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No. 12-_____

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

DAIRYAMERICA, INC. and CALIFORNIA DAIRIES, INC.,

Petitioners,

v.

GERALD CARLIN, et al.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Ninth Circuit erred in holding that the United States Department of Agriculture (USDA) retroactively rejected USDA's previously announced milk minimum prices – thus rendering inapplicable the filed rate doctrine – even though the USDA report upon which the Ninth Circuit relied stated that “[t]he previously announced [] prices remain unchanged,” and USDA has clarified since the Ninth Circuit issued its decision that “[t]he report was not issued in order to reject or change any of the minimum handler prices previously announced.”

**PARTIES TO THE PROCEEDINGS AND
RULE 29.6 STATEMENT**

Apart from the parties listed on the cover, John Rahm, Paul Rozwadowski, and Diana Wolfe are also named plaintiffs in this case and respondents in this Court. Ms. Wolfe recently substituted in for her deceased husband, Bryan Wolfe.

Pursuant to Rule 29.6, undersigned counsel state that petitioner DairyAmerica, Inc., a nonprofit corporation, is a federated marketing cooperative and does not have any parent corporation. Petitioner California Dairies, Inc. is a producer-owned dairy cooperative that is presently one of four such cooperatives with equal interests in DairyAmerica. (The other three are O-AT-KA Milk Dairies, Inc., Agri-Mark, Inc., and United Dairymen of Arizona.) California Dairies has no parent corporation, and no corporate entity owns ten percent of its stock or has any other ownership interest.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners DairyAmerica, Inc. and California Dairies, Inc. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The amended opinion of the United States Court of Appeals for the Ninth Circuit (Pet. App. 1a) is published at 705 F.3d 856. The opinion of the district court (Pet. App. 60a) is published at 690 F. Supp. 2d 1128.

JURISDICTION

The judgment of the Ninth Circuit was entered on August 2, 2012. Pet. App. 1a. That court denied a timely-filed petition for rehearing, and issued an amended opinion, on January 11, 2013. Pet. App. 4a. On April 5, 2013, Justice Kennedy extended the time in which to file a petition for certiorari to and including May 27, 2013. No. 12A941. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY AND REGULATORY PROVISIONS

Because the filed rate doctrine is a judicially created doctrine, there are no statutory or regulatory provisions that are directly relevant to the question presented.

The USDA pronouncements that are relevant are reproduced at Pet. App. 86a-93a.

STATEMENT OF THE CASE

This is a putative nationwide class action in which respondent dairy farmers seek potentially hundreds of millions of dollars in damages for misrepresentations that petitioner DairyAmerica allegedly made to the United States Department of Agriculture (USDA). According to respondents, those misrepresentations caused USDA to establish inappropriately low prices for certain milk products, causing respondents, in turn, to receive less money for selling their products to which they were entitled. The district court dismissed the claims, holding that the filed rate doctrine bars them. The Ninth Circuit reversed, ruling that even though the filed rate doctrine generally applies to USDA pricing pronouncements, a report that USDA issued in 2007 retroactively rejected its earlier pricing orders covering part of the time period at issue.

After the Ninth Circuit issued its decision, USDA issued a statement clarifying that its 2007 “informational report . . . was *not* issued in order to reject or change any of the minimum handler prices previously announced.” Pet. App. 86a-87a (emphasis added). The previous prices, USDA explained, were “final” when issued and thus “remain unchanged.” Pet. App. 86a.

A. Factual and Legal Background

Pursuant to the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 601 *et seq.*, USDA “establishe[s] and maintain[s] orderly marketing conditions and fair prices for agricultural commodities.” *Glickman v. Wileman Bros. & Elliott*,

Inc., 521 U.S. 457, 461 (1997). Among the programs the Act authorizes is the Federal Milk Marketing Order program. *See* 7 U.S.C. § 608c(5). Under this program, USDA sets minimum prices that milk processors and manufacturers (otherwise known as “handlers”) must pay dairy farmers (otherwise known as “producers”) for each kind of milk product. Pet. App. 8a; *see generally West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994). The Secretary has delegated this authority to the Agricultural Marketing Service (AMS), 7 C.F.R. § 2.79(a)(8)(viii), and AMS pricing orders cover most states, but not California, which has its own pricing program that is not at issue here, *see Hillside Dairy, Inc. v. Lyons*, 539 U.S. 59 (2003).

