scheme.

2. Whether Milk Marketing Order No. 30's distinction between fluid milk handlers and handlers of manufactured dairy products is rationally related to a legitimate government objective, and thus consistent with the equal protection component of the Due Process Clause of the Fifth Amendment.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes and regulations:

In the Supreme Court of the United States

No. 04-766

LAMERS DAIRY, INC., PETITIONER

v.

DEPARTMENT OF AGRICULTURE

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A21)[1] is reported at 379 F.3d 466. The opinion of the district court (Pet. App. B1-B17) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 13, 2004. The petition for a writ of certiorari was filed on November 11, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Agricultural Marketing Agreement Act of 1937 (AMAA), 7 U.S.C. 601 *et seq.*, authorizes the Secretary of Agriculture to issue orders establishing

[1] Appendices A, C, and D are not numbered. The citations herein are based on the actual pagination.

minimum uniform prices for raw milk. Such orders prevent the destabilization in the milk market that would occur if dairy farmers flooded the market for fluid milk in an attempt to capture the market price associated with fluid milk products, which is typically higher than the market price for milk that is used in manufactured products, like yogurt, cheese, or butter. To this end, the AMAA authorizes the Secretary of Agriculture to establish a minimum price that milk "handlers," purchasers of raw milk that prepare fluid or manufactured milk products for resale to consumers or intermediaries, must pay to milk producers regardless of the milk's end use. See generally *Block* v. *Community Nutrition Inst.*, 467 U.S. 340 (1984); *Zuber* v. *Allen*, 396 U.S. 168, 172-174 (1969).

Specifically, the AMAA requires the Secretary to classify milk according to its end use—raw milk for fluid consumption is "Class I milk," and raw milk for manufactured products is classified as "Class II," "Class III," or "Class IV" milk, depending on the milk's precise end use, see 7 C.F.R. 1000.40—and establish a uniform minimum price for each class of milk. 7 U.S.C. 608c(5)(A). In addition, the Secretary may establish a minimum regional price that handlers must pay for milk, regardless of its class, in specified marketing areas. 7 U.S.C. 608c(5)(B). This minimum regional price, called a "blend price," is a weighted average of the value of the various classes of milk sold in the marketing area. *Ibid.*; *Lehigh Valley Coop. Farmers, Inc.* v. *United States*, 370 U.S. 76, 80 (1962). Finally, the AMAA authorizes the Secretary to pool milk revenues in order to redistribute those revenues equitably. 7 U.S.C. 608c(5)(C).

The Secretary effectively pools and redistributes milk revenues through regional producer settlement

funds. See 7 C.F.R. 1000.70; *Lehigh Valley*, 370 U.S. at 81. When a handler pays a blend price for raw milk that is less than the minimum class price established by the Secretary, which usually occurs when the handler is purchasing Class I milk, the handler must pay into the fund the difference between the blend price and the minimum. 7 C.F.R. 1030.71. Conversely, when a handler pays a blend price that exceeds the minimum class price, which usually occurs when the handler purchases Class II, III, or IV milk, the handler may draw a payment from the settlement fund in the amount of the difference.[2] See 7 C.F.R. 1030.72.

2. Pursuant to the AMAA, the Secretary has issued Milk Marketing Order No. 30 (Order No. 30) to govern milk handlers in the upper Midwest. 7 C.F.R. Pt. 1030. Order No. 30 requires handlers purchasing raw milk for fluid consumption (Class I handlers) to abide by the regulatory minimum pricing structure and revenue pooling. The participation of handlers purchasing milk for use in hard cheese and cream cheese (Class III handlers), however, is entirely voluntary, and they may "de-pool." Pet. App. A8-A9.

Class III handlers have an incentive to de-pool when market conditions are such that they would be required to pay *into* the settlement fund if they were to participate in the regulatory scheme—that is, in the rare instances in which the minimum price of Class III milk exceeds the price of Class I milk, which occurs, for

---

[2] In practice, a handler's obligation to the producer settlement fund is more complex, determined by a complicated formula that takes into account the total value of the handler's milk usage and various credits and adjustments for transportation, assembly, and plant location. 7 C.F.R. 1030.71, 1030.55, 1030.75.

example, during times of rapidly increasing demand for cheese. Pet. App. A7-A8. When this phenomenon (known as "price inversion") occurs, Class I handlers may have to pay an out-of-pocket premium to attract supplies of raw milk. *Id.* at A9. Thus, the ability of Class III handlers to de-pool under Order No. 30 can have negative economic consequences on Class I handlers that must operate within the pool during times of price inversion. *Ibid.*

3. Petitioner is a Wisconsin corporation that bottles fluid milk for distribution and sale to wholesale and retail customers in Wisconsin. As such, petitioner is a Class I milk handler that is subject to, and required to abide by, Order No. 30. Pet. App. B1.

