

In the

## Supreme Court of the United States

COLONIAL PIPELINE COMPANY, )

Appellant, )

V. )

JOSEPH N. TRAIGLE,  
Collector of Revenue, )

Appellee. )

No. 73-1595

Washington, D. C.  
January 13, 1975

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Collector of Revenue,

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Monday, January 13, 1975.

The above-entitled matter came on for argument at

1:58 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States  
WILLIAM J. BRENNAN, JR., Associate Justice  
POTTER STEWART, Associate Justice  
BYRON R. WHITE, Associate Justice  
THURGOOD MARSHALL, Associate Justice  
HARRY A. BLACKMUN, Associate Justice  
LEWIS F. POWELL, JR., Associate Justice  
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

R. GORDON KEAN, JR., ESQ., Sanders, Miller, Downing  
& Kean, Post Office Box 1588, Baton Rouge,  
Louisiana 70821; on behalf of the Appellant.

WHIT M. COOK, II, ESQ., Department of Revenue, Legal  
Division, Post Office Box 201, Baton Rouge,  
Louisiana 70821; on behalf of the Appellee.

## C O N T E N T S

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for the Appellant

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In rebuttal

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Whit M. Cook, II, Esq.,  
for the Appellee

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments next in 73-1595, Colonial Pipeline against Traigle.

Mr. Kean, you may proceed whenever you're ready.

ORAL ARGUMENT OF R. GORDON KEAN, JR., ESQ.,

ON BEHALF OF THE APPELLANT

MR. KEAN: Mr. Chief Justice, and may it please the Court:

My name is Gordon Kean. I represent Colonial Pipeline Company. They are here on appeal from the decision of the Louisiana Supreme Court.

This case presents, I think, for decision the question of just how far the States may go in fractionalizing the doing-business concept, in an effort to levy an excise tax on a purely interstate business before reaching outer limits permitted by the commerce clause.

This is the first time this Court has addressed itself to this specific question, as I appreciate it, since 1964, when the Court decided the General Motors case by a divided court.

In the interim there have been several State court decisions which have related to the question, as to which this Court declined to accept jurisdiction. And as a consequence of those actions by this Court in declining jurisdiction in the State court cases that raised the issue, the Louisiana



Supreme Court commented, in passing upon the question, that there had been a serious inroad in the traditional immunity of purely interstate business operations.

For this reason I think the Court here, because of the facts and the background of the Louisiana law that I shall detail to the Court, had a unique opportunity to again declare where the line is to be drawn.

The facts, as I outline them in the law under which this case occurs, I think place the issue in rather sharp focus. So that the Court is in a position to decide whether or not and how far the States may go in fractionalizing the business concept as a basis for the tax.

The Colonial Pipeline is a Delaware corporation. It operates in interstate commerce, transporting for others as a common carrier, under the jurisdiction of the Interstate Commerce Commission, refined petroleum products for others.

Under these circumstances, this is not a case such as that before the Court in General Motors, which is the last time this issue was before the Court, because Colonial does not own and does not deliver in the State of Louisiana any of the products which it transports through its lines.

Neither is this an "in lieu" tax case, such as this Court used as a basis for distinguishing the Virginia franchise tax which was before the Court in the second Railway Express case from Virginia.

This tax is levied by the very express language of the Louisiana statute in addition to all other taxes which are paid by Colonial Pipeline in the State of Louisiana.

As I indicated, Colonial is an interstate carrier.

QUESTION: Well, what other taxes are paid by Colonial as --

MR. KEAN: Colonial pays, Mr. Justice Rehnquist, the property tax on its facilities, which are located in the State of Louisiana; it pays an apportioned income tax, based upon income derived from its operations in that State; it pays the sales and use tax in connection with such operations as it conducts in the State; it pays all of that range of taxes, just as any other operator in the State would pay.

Our position is that with respect to the franchise tax, that there is nothing which Louisiana gives to Colonial as a basis upon which to levy that tax.

Our Position is that Colonial is operating in interstate commerce as a corporation, and under the Constitution and statutes of the United States it has then derived the right to operate in interstate commerce, and therefore Louisiana gives to -- gives to Colonial, with respect to the privilege of franchise tax, nothing for which they could demand compensation.

We do not contend that Colonial under the traditional cases, decided by this case [sic], does not owe the property

tax, that it does not owe the income tax or the sales and use tax; all of which this Court has clearly recognized, that the interstate carrier must be responsible for.

QUESTION: Are you objecting to the imposition of the income tax by Louisiana, as well?

MR. KEAN: No, sir, we do not.

QUESTION: Well, if you prevail here, what's to prevent Louisiana from merely increasing the rates of its income tax by the same amount as your franchise tax?

MR. KEAN: Well, I think if they increased the rates of the corporation income tax, they've got to increase those rates across the board.

Certainly they couldn't single out interstate commerce as a basis for a differential in income tax payment in the State of Louisiana from what they would otherwise establish for other companies operating in that State.

QUESTION: Let me put it another way, then. Explain for us the how, that Colonial's tax burden in Louisiana is different from the burden borne by domestic corporations.

MR. KEAN: As I view it, Mr. Justice Blackmun, Colonial pays the property tax for which it has the right to -- and to get police protection, fire protection, any other protection that a State would afford under those circumstances.

Colonial, as an interstate carrier, as I see it, if it is compelled to pay the Louisiana privilege tax, for no

right which Louisiana itself gives to Colonial, then under those circumstances we have a tax on interstate commerce which, I say to the Court, is prohibited by the prior decisions of this Court, and if it is permitted, then under the circumstances we have a situation where the States can then control the question of interstate commerce against the very principle that the commerce clause was created for.