To assist AMS in setting minimum prices, the Dairy Market Enhancement Act of 2000, 7 U.S.C. § 1673b, requires the Secretary to “establish a program of mandatory dairy product information reporting” for, among other things, nonfat dry milk products. Thus, during the time period at issue in this case, USDA collected pricing information from dairy firms producing cheese, butter, nonfat dry milk and whey. USDA then used that information to calculate and announce monthly uniform minimum prices that all handlers were required to pay to dairy farmers who shipped raw milk covered by the Federal Milk Marketing Order program.

In April of 2007, *The Milkweed*, a dairy industry trade publication, reported that petitioner DairyAmerica – a cooperative of dairy farmers that at the time marketed approximately 75 percent of the nonfat dry milk in the United States – had been

misreporting certain pricing information to the USDA. Pet. App. 18a. The publication surmised that this misreporting had caused dairy farmers to lose “over half a billion dollars.” Ex. 2 to Pltfs’ Opp. to Motion to Dismiss, at 1.

Upon learning of these allegations, USDA asked other dairy firms to submit weekly data from the past year, so as “to estimate the hypothetical impact” of DairyAmerica’s misreporting on the USDA’s monthly minimum prices. Pet. App. 86a; *see also* Pet. App. 18a-19a. After receiving this information, “AMS calculated that the errors in the reporting of nonfat dry milk prices for the period April 29, 2006 through April 14, 2007” had understated the total value of the milk at issue by some \$50 million, or about \$0.02 per pound. Pet. App. 19a, 49a n.21. AMS thus issued charts of “revised prices” showing these calculations. Pet. App. 88a-93a. AMS stressed, however, that this “informational report,” Pet. App. 86a, was not itself a pricing order. “[T]he previously announced” Federal Milk Marketing Order prices during the period at issue, AMS emphasized, “remain unchanged.” Pet. App. 91a.

B. Procedural History

1. Plaintiffs (respondents in this Court) are “dairy farmers located in states other than California who sold raw milk that was priced according to Federal Milk Marketing Orders during the time between January 1, 2002 and April 30, 2007.” Pet. App. 61a. They allege (on behalf of themselves and as representatives of a putative nationwide class) that, as a result of DairyAmerica’s misreporting,

they received less money during this period than they should have for their raw milk.¹ Specifically, invoking the diversity jurisdiction of the United States District Court for the Eastern District of California, the plaintiffs advance four causes of action: (1) negligent misrepresentation; (2) negligent interference with prospective business advantage; (3) violation of California's Unfair Business Practices Law, Cal. Bus. & Prof. Code § 17200 *et seq.*; and (4) unjust enrichment. Pet. App. 21a. They seek compensatory, consequential, and statutory damages. Amended Complaint at 25. Plaintiffs' complaint does not attempt to quantify such damages, but if they base them on figures from *The Milkweed* and AMS's informational report, they will seek hundreds of millions of dollars.²

Petitioners moved to dismiss the case under the filed rate doctrine, among other several grounds. "Simply stated, the doctrine holds that any 'filed rate' – that is, one approved by the governing regulatory agency – is *per se* reasonable and unassailable in judicial proceedings." *Wegoland Ltd. v. NYNEX Corp.*, 27 F.3d 17, 18 (2d Cir. 1994); *see generally Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 580 (1980); *Keogh v. Chicago Nw. Ry. Co.*, 260 U.S. 156 (1922). The doctrine, which is designed to afford finality and certainty to businesses operating in heavily regulated industries, is triggered whenever an agency has "filed" a rate; the agency need not

¹ Plaintiffs allege that petitioner California Dairies, one of DairyAmerica's producer-owned cooperative members, is liable solely as a derivative matter based on DairyAmerica's actions.

² Plaintiffs also sought injunctive relief, but the district court dismissed that claim as inadequately pled. Pet. App. 22a.

have “investigated and approved” the rate. *Square D Co. v. Niagara Falls Frontier Tariff Bureau Inc.*, 476 U.S. 409, 417 n.19 (1986).