In September 1999, petitioner ceased making payments into the producer settlement fund and filed an administrative petition for exemption from, or modification of, Order No. 30. Petitioner argued that Order No. 30 violated equal protection and allowed violations of a provision in the AMAA purportedly prohibiting unfair trade practices, see 7 U.S.C. 608c(7)(A), by distinguishing between Class I and Class III handlers. Pet. App. A10. After an evidentiary hearing, an administrative law judge sustained Order No. 30 and dismissed the petition. *Ibid.* A United States Department of Agriculture (USDA) judicial officer affirmed the ALJ's decision. *Ibid.*

4. The district court affirmed the Secretary's decision. Pet. App. B1-B17. The court rejected petitioner's constitutional claim, observing that petitioner could not "point to any unequal treatment between similarly situated handlers" caused by the marketing order. *Id.* at B15-B17. Moreover, "even if [petitioner] could demonstrate how it was treated differently," the court

observed, "its equal protection claim would not survive a rational basis review." *Id.* at B16. The court explained that "the Secretary of Agriculture has stated that the classification scheme ensures that all *producers* supplying handlers in a marketing area receive the same uniform price," the "rational purpose" of which "is to raise producer prices by means of the producer settlement fund." *Ibid.* The court also rejected petitioner's claim that the marketing order results in an unfair trade practice prohibited by 7 U.S.C. 608c(7)(A), reasoning that the provision did not create a "statutory right" to fair trade practices but simply listed terms that the Secretary could include in a pricing order. Pet. App. B12.

5. The court of appeals affirmed. Pet. App. A1-A21. With respect to petitioner's equal protection claim, the court reasoned that Order No. 30 is subject to rational basis review because any distinction between Class I and Class III milk handlers would not "involve[] fundamental rights or target[] a suspect class" but would constitute "mere[] economic regulation." *Id.* at A11. The court further observed that the Secretary had a rational basis for "requir[ing] that milk used to produce fluid products be pooled while exempting other handlers from obligatory pooling," because "the AMAA is premised on obligatory pooling of Class I milk, so that all producers may partake of its economic benefits." *Id.* at A13. The equal protection component of the Due Process Clause did not require the government, moreover, to attack every aspect of destabilization in the milk market. Thus, the fact that Congress and the Secretary had chosen "to address the usual situation" in the milk industry, "while not addressing the abnormal, aberrant situation in which Class I milk does not carry the

highest market price," did not violate equal protection. *Id*. at A16.

The court rejected petitioner's contention that Order No. 30 resulted in an "unfair trade practice" prohibited by 7 U.S.C. 608c(7)(A) for the same reason identified by the district court: the argument relied on "a non-existent statutory right." Pet. App. A19. Section 608c(7)(A), the court explained, "is not an independent statutory prohibition, and the Secretary is not required to include it in any order." *Id*. at A19-A20. The court noted that "[w]ere it possible to construe Lamers' claim as an argument that the Secretary has advanced an unreasonable interpretation of the AMAA" in Order No. 30, it would have been required to determine whether to defer to the Secretary's interpretation of the act. *Id.* at A20. But the court did not decide that issue, because it was "not possible to construe [petitioner's] arguments as reaching beyond a claim that the Secretary has failed to enforce an AMAA prohibition on 'unfair trade practices'." *Id*. at A21.

ARGUMENT

Petitioner largely contends that the court of appeals erred by failing to hold that the Secretary lacks authority under the AMAA to permit Class III handlers to opt out of the regulatory pricing scheme. Pet. 7-16. Petitioner also argues that Order No. 30's distinction between different types of milk handlers violates the equal protection component of the Due Process Clause. Pet. 13. Petitioner failed, however, to advance in the courts below a claim challenging the Secretary's authority to issue Order No. 30. In addition, the court of appeals correctly applied this Court's equal protection precedents to reject petitioner's equal protection claim,

and no other court of appeals has rendered a conflicting decision. Further review is therefore not warranted.