QUESTION: Well, then I go back to my other question: Why can't Louisiana accomplish the same thing by increasing the income tax across the board, if you will?

MR. KEAN: Well, they could perhaps increase the income tax across the board, so that all of the corporations in the State of Louisiana pay an increased income tax; and under those circumstances it may well be that they would accomplish dollarwise the same result.

But I say to the Court again that where this tax is levied on the privilege, upon doing business in corporate form, as the Louisiana Supreme Court construed it to be, then that gets to the authority and right of the corporation to exist. And under those circumstances, if that corporation is engaged in interstate commerce, solely in interstate commerce, then it's our view that the State has the right to, through the power of taxation on the privilege or the right to do business in corporate form, to, in effect, destroy interstate commerce.

QUESTION: You say, then, in effect, that even though Louisiana can, and I gather it does, impose this same tax on domestic corporations, it can't impose it on your client?

MR. KEAN: That's correct. My position, Mr. Justice Rehnquist, is that the privilege tax or the tax upon the right to do business in corporate form, as the Louisiana Court construed this tax to be imposed on, is a right which Colonial, engaging as it does in interstate commerce, derives from the Federal Constitution. And therefore Louisiana gives to Colonial nothing for which they could expect recompense in so far as the privilege tax is concerned.

QUESTION: Well, why do you concede, then, that Louisiana can subject Colonial to an income tax?

MR. KEAN: For the simple reason that this Court has held in the prior cases that a fairly apportioned income tax is -- can be levied against an interstate carrier. Because it's on the income as distinguished from the right to carry on the interstate business.

QUESTION: You're making no claim here of unfair apportionment to the --

MR. KEAN: No, sir, I make no claim --

QUESTION: -- franchise tax?

MR. KEAN: No, sir. I make no claim of unfair apportionment. I simply lay our claim on the basis that



the privilege tax or the franchise tax, as imposed in the State of Louisiana, as interpreted by the Louisiana Supreme Court, is laid upon the privilege and under the circumstance violates the commerce clause of the United States Constitution.

QUESTION: How is the income tax apportioned? On that -- is it some rough measure of the income earned from doing business in Louisiana?

MR. KEAN: Yes, sir. It's on the usual apportionment basis of --

QUESTION: Well, you do have a source of income, then, that you concede is in Louisiana?

MR. KEAN: Yes, sir. Yes, sir.

QUESTION: And you are doing business in Louisiana.

MR. KEAN: We are doing business. We have a pipeline system of 268 miles, out of some 3500 miles of system, in the State of Louisiana.

QUESTION: Well, you don't think -- do you think that Louisiana can -- could -- you're qualified to do business, then, in Louisiana?

MR. KEAN: We're qualified in Louisiana to do business, intrastate business.

QUESTION: Yes. And do you think they could say, Well, if you want to have -- if you want the privilege of doing business in Louisiana, doing a business for which you're

going to generate some income in Louisiana, for that privilege we're going to charge you a hundred dollars a year.

MR. KEAN: I don't think so, as long as that business was a purely interstate business. Because, under those circumstances, you'd give to the State the right to deny interstate business within its borders based upon the payment of some fee.

QUESTION: Well, that may be true. But, at the same time, you are doing business in Louisiana.

MR. KEAN: Yes, sir, we --

QUESTION: And generating income in Louisiana.

MR. KEAN: We operate a pipeline system in Louisiana.

QUESTION : And asking for the -- and asking for Louisiana's protection in the course of doing so.

MR. KEAN: No. We ask nothing from Louisiana, with respect to the --

QUESTION: Well, you're getting it, anyway. You're getting it whether you're asking --

MR. KEAN: -- the right to carry on the interstate business. Because our position is, under decided cases of this Court, that the right to carry on a purely interstate business is derived from the Constitution, and therefore there's nothing for us to pay Louisiana in the way of a privilege tax to carry on that business.

QUESTION: Of course, wasn't that argument made when

Northwestern States was argued here, and rejected -- and I think I'm still troubled by the distinction between the income tax, which you do not contest because of the Northwestern case, and this one.

MR. KEAN: Well, as I appreciate the difference, Mr. Justice Blackmun, and the distinction made by the Court in the Northwestern States case, is that they were dealing there with an income tax. And the Court there taking the position, somewhat as the Court has done in the case of the property tax, that this was not a tax on interstate commerce, it was a tax on income, and if that income tax was fairly apportioned, so you didn't have a multiplicity of the same kind of tax, so as to burden interstate commerce, then under the circumstances that was a constitutionally acceptable tax.

Now, we're here dealing -- and I go back again, if I may, and let me try to give a little bit of the background of Colonial's operations in the State of Louisiana.

They operate, Colonial operates a pipeline system, as I say, transporting refined petroleum products for others, of some 3500 miles of pipeline, all the way from Houston, Texas, to the New York Harbor area. Some 258 miles of that pipeline traverse the State of Louisiana.

The Collector admits, and Louisiana courts found, that everything that Colonial was doing in the State of

Louisiana was related to and an integral part of its interstate movement of these products.

Colonial does no intrastate business in the State of Louisiana. Everything it does is related to interstate movement of its product.

And under the circumstances, there are no local activities, as we view them, in the State of Louisiana upon which Louisiana may lay the privilege tax, that is, local activities sufficiently separate from the flow of interstate commerce to permit that tax.

QUESTION: It does take oil out and put oil in at stations in Louisiana, doesn't it?