The district court granted the motion to dismiss. Consistent with every other court that has addressed the issue,³ the court held that the filed rate doctrine applies to Federal Milk Marketing Orders setting minimum prices for raw milk. Pet. App. 68a. The court further held that doctrine barred all of plaintiffs’ claims because “Plaintiffs’ damages can only be ascertained by reference to rates set by the Secretary pursuant to the [Federal Milk Marketing Orders] during the time in question.” Pet. App. 74a. “This,” the district court observed, “is precisely what the filed rate doctrine forbids.” *Id.* Finally, the district court noted that unlike the agency in *Interstate Commerce Comm’n v. American Trucking Ass’n*, 467 U.S. 354 (1984), “there is no indication” that the USDA, in its June 2007 informational report, had intended to retroactively reject its previously filed rates or to allow “a disciplinary sanction for violations of the sort that are alleged against [petitioners].” Pet. App. 82a.

2. The Ninth Circuit agreed that the filed rate doctrine applies to Federal Milk Marketing Orders but nonetheless reversed. The court of appeals acknowledged that “the USDA’s recalculation of

³ See, e.g., *In re Se. Milk Antitrust Litig.*, 801 F. Supp. 2d 705, 732-34 (E.D. Tenn. 2011); *In re Dairy Farmers of Am., Inc. Cheese Antitrust Litig.*, 767 F. Supp. 2d 880, 894-95 (N.D. Ill. 2011); *Servais v. Kraft Foods, Inc.*, 631 N.W.2d 629, 633-35 (Wis. Ct. App. 2001).

minimum dairy prices [in its June 2007 report] was not explicitly called a rejection,” Pet. App. 49a. Yet – characterizing the issue as a “difficult” one, Pet. App. 40a – the Ninth Circuit concluded that “[t]he USDA adequately expressed its disapproval of the FMMO prices” and thus retroactively rejected its earlier price orders. *Id.*

The Ninth Circuit never mentioned USDA’s admonition in its informational report that “the previously announced FMMO minimum prices remain unchanged.” Pet. App. 91a. Nor did the court of appeals contend that this Court’s decision in *American Trucking* or any other case compelled suspension of the filed rate doctrine under these circumstances. Instead, the Ninth Circuit simply asserted that the doctrine did not apply because “this case does not involve a scenario where a litigant is seeking to have a court substitute its evaluation of a proper rate for the agency’s determination.” Pet. App. 57a.

3. Petitioners sought rehearing, arguing that the Ninth Circuit’s retroactive rejection holding was wrong as a matter of law and that, at the very least, “if given the opportunity to conduct discovery, [they] would produce evidence to show that the USDA did not, in fact, reject the FMMO prices.” Pet. App. 59a. The Ninth Circuit denied the petition by a divided vote, with Judge Fisher voting to grant the petition. Pet. App. 4a. Judge Fisher also issued an opinion concurring in the judgment. Although he agreed that the district court’s order of dismissal should be vacated, he would have remanded to allow petitioners to prove “on a full evidentiary record, that

the plaintiffs' factual allegations [regarding the USDA's rejection of the filed rates] are untrue." Pet. App. 59a.

4. Two months after the Ninth Circuit's denial of rehearing, USDA issued a statement of clarification. The statement explains that the USDA's June 2007 informational report "was *not* issued in order to reject or change any of the minimum handler prices previously announced." Pet. App. 87a (emphasis added). To the contrary, USDA explained that "[o]nce [FMMO] prices are announced, they are final." Pet. App. 86a. Thus, the purpose of the June 2007 report was merely "to estimate the hypothetical impact" of price misreporting on previously issued pricing orders, "even though the FMMO prices would not be changed." *Id.*

5. This petition follows.

REASONS FOR GRANTING THE WRIT

"Where intervening developments . . . reveal a reasonable possibility that the decision below rests upon a premise that the lower court would reject if given an opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation," it is "appropriate" for this Court to grant, vacate, and remand (GVR) the decision. *Lawrence v. Chater*, 516 U.S. 163, 167 (1996); *see generally* Eugene Gressman et al., *Supreme Court Practice* 345-49 (9th ed. 2007). Several types of "intervening developments" may

trigger such GVR orders. In particular, this Court has long recognized the propriety of GVR'ing cases not only in light of intervening court decisions but also in light of intervening statements issued by concerned federal agencies, *see, e.g., First Nat'l City Bank v. Banco Nacional de Cuba*, 400 U.S. 1019 (1971); *Thorpe v. Housing Auth. of Durham*, 386 U.S. 670, 673-74 (1967) (per curiam), or other changed factual circumstances, *see, e.g., NLRB v. Federal Motor Truck Co.*, 325 U.S. 838 (1945).