1. a. Petitioner advanced no claim in the court of appeals that the Secretary lacked statutory authority to issue Order No. 30. Nor did it advance any claim that Order No. 30 is an unreasonable interpretation of the AMAA under *Chevron* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Rather, petitioner relied on its interpretation of the AMAA to advance its equal protection argument. For example, petitioner argued that the court of appeals should not limit its equal protection inquiry to whether petitioner suffered disparate treatment "as a Class I handler vis-a-vis other Class I handlers," because the AMAA "deals with *all* handlers." Pet. C.A. Br. 10.[3] Although petitioner argued that Order No. 30 fails to protect its purported statutory right to be free from unfair trade practices, the court of appeals expressly declined to decide whether Order No. 30 rests on an unreasonable interpretation of the AMAA, because petitioner had failed to argue the point. Pet. App. A20-A21. It simply was "not possible," in the court of appeals' view, "to construe [petitioner's] arguments as reaching beyond a claim that the Secretary has failed to enforce an AMAA prohibition on 'unfair trade practices.'" *Id.* at A21.

Accordingly, whether the Secretary is authorized under the AMAA to permit de-pooling by certain

---

[3] Petitioner also relied on the purpose of the AMAA in arguing that the failure of Order No. 30 "to account for certain out-of-pocket premiums" that it was required to pay to milk suppliers "violates its right to equal protection." Pet. App. A18. The court of appeals correctly rejected this equal protection claim on the ground that it involved "no *distinction* for this court to review" (*ibid.*), and petitioner does not renew that argument in this Court.

handlers is not a question preserved for this Court's review. See *Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103, 109 (2001); *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993); *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

b. In any event, petitioner's argument lacks merit. The fundamental purpose of the AMAA is to prevent milk producers from flooding the fluid milk market by establishing uniform prices that handlers must pay to milk producers regardless of the milk's end use. *Community Nutrition Inst.*, 467 U.S. at 341-342; *Zuber*, 396 U.S. at 172-176. Permitting handlers that produce cheese to participate voluntarily in this uniform pricing system, as milk marketing orders have long provided, does not conflict with this statutory goal. As the court of appeals observed, such an exception would not cause excess supply in the *fluid* milk market. Pet. App. A15-A16. Moreover, contrary to petitioner's claim (Pet. 13-14), the AMAA does not require that all regulated handlers pay the *same* price for milk; it requires only that handlers pay to producers at least a uniform *minimum* price. See 7 U.S.C. 608c(5)(B).

2. a. With respect to the primary legal issue decided below—whether Order No. 30 violates the equal protection component of the Due Process Clause by distinguishing between Class I and Class III milk handlers—there is no conflict among the courts of appeals that would warrant this Court's review. Indeed, no other court of appeals has considered the issue. Cf. *United Dairymen* v. *Veneman*, 279 F.3d 1160, 1164, 1167 (9th Cir. 2002) (holding that district court lacked subject matter jurisdiction, because plaintiffs lacked standing, to consider similar equal protection challenge

to exclusion of producer-handlers from marketing order).

b. The court of appeals' conclusion that petitioner's equal protection challenge lacks merit is, in any event, consistent with this Court's precedents. This Court has made clear that, unless it implicates a suspect classification or fundamental right, economic legislation is reviewed deferentially when challenged on equal protection grounds; the legislation must be upheld if there is any rational basis for the classification employed therein. *Heller* v. *Doe*, 509 U.S. 312, 319-321 (1993); *FCC* v. *Beach Communications, Inc.*, 508 U.S. 307, 313 (1993); *New Orleans* v. *Dukes*, 427 U.S. 297, 303-304 (1976).

As the court of appeals pointed out (Pet. App. A12-A13), handlers of manufactured milk products and handlers of fluid milk products are not similarly situated, because of differences surrounding the production of fluid milk and manufactured milk products. Cheese, for example, is less seasonal and more easily stored and transported than fluid milk. *Ibid*. The court of appeals' conclusion that these differences provide a rational basis for regulating handlers differently is consistent with this Court's equal protection jurisprudence. See *Nordlinger* v. *Hahn*, 505 U.S. 1, 10 (1992) ("The Equal Protection Clause does not forbid classifications. It simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike."). In addition, the court of appeals' conclusion (Pet. App. A15-A16) that equal protection under the Constitution does not compel Congress or the Secretary to address every problem in the milk market simultaneously is consistent with this Court's conclusion that Congress is free to proceed "one step at a time" in addressing complex

economic problems. *Williamson* v. *Lee Optical, Inc.*, 348 U.S. 483 (1955); *Dandridge* v. *Williams*, 397 U.S. 471, 487 (1970). Accordingly, the court of appeals' decision is correct and consistent with this Court's precedents.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Acting Solicitor General

PETER D. KEISLER
Assistant Attorney General

BARBARA C. BIDDLE
JEFFREY CLAIR
Attorneys

FEBRUARY 2005