MR. KEAN: They pick up oil from Cities Service refinery in Lake Charles, Louisiana, and they transport that further to the east, outside the State. They deliver refined products to a station in Baton Rouge from a refinery in Texas.

But there are no movements of its products from a point in Louisiana to another point in Louisiana. All of the movements of its products, however they may come, either come from out of the State into Louisiana, or from Louisiana out of the State; and in the majority of the instances it's primarily a matter of simply moving the oil or the refined petroleum products through a pipeline that traverses the State of Louisiana.

So I say to the Court that there are no local

activities separate from the interstate movement in Louisiana.

And under the circumstances, if we hold that this tax can be validly levied upon Colonial, then I say to the Court, contrary to prior decisions of this Court in cases such as Spector Motor, that we have now granted the States the authority to levy a tax upon the privilege of doing purely interstate business, contrary to what I believe was the concept behind the commerce clause of the United States Constitution.

Now, let me make a little -- several further points with respect to the facts, so that the Court will appreciate them fully.

And I think the background of the statute, the Louisiana statute, puts this matter in sharp focus.

Prior to 1970, the Louisiana tax was interpreted as being imposed upon the privilege of doing business. And this same Colonial Pipeline Company litigated in the Louisiana courts the question of whether or not that tax, so imposed, violated the commerce clause of the United States Constitution, and the Louisiana courts held, citing the Spector Motor case, that the tax as applied to this purely interstate operation violated the commerce clause, and the Louisiana courts ordered a refund of the taxes which Colonial had paid under protest in connection with the levy of the privilege tax.

Louisiana, in 1970, made some revisions in its franchise tax, so as to include what they call alternating



incidents or "alternative incidents", which in reality were nothing more than a restatement of what constituted doing business.

And the tax was paid under protest again, and Colonial took the position that there had been no substantive change in the operating incidents of the tax, and under those circumstances, the first Colonial case, which had been decided by the Louisiana Court, was dispositive of the issue.

The Louisiana District Court and the Louisiana Court of Appeals agreed. And when the case went to the Louisiana Supreme Court under writ, the Louisiana Supreme Court took the position that in reality there was no substantive change in the statute, that the tax, even before the 1970 amendment, was not imposed upon the privilege of doing business, but was imposed upon the doing of business in corporate form.

And then took the position that that doing of business in corporate form was a local activity upon which Louisiana could impose -- place a levy, this franchise tax, without violation of the commerce clause.

I believe if this Court will read the statute before 1970 and after 1970, it will come to the conclusion, as did the lower courts in Louisiana and, in fact, the Louisiana Supreme Court, that there was no change in the operating incidents of the tax, because doing business in

corporate form was the manner in which you carried out this interstate business of Colonial; and, under the circumstances, the cases were parallel cases, and should have reached a similar result.

Now, I suggest to the Court that there is no distinction -- as a matter of fact, it seems to me there is more threat to the commerce clause by saying that you can impose a tax upon the business -- on doing interstate business in corporate form, than otherwise; because that is the traditional method in which interstate business is conducted.

And under the circumstances, it appears to us that the case is in the same posture it was at the time of the first case, but if we accept it as having some distinction by reason of the 1970 amendment, I still say to the Court that this is a tax upon interstate commerce, which this Court has recognized as beyond the bounds of the States with respect to the commerce clause; and under the circumstances, the Louisiana Supreme Court ought to be reversed.

Now, the Louisiana Supreme Court stated that the operating incidents of the tax was, and I quote, "the local incident tax is a form of doing business rather than the business done by that corporation."

And they emphasized it by saying that the thrust of the statute is to tax the doing business in Louisiana in corporate form.

And I don't believe that there is any distinction that makes the difference between a tax upon a privilege of doing business and a tax which imposes it upon the doing of business in corporate form.

QUESTION: Do you know whether any of the airlines are subject to this tax, airlines that --

MR. KEAN: That are operating in Louisiana?

QUESTION: Yes. Without making any local stops, except one.

MR. KEAN: I don't know, Mr. Chief Justice. I don't know.

I really have never explored that question with the Collector of Revenue.

QUESTION: I take it your view would be that Louisiana could not tax an airline that was coming in and landing merely at New Orleans, and then picking up passengers and going out?

MR. KEAN: Well, that --

QUESTION: Discharging and picking up.

MR. KEAN: It would depend, I think, on whether or not the Court could find some activities that the airlines was conducting in the State of Louisiana, that they were indeed engaged in local activities separate from that interstate operation, which might then form the basis of the tax.

For example, if that airline was bringing materials

in to Baton Rouge, where it maintained a warehouse, and was there storing those materials for some period of time before it was delivered to its customers, then I would say that that constitutes an intrastate activity, unrelated and unnecessary to carrying on the interstate business of the airline, and under the circumstances the State of Louisiana would well have a basis for levying the tax upon the privilege of doing business.

Based upon the imposition of it, upon the local activity being conducted by that company.

But where the sole and only activity done by the company in the State of Louisiana is that which relates to interstate commerce, I say to the Court that you have to come to a different conclusion.

Otherwise the States then have the right to determine whether or not corporations engaged in interstate commerce can truly exist in the States in which they operate.

I think if the Court looked --

QUESTION: Well, you're protected to a certain extent by the fact that this tax applies equally to domestic corporations.

MR. KEAN: Well, this Court held, Mr. Justice Rehnquist, in Spector Motors, which was dealing with the transportation operation, --

QUESTION: Well, isn't Spector pretty much of an

anomaly -- I mean it's really not consistent with the Memphis case that went before, and it's really not consistent with several of the cases that have come afterwards.