This GVR standard is satisfied here. In a decision concerning a federal program that regulates a multi-billion dollar industry, the Ninth Circuit has construed a USDA report to retroactively reject certain previously issued federal milk prices. The holding suspends the filed rate doctrine and allows a class action to proceed that otherwise would have to be dismissed. Yet USDA has since clarified that its report “was *not* issued in order to reject” the previously announced prices. Pet. App. 87a (emphasis added). To the contrary, “[o]nce [FMMO] prices are announced, they are final.” *Id.* 86a.

This Court should grant, vacate, and remand the Ninth Circuit’s decision to allow it to consider the USDA’s newly issued clarification in the first instance. *See, e.g., Chaidez v. United States*, 133 S. Ct. 1103, 1113 n.16 (2013) (reiterating that this Court is “a court of review, not of first view”) (quoting *Cuter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005)). Alternatively, if this Court would prefer to consider without any further proceedings whether USDA has retroactively rejected the prices it

previously established for certain dairy products, it should grant certiorari outright.

A. USDA's New Pronouncement Makes Clear That The Ninth Circuit Erred In Holding That The Agency Retroactively Rejected The Filed Rates At Issue.

1. As a general rule, the filed rate doctrine precludes any state-law cause of action seeking damages based on the alleged inadequacy of a price or tariff established by a federal agency. *See, e.g., Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 580 (1980); *Keogh v. Chicago Nw. Ry. Co.*, 260 U.S. 156 (1922). The doctrine does not depend on whether the agency “investigated and approved” the filed rate. *Square D Co. v. Niagara Falls Frontier Tariff Bureau Inc.*, 476 U.S. 409, 417 n.19 (1986). And this Court has acknowledged that the doctrine sometimes produces “harsh consequences.” *Maislin Indus., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 131 (1990). But “strict adherence” to the doctrine is “necessary” to afford finality and certainty to businesses operating in heavily regulated industries. *Id.* at 132; *see also Keogh*, 260 U.S. at 162-65 (enforcing filed rate even though it was the product of an antitrust conspiracy).

As is relevant here, this Court has recognized only one “narrow” exception to the filed rate doctrine. In *Interstate Commerce Comm’n v. American Trucking Ass’n*, 467 U.S. 354, 359 (1984), this Court held that when an agency later determines that a rate it filed was unreasonable and that correcting it would further the agency’s statutory mandate, the agency may “reject retroactively” the rate that it previously filed. *Id.* at 360. Such action, which this

Court has found to be legitimately exercised only once (in the *American Trucking* case itself), “nullifie[s]” the previously binding rate. *Id.* at 371.

2. The Ninth Circuit held that “the USDA’s actions here constitute a sufficient [retroactive] rejection such that the filed rate doctrine is not a bar” to respondents’ nationwide class action premised on the alleged inadequacy of federal milk marketing pricing orders. Pet. App. 48a. The Ninth Circuit based this conclusion on a report issued in June 2007 by AMS, an agency within USDA.⁴ In the report, USDA provided “revised data” showing the impact that accurate reporting from DairyAmerica “would have had for the Federal [Milk Marketing] order system.” Pet. App. 88a-89a. The report was careful to note that “[t]he previously announced FMMO minimum prices remain unchanged.” Pet. App. 91a. But the Ninth Circuit nonetheless insisted that “[t]he USDA adequately expressed its disapproval of the FMMO prices” in order to suspend the filed rate doctrine. Pet. App. 49a.

3. USDA has since issued a statement clarifying that the June 2007 “informational report” “was *not* issued in order to reject or change any of the minimum handler prices previously announced.” Pet. App. 87a (emphasis added). To the contrary,

⁴ The AMS 2007 report was based upon data collected by another USDA agency, NASS (National Agricultural Statistical Service). The Ninth Circuit believed NASS had the power to set “revised prices and sales volumes.” Pet. App. 20-21. But the Ninth Circuit was incorrect: those responsibilities fall solely under AMS’s authority. 7 C.F.R. §§ 2.22(a)(1)(viii)(G) and 2.79(a)(8)(viii); see *White Eagle Co-op Ass’n v. Conner*, 553 F.3d 467, 483 (7th Cir. 2009).