MR. KEAN: I don't think that the cases which came after make any change in the law so far as Spector is concerned. For example, the first Railway Express case in Virginia, the Court reached the same identical conclusion that they reached in Spector, which was that where you had a tax imposed solely upon the privilege of doing interstate business, it was violative of the commerce clause.

Virginia then came back, as the Court may recall, in the second Railway case, and provided that their tax was an "in lieu" tax, in lieu of the ad valorem tax on intangibles and rolling stock of the Railway Express Agency. And under those circumstances, this Court characterized the Virginia tax in the second Railway case as being in the nature of an ad valorem tax, which was acceptable under a long line of decisions that this Court had rendered.

But I know of no case -- I know of no case which has been decided by this Court, and Spector and the first Railway Express case to the contrary, which holds that the States have a right to levy a franchise or privilege tax upon a business that's engaged exclusively in interstate commerce.

And it seems to me that in logic and in good reason that has to be the case.



For example, in Spector and in the first Railway case, this Court established the rule which stated that the commerce clause prohibits a State franchise tax, the operating incidents of which falls upon the privilege of carrying on exclusively -- and I emphasize the word "exclusively" -- interstate transportation in and through the State.

Now, there -- if we now permit, contrary to what Spector holds, the States to say that we now have the right to tax the very business means by which an interstate carrier operates, then it has the right to tax the existence of that business. And it has the right under those circumstances, if we grant to the States the power to tax that business, going back over many years of history before this Court, the recognition that the power to tax includes the power to destroy.

QUESTION: But you're protected by the principle that a tax on interstate commerce can't discriminate against interstate commerce. And here you don't really claim any discrimination.

MR. KEAN: No, I don't feel that interstate commerce is protected by apportionment of -- by apportionment of a privilege tax. Because the tax there is laid upon interstate commerce, and no manner of apportionment can deny that fact.

And in Spector, for example, this Court squarely said that the fact that the tax was fairly apportioned did not save the tax.

And I think it's logical and reasonable that that should be the case, because even if you -- even if you apportion it fairly, nonetheless you're in a position, as I see it, for the State to say: We give you the right to come into the State under these circumstances, we lay down the conditions under which interstate commerce will be carried on through the State of Louisiana.

And by that means have vested in the States the right to control and decide the manner in which interstate commerce can be conducted among the States, contrary to the principle that the commerce clause was established to achieve.

QUESTION: But Northwestern States came along after Spector.

MR. KEAN: It's my recollection it did, yes, sir.

QUESTION: And at least that was some kind of an incursion on Spector, wasn't it?

MR. KEAN: No, sir. But --

QUESTION: That was apportioned income tax, wasn't it?

MR. KEAN: That was an apportioned income tax.

QUESTION: Yes, of course, it was apportioned income tax.

QUESTION: But this is an unapportioned franchise tax.

MR. KEAN: But my point is this is the same argument --

QUESTION: Aren't you making the same argument here

that was made in Northwestern States?

MR. KEAN: No, I'm not. Because, as I pointed out a moment ago, Northwestern States was dealing with an income tax.

QUESTION: Exactly. An apportionment of that. And some States call an income tax a franchise tax.

MR. KEAN: No, sir. No -- well, it may well be that some States do. Some States measure their franchise tax by income.

For example, in the General Motors, there was the franchise tax measured by gross receipts. And I think perhaps in the Spector case there was a franchise tax measured by income.

But, however it's measured, under whatever circumstances it has been stated to be imposed upon, if it was a tax on interstate commerce directly, as distinguished from a tax on income which this Court held in Northwestern States you kind of pull out here, and therefore it's not a tax on the commerce itself.

QUESTION: No, I'm not blaming you for this argument, I think you're forced into it by what I regard as the inconsistency of our decisions here, to wit: Memphis, Spector, Northwestern States.

MR. KEAN: Well, I must say, Mr. Justice Blackmun, in all of the cases which have dealt with the problem, the

decisions have been by a sharply divided court.

QUESTION: Indeed they have, and I --

MR. KEAN: As a matter of fact, in the Memphis Gas vs. Stone case, it was not even a majority opinion, as the Court may recall. It was, I think, a four-to-three decision. Anyway it was not a -- five members of the Court who actually wrote the majority opinion.

So I say to the Court that this case, as I see it, with the facts where we have no dispute whatsoever, as to the interstate character of this common carrier pipeline --

QUESTION: I think we realize this, and there's not any question about it, but I -- I'm just suggesting that the difference between Northwestern States and this case is a very thin one. This Court drew it, but I think it's a very thin one.

MR. KEAN: I don't share your view, Mr. Justice Blackmun, that it is a thin one. I think there are a lot of narrower constructions that get applied in this field. But I can see in my own mind a great distinction between a fairly apportioned income tax, where the tax is upon the income as distinguished from a tax upon the privilege of doing interstate business, where the tax is imposed and levied upon the interstate business itself.

QUESTION: Even though measured by income?

MR. KEAN: Yes, sir. Even though measured by income, or even --

QUESTION: Does that make any sense to you, just as a practical matter?

MR. KEAN: Yes, sir. It makes sense in the same -- because, it seems to me, that if this Court recognizes the right of the States to levy a tax upon the privilege of doing purely interstate business, however that is measured, however, whatever it may be imposed upon, then this Court has made the breakthrough which permits the States, in my opinion, to regulate interstate commerce contrary to the theory and purpose of the commerce clause.

May I save a few minutes for rebuttal?

Thank you.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Kean.

Mr. Cook.

ORAL ARGUMENT OF WHIT M. COOK, II, ESQ.,

ON BEHALF OF THE APPELLEE

MR. COOK: Mr. Chief Justice, and may it please the Court:

The sole issue presented to this Court by this case is whether or not the operating incidences of the Louisiana corporation franchise tax are a sufficient basis to support the constitutional application of the tax upon Colonial.

I think that I'd like to point out a few pertinent sections of the statute before I go on. It's on page 5 of my brief.



QUESTION: Page?

MR. COOK: Page 5.

QUESTION: Of what?

MR. COOK: Of my brief.

QUESTION: Oh. Thank you.

MR. COOK: Louisiana Revised Statute 47:601, which imposes the tax, states:

"Imposition of tax.

"Every domestic corporation and every foreign corporation, exercising its charter, or qualified to do business or actually doing business in this State, or owning or using any part or all of its capital, plant or any other property in this State, subject to compliance with other provisions of law, ... shall pay an annual tax ..."

[sic]

I'll skip down to the incidences of the tax.

"The tax levied herein is due and payable on any one or all of the following alternative incidents:

"The qualification to carry on or do business in this State or the actual doing of business within this State in a corporate form."

The statute defines "doing business".

"The term 'doing business' as used herein shall mean and include each and every act, power, right, privilege, or immunity exercised in this States, as an incident to or by virtue of the powers and privileges acquired by the nature

of such organizations, as well as, the buying, selling or procuring of services or property."

QUESTION: Mr. Cook, for tax purposes, what's the difference between levying a tax -- or what's the difference between doing interstate business and doing interstate business in a corporate form?

MR. COOK: That is the heart of this case today.

QUESTION: And let me add a second question: If Louisiana can impose it on doing business in a corporate form, may it impose a tax on doing interstate business in a partnership form or in a sole proprietorship form?

MR. COOK: The Louisiana Supreme Court recognized that the State may not -- and the State has not attempted here to impose a tax on the privilege of doing interstate business in Louisiana.

What the State is attempting and what they have taxed is the corporation that has -- which is on page 26 of the Jurisdictional Statement -- has qualified to do business in Louisiana.

In 1962, when Colonial first came into the State to begin laying its pipeline, it did qualify with the Secretary of State to do business in Louisiana.

They have received a qualification from the Secretary of State that authorizes them to do anything and everything that a domestic corporation, another domestic corporation has

authority to do, only limited by their own articles of incorporation.

I would like to point out that the legislative intent was put into the statute so there could be no ambiguity about what the purpose of the tax is. It being the purpose of the section to require the payment of this tax to the State of Louisiana by domestic corporations, for the right granted by the laws of this State to exist as such, the corporation -- organization, rather.

And by both domestic and foreign corporations, for the enjoyment, under the protective laws of the State, of the powers, rights, privilege and immunities derived by reason of the corporate form of existence and operation.

QUESTION: Mr. Kean, as I read the statute, there's no apportionment of any kind of this tax; is that correct?

I beg your pardon, I've got the wrong advocate.  
Mr. Cook. I'm sorry.

MR. COOK: No, sir, that's not correct. Revised Statute 47:606 --

QUESTION: What page of your brief is that on?

MR. COOK: That's set out in the Appendix to my brief, on page 45.

QUESTION: What's the --

MR. COOK: I'd like to add that Colonial has not complained about the apportionment formula or the measure of

the tax.

What they have complained of is the imposition of the tax at all.

QUESTION: As a matter of information, what's the basis of apportionment? I'd overlooked that.

MR. COOK: I'll have to go over that.

QUESTION: Well, if you don't remember it, just go ahead. I don't want to interrupt you.

MR. COOK: Now, what is the difference between taxing the privilege of doing interstate business and the tax imposed in this case?

It's very simple. The State is not taxing the business of transporting natural gas through the State. The tax is not levied on that business. The tax is levied on a corporation which has voluntarily come into the State and qualified with the Secretary of State to do business in the State.

QUESTION: Could a State impose a tax on the privilege of doing this business in a noncorporate form? It would have then two complementary taxes.

MR. COOK: No, this -- the tax is only imposed upon corporations. It's not imposed --

QUESTION: Well, we're talking about constitutional power.

MR. COOK: Yes.

QUESTION: And I grant you -- I know that this tax is imposed on corporations, and you justify it by saying that while at least arguendo it would be beyond the power of Louisiana to tax this business as a business, since it's purely interstate, but this is valid because Louisiana is taxing it because it's in corporate form.

And I'm asking you if Louisiana would have the constitutional power to conduct this business because the incidents of it was that it was conducted in noncorporate form?

MR. COOK: If the State granted to the partnership, or whatever other type of association it was, benefits, local benefits upon which it could levy a tax, yes. It does do this to corporations that qualify with the Secretary of State. They derive benefits of, the normal benefits of any domestic corporation would derive from the State.

QUESTION: Unh-hunh.

And there's nothing left of the interstate immunity, is there?

MR. COOK: The interstate immunity still exists --

QUESTION: If the State can tax -- if the State can tax a purely interstate business by way of a franchise tax, on the basis of the form in which it's conducted, whether it be corporate or noncorporate, then there's nothing left of the exemption, is there?

MR. COOK: I agree with your statement, except for one



point. The State here does not do that. In other words, they do not attempt to do that.

Colonial Pipeline came to Louisiana and qualified, voluntarily, for whatever reason, to do business in Louisiana.