USDA explained that “[o]nce [FMMO] prices are announced, they are final.” Pet. App. 86a. Thus, the purpose of the June 2007 report was merely “to estimate the hypothetical impact” of DairyAmerica’s misreporting on previously issued pricing orders, “even though the FMMO prices would not be changed.” *Id.*

In light of USDA’s new statement, the Ninth Circuit decision is demonstrably incorrect. Whatever exactly a federal agency must do in order to retroactively reject previously filed rates, it is axiomatic that an agency must at least actually intend to reject the rates. USDA has now made clear that it never intended to reject the federal milk marketing order rates at issue. Consequently, this Court should vacate the Ninth Circuit’s opinion and remand so that the plaintiffs’ case can be dismissed.

B. The Ninth Circuit’s Decision Would Do Substantial Damage If Allowed To Remain On The Books.

It is imperative that this Court GVR the Ninth Circuit’s decision not just because it is now clearly wrong but also because it could cause serious harm if allowed to remain on the books. This is so both (1) in the context of this particular case and (2) with respect to the Agricultural Marketing Agreement Act’s Federal Milk Marketing Order program in general.

1. After the Ninth Circuit issued its decision, a dairy industry trade publication called the decision “H-U-G-E,” surmising that “defendants face potential liabilities totaling hundreds of millions of dollars in

this legal matter.” Pete Hardin, *Producers’ Class Action Lawsuit vs. DairyAmerica & CDI*, The Milkweed, April 2013, at 5. USDA’s new statement makes it clear, however, that the plaintiffs’ case is actually meritless and should now be dismissed. This Court should GVR to ensure that this happens promptly, so that the plaintiffs are not able to try to force a settlement merely based on the nuisance value of litigating the case to its proper conclusion.

Had the Ninth Circuit been more cautious in its ruling, petitioners might have been able to secure a prompt dismissal on remand without this Court’s intervention. Yet the Ninth Circuit did not hold merely that petitioners were not entitled on the record at that time to dismissal; it held *as a matter of law* that USDA retroactively rejected the rates at issue. Pet. App. 58a. The Ninth Circuit thus rejected petitioners’ fallback request that it at least be “given the opportunity to . . . produce evidence to show that the UDSA did not, in fact, reject the FMMO prices,” Pet. App. 59a (Fisher, J., concurring in the judgment). Absent a GVR order from this Court, there is a serious risk that the Ninth Circuit’s categorical decision will preclude petitioners’ from reopening the “retroactive rejection” issue as they plainly should be entitled to do.

2. More generally, if the Ninth Circuit’s decision is permitted to stand, USDA will no longer be the ultimate arbiter of what constitutes federally mandated minimum prices for milk and milk products designed to result in uniform prices paid to producers by handlers. USDA has already announced that the payment pools for milk and milk

products at issue here are "closed," Pet. App. 86a. Therefore, any damage award would require a court to arbitrarily recalculate payments to be made by some handlers to some producers, a task bound to result in non-uniform prices. This action would defeat USDA's carefully calibrated pricing scheme. Since the pools are closed, handlers who would have been required to pay new money (the increased price) into the pools will be exempt from this obligation. In the end, since DairyAmerica is owned exclusively by other dairy-farmer owned cooperatives, its dairy farmers would be simply transferring monies to other farmers.

The Ninth Circuit's decision also threatens to cause USDA to receive less complete and accurate information than it needs to operate the milk order program. To avoid the risk that a court would second-guess USDA's use of the data to establish filed rates, dairy firms governed by the Ninth Circuit's decision would hesitate to correct any previously submitted prices USDA used to establish its minimum prices. Indeed, if juries replace USDA's intricate uniform pricing program with their own decisions as to what filed rates should have and would have been, the very basis for applying the filed rate doctrine will be undermined. Industry participants will no longer be guaranteed certainty and predictability in this enormously complex and important agricultural realm.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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