Now, the extent of their use of that authority is their own business. The State is taxing the corporation, because it's qualified and because the, as the Supreme Court of Louisiana held, they received protection of the lawful activities which they conduct in the State. Which, as in the case of Memphis Gas --

QUESTION: Well, that would be true -- that would be true of an individual proprietorship that was running this pipeline, wouldn't it? He'd presumably receive the police and fire protection and the other protections the State gives.

MR. COOK: That is true, he would receive those protections, but he would not receive the other corporate benefits, which, in other words, --

QUESTION: Well, what are these benefits?

MR. COOK: As pointed out by the Louisiana Supreme Court --

QUESTION: This isn't a Louisiana corporation.

MR. COOK: No, sir, but they have qualified to do business in the State.

QUESTION: Unh-hunh.

QUESTION: Could they have run the pipeline through

without qualifying?

MR. COOK: Yes, they could. The State did not require them to do so.

QUESTION: I suppose if they hadn't qualified, they would have run the risk that in the event of an explosion the stockholders could be held individually liable under Louisiana law?

MR. COOK: Yes.

Now, Mr. Kean --

QUESTION: Did they have a statute which prevents them from going into State court if they have not qualified? Do you have such a statute?

MR. COOK: We do have such a statute. However, corporations doing exclusively interstate business are excluded from the provisions of that statute.

And I point that out in my brief, has also been the State Supreme Court holding that has upheld that statute in saying that is the construction of the statute.

Now, appellant has pointed out several cases, attempting to argue that the tax imposed by this statute is a license tax, as a condition precedent for doing business in Louisiana; and several of the -- several of the cases pointed out by appellant brought up that issue that you just asked.

These cases were cited by Louisiana Supreme Court when it held that the requirement that the State qualify --

I mean that the corporation qualify in the State in order to be able to use the courts of the State, only apply to corporations doing intrastate business; they do not apply to corporations doing exclusively interstate business.

QUESTION: Well now, have I heard your answer to Justice Stewart's question, which I think followed mine, as to whether, in your opinion, Louisiana had the power to tax the doing of interstate business in an individual or sole proprietorship or partnership form?

MR. COOK: Yes. I did answer that. They would if they gave to the individual, to the partnership the benefits, local benefits emanating from the State of Louisiana, emanating from the sovereign power of the State of Louisiana.

QUESTION: Well, suppose Colonial were owned by Mr. Colonial, let's say, an individual; could they tax him?

MR. COOK: Not -- well, could they tax him? I don't know of any benefits that they would be passing to him --

QUESTION: Well, if they specifically expressed the congressional intent, to make the incidents of the taxation the privilege of doing this business as an individual proprietorship.

MR. COOK: Right. No, he would have the right to receive the same police protection that Colonial received in this case.

QUESTION: Unh-hunh, that this --

MR. COOK: However, he would not have the right to receive the corporate benefits that Colonial does.

Now, I would like to point out that --

QUESTION: Well, I don't know that -- did you answer my brother Blackmun's question?

QUESTION: Or Mr. Stewart's question.

QUESTION: Well, it's really the same question.

MR. COOK: I thought that I did. And my answer would be only if there were local benefits given to --

QUESTION: Well, you mentioned fire protection.

MR. COOK: Yes. I said in this case, in the Colonial case, the corporation receives numerous benefits as a corporation, in addition to the fire protection, the use of the highways, the school system and so forth.

QUESTION: Well, those benefits are conferred by Delaware or wherever -- New Jersey, or wherever it is this place is incorporated.

MR. COOK: The tax, the power of the State to tax is only upon entities that emanate from the State. Do you -- like, for example, domestic corporations, our form of domestic corporation in Louisiana, and the State would have the power to tax domestic corporations.

QUESTION: You don't really believe --

MR. COOK: Colonial --

QUESTION: Go ahead.

MR. COOK: Colonial voluntarily came to Louisiana, qualified with the Secretary of State, received a certificate of --

QUESTION: Did they pay a fee for that?

MR. COOK: Pardon me?

QUESTION: Did they get that free or did they have to pay a fee? Filing fee?

MR. COOK: I can't answer that question.

QUESTION: Probably did, if it's like any State I know anything about.

MR. COOK: Filing fee.

QUESTION: Yes.

QUESTION: Well, when I go to -- if I should go; I never have -- but if I should go to the Mardi Gras in New Orleans, I get police protection and fire protection. So that that incident alone wasn't very much of a basis for levying taxes, is it?

MR. COOK: I agree with that.

QUESTION: It's the corporate form.

MR. COOK: It's the corporation itself, not --

QUESTION: Well, don't they pay property taxes?

MR. COOK: They do. They pay a property -- they pay local property taxes, that go to --

QUESTION: Well, is that or is that not for fire



protection and police protection? That's what the property tax is, isn't it?

MR. COOK: That goes to the local parishes for their use, yes. This, the local -- the property tax is not a State tax, there are parish taxes.

QUESTION: It's not a corporate tax, he's not -- they already paid the property tax. They pay income tax. Right?

MR. COOK: That's correct. And they do pay a local property tax.

QUESTION: So what is this other benefit they get? In addition to all the others.

MR. COOK: The State is levying a tax on the corporation, on the corporate form of existence.

QUESTION: And it gives what in return?

MR. COOK: It gives to the corporations the various corporate benefits they receive by virtue of being incorporated.

QUESTION: Name one or two of them.

MR. COOK: The absence of individual liability. The transfer of assets through the -- through stock; continuity of business; centralization of management. The normal corporate benefits that any corporation receives.

QUESTION: And that's given by Louisiana?

MR. COOK: It is to the State's -- to the corporations which (1) are domestic or (2) which have qualified --

QUESTION: But one of them you said didn't apply to

interstate.

MR. COOK: Pardon me?

QUESTION: You said one of those benefits didn't apply to interstate corporations, didn't you?

MR. COOK: It wouldn't, but the corporation has voluntarily qualified in the State.

This is no different from the case in the Stone v. Interstate Natural Gas Company, or really the Memphis Natural Gas case, except in this case the corporation qualified in Louisiana to do business.

In Memphis Natural Gas case, they did not qualify to do business in Louisiana -- I mean in Mississippi.

In the Stone case, they did qualify. They did only interstate business in the Stone case, and in the Memphis Natural Gas case.

In the other cases cited by me in our brief to this Court, each of the highest State courts which has considered the incident of the tax as one being imposed upon the corporate existence, the corporate form, has upheld the validity of the State's power to tax this incident.

Now, appellant cites, or states that the tax in question is the same as the equivalent of, or is an effective condition precedent to Colonial doing interstate commerce in Louisiana.

I'd like to point out, and I made this statement

before, that the State of Louisiana did not require Colonial to come into Louisiana and qualify, as a precondition for them to do their interstate business.

Now, the cases cited by Mr. Kean in support of his position are not applicable in this case. In each of those cases there was an attempt by the State to exclude a certain type of business, like express companies, in one case a pipeline company, and to require them, before they did business in the State, a license in order to be able to do that business.

Louisiana has not done that. Louisiana has only taxed the corporation which has voluntarily qualified in the State.

As I pointed out earlier to Mr. Justice Blackmun, Louisiana does not require that the corporation qualify in order to be able to use the courts of the State. There was intimation to that effect in the case of Graham Manufacturing Company v. Rolland. I pointed out that the Louisiana Supreme Court has so held.

Louisiana does have an occupational license tax, or a license tax similar to the cases that Mr. Kean cites in his argument. They are imposed by other statutes. Title 47, section 341 through 405.

This tax, this occupational license tax, is imposed upon individuals, partnerships, corporations, or anybody that

comes in and performs or does the certain types of businesses, trades or professions conducted in Louisiana. It makes no difference the type of business that's done. It is a precondition of doing that type of business, and it only applies to interstate business done.

Appellant cites the enforcement provisions of the Louisiana taxing statute as joining with the tax in question to be an effective license tax or condition precedent on doing business in Louisiana.

Namely, he cites Title 47, section 401. That section only applies to the occupational license tax imposed by sections not in question before the Court.

I'd also like to point out that this, the enforcement provisions apply to -- that the other four enforcement provisions as cited by him apply to all State taxes. The constitutionality of these four provisions has not been drawn in question in the courts below, nor, as Colonial complained of the enforcement provisions in the courts below.

I'd like to point out some of the facts about this case, as far as the amount of investment in the State of Louisiana.

It's true Colonial owns and maintains 258 miles of pipeline in the State. They have an investment there of a cost to them of \$40 million.

QUESTION: They are paying property taxes on that,

though, aren't they?

MR. COOK: Correct. All I'm doing is showing the extent and size of their investment. They are there doing business.

QUESTION: Well, but you've taken care of that with the property tax, haven't you?

MR. COOK: That is -- yes, sir.

This is one-tenth of their total assets, capital assets.

They also receive substantial revenues that are apportioned to the State. During one of the taxable years in question, 1970, Colonial had a gross receipts of \$102 million, a net income of \$25 million; \$2 million only of which was apportioned to Louisiana.

QUESTION: And you taxed that?

MR. COOK: That's correct.

QUESTION: The income tax.

MR. COOK: That's correct.

In addition, --

QUESTION: Well, that's what every domestic corporation --

MR. COOK: That's correct.

QUESTION: -- paid on each of these.

MR. COOK: Yes, sir.

There is no difference between the interstate



corporation that -- or Colonial in this case, and they are a foreign corporation, and a domestic corporation that is Louisiana domiciled.

I'd also like to point out that --

QUESTION: Well, what's the counterpart tax on a domestic corporation, if you will spell that out for me again? That corresponds to the tax in question in this case.

MR. COOK: It is the same tax. The --

QUESTION: Well, the domestic corporation -- let's assume that you had one that went from Baton Rouge to New Orleans, if that were feasible, domestic entirely; they pay the income tax, they pay the property tax, and then what else do they pay?

MR. COOK: They would pay the corporate franchise tax and --

QUESTION: The corporate franchise tax.

MR. COOK: -- published by the statute in question.

I'd also like to point out that Colonial, when they built their pipeline across the State of Louisiana, utilized the State's courts for their expropriation of the various properties and to build their pipeline. The expropriation powers came from the State, the State gave to the common carriers and to petroleum pipelines the right to utilize expropriation powers in the State courts to build their pipeline.

QUESTION: Well, if the individual that was postulated by, I think, Mr. Justice Stewart and Mr. Justice Blackmun had started this pipeline in Texas and went all the way to the East Coast, what would be the situation on -- would he be able to condemn land?

MR. COOK: Would he be a common carrier? I --

QUESTION: As a common carrier?

MR. COOK: I would have to look -- I don't know.

QUESTION: Well, don't you think that might be quite important in this case?

MR. COOK: Yes. Well, no, sir, because that has not been an issue in the case.

QUESTION: No, but you're speaking of the power to -- of eminent domain is what you're suggesting.

MR. COOK: Well, okay. If we are talking strictly of the power of the State to do it, then, yes, the State is granting the individual powers that come from State law not from the federal law.

QUESTION: Yes, but you wouldn't be taxing this individual, or would you?

Would you be levying this tax on that individual?

MR. COOK: No, I wouldn't.

QUESTION: Well, are there any individuals that you know of in Louisiana that have \$40 million invested in a transcontinental pipeline?

MR. COOK: No, there's not.

QUESTION: But you might have individuals that have a substantial sum invested in a trucking concern, running from Texas to Mississippi?

MR. COOK: That's correct.

QUESTION: I'm just wondering what your last argument, what pertinency it has, in view of the fact that you catch -- you catch them for property and income taxes. You're not bootstrapping, because -- and saying, because this is a substantial investment we tax them there, therefore we can tax them here also; are you?

MR. COOK: No, I'm not. I was simply pointing out the extent of the investment in the State, and the fact that they had received, for example, expropriation benefits under State law from the State and not the federal government.

QUESTION: But that's not -- if I understood your response correctly, that's not any different from what it would be if Mr. H. L. Hunt over in Texas had individually built a pipeline or had run a truck line across.

MR. COOK: That's correct. If --

QUESTION: The only one --

MR. COOK: My answer -- my answer to Mr. Justice Blackmun's and Mr. Justice Stewart's question is: If the State grants to the individual or to a partnership or to any type of association benefits that emanate from the State, and

not from the federal government, then it's within the power of the State to tax that benefit.

QUESTION: But I thought you had conceded that they would not levy this tax on the individual.

MR. COOK: They would not levy this tax.

QUESTION: Yeah.

MR. COOK: And the State is not attempting to levy this tax on the individual. It is, in fact, a corporation tax. It is imposed only on corporations for the privilege of existing in corporate form.

QUESTION: But what Mr. Justice Stewart said, we're not talking about exactly what the State has done here, we're speaking of constitutional power. And I wonder whether you've ever answered that question.

MR. COOK: I attempted to, and I'll attempt to do it again, and that is this:

If the State grants any powers or rights or privileges or immunities or benefits of any nature to individuals that is subject to the State's power to grant to the individual, and is subject to taxation, yes. The State would have power to tax that. The State --

QUESTION: Give me an example of this, because I detect, I think, an inference that the only thing granted Colonial is the right to do business in corporate form. Is this what you're saying?

MR. COOK: That is what is being taxed. The State seized upon the local activities, local incidents that are spelled out in the statute to support that. The only thing that is being taxed is the corporate entity; that is correct.

QUESTION: But are there any other benefits that Colonial receives from Louisiana?

MR. COOK: The benefits are the normal corporate benefits that any other corporation, domestic or foreign, receives.

QUESTION: Well, don't they have fire protection, all the rest of this kind of thing, and is this answered by Mr. Justice Marshall's comment: Well, that's taken care of by the property tax?

MR. COOK: No, sir. The property tax in Louisiana is a local tax by the local parish, it does go for road improvements, fire protection, and things of that nature. It does not pay for the State police power or the police work.

The State does have a different police setup between the local parishes and the State. They do protect Colonial in the State.

QUESTION: Well, you referred to before, didn't you, to the limited liability, not necessarily that the State spends money to give Colonial, but that Louisiana



recognizes limited liability on the part of a corporation which is qualified to do business in the State; and the other incidents of corporate life, that it presumably doesn't have to recognize, but does recognize, that really aren't arguably taken up by the property tax or the income tax.

MR. COOK: That is correct.

QUESTION: And it's taxing all corporations that do business in Louisiana, domestic or foreign, for these particular privileges, isn't it?

MR. COOK: That's correct.

I'd like to point out that the case cited by Mr. Kean in his argument, in support of the fact that this tax is beyond the power of the State to tax, is the case of Spector Motor Company v. O'Connor. In that case the incidents of the tax was not the corporation, or the corporate form of doing business.

The incidents of the tax was the doing of business in that State. Just as our occupational license tax subjected by other statutes impose a license tax on doing of a particular type of business, or doing a particular type of trade or profession.

And I submit, and we submit that it is a distinct difference between taxing the corporation for the privileged existence and enjoyment of the privileged immunities in the State, and taxing a business being done in the State.

That's all.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Cook.

Mr. Kean, you have a minute.

REBUTTAL ARGUMENT OF R. GORDON KEAN, JR., ESQ.,

ON BEHALF OF THE APPELLANT

MR. KEAN: Thank you, sir.

May it please the Court:

I'd like to make several comments. One has to do with the argument of counsel concerning the fact that Colonial is qualified to do business in the State of Louisiana, and he seems to place great emphasis on that fact, even though the Louisiana Supreme Court did not.

The fact is, and if the Court will look at Exhibit P-6 in the Appendix, you will find that Colonial is qualified to do interstate business in the State of Louisiana.

And if this Court will review the case of Ozark Pipeline Corporation vs. Monier, which is at 266 U.S., the Court will find there the question being raised, concerning the qualification of an interstate carrier in the State at issue there; and the Court held that it was not a question of qualification, but a question of what is done pursuant to that qualification, and where, in the Monier case, nothing had been done other than interstate commerce, the Court held that the mere qualification had no bearing, nor created any right in the State to impose the tax.

QUESTION: Well, a right doesn't have to be exercised, necessarily, to be valuable, does it?

MR. KEAN: I think in the case of the interstate carrier, if you -- the only basis upon which you could levy the tax, if it please the Court, is on the basis of some intrastate activity; and under those circumstances, if no intrastate activity is engaged in, it does become important, yes, sir.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.  
The case is submitted.

[Whereupon, at 2:58 o'clock, p.m., the case in the above-entitled matter was submitted.]

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