

## IN THE SUPREME COURT OF THE UNITED STATES

----- :  
: THE GREAT ATLANTIC AND PACIFIC :  
: TEA COMPANY, INC., :  
: :  
: Appellant, :  
: :  
: v. : No. 74-1148  
: :  
: HUGH B. COTTRELL, HEALTH OFFICER, :  
: STATE OF MISSISSIPPI, :  
: :  
: Appellee. :  
: :  
: ----- :

Washington, D. C.,

Monday, December 1, 1975.

The above-entitled matter came on for argument at  
1:41 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:

WALTER W. CHRISTY, ESQ., Kullman, Lang, Inman & Bee,  
Post Office Box 60118, New Orleans, Louisiana 70160;  
on behalf of the Appellant.

HEBER LADNER, JR., ESQ., Special Counsel, Suite 1638  
Capital Towers, Jackson, Mississippi 39205; on  
behalf of the Appellee.

C O N T E N T S

<u>ORAL ARGUMENT OF:</u>	<u>PAGE</u>
Walter W. Christy, Esq., for the Appellant	3
Heber A. Ladner, Jr., Esq., for the Appellee	14
<u>REBUTTAL ARGUMENT OF:</u>	
Walter W. Christy, Esq., for the Appellant	29

- - -

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in Great Atlantic and Pacific Tea Company against Cottrell.

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

ORAL ARGUMENT OF WALTER W. CHRISTY, ESQ.,

ON BEHALF OF THE APPELLANT

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

The instant case presents a challenge to a Mississippi statute governing the sale of milk in Mississippi by out-of-State processors and producers.

My client, The Great Atlantic and Pacific Tea Company, operates a processing, milk processing plant in the State of Louisiana, at which it processes milk for its stores in Louisiana and Mississippi. A&P also operates approximately 38 stores in the State of Mississippi. A&P sought a permit from Mississippi -- or certification from Mississippi for the right to sell its milk at its stores in Mississippi.

The permit was refused on the basis that the statute in question requires that a certificate be attached to the application, certifying that the State, in this case Louisiana, would give reciprocity to Mississippi's inspections of its milk.

Basically, the statute says, Your Honors, that Mississippi will allow an out-of-State processor to sell its

milk in Mississippi if that company -- if the State which inspects that company's milk has standards and procedures that are substantially equivalent to those of Mississippi, and if the milk receives at least a 90 percent rating under the public -- under an inspection administered by the Public Health Service-certified officer.

It further provides -- and this is the portion of the statute which we claim to be unconstitutional -- that the milk would be accepted only if the sending State gives reciprocity to Mississippi's inspections, and accepts its standards also.

QUESTION: Mr. Christy, are you attacking the entire Mississippi regulation, or just Section 11 of it?

MR. CHRISTY: Well, Your Honor, just that Section 11 is the only section that deals with out-of-State processors, which is the -- well, in answer to your question, only Section 11, only part of Section 11, the part that requires that the processor obtain a reciprocity agreement from the State in which its plant is located.

QUESTION: I think the rest of it isn't for us, is it, it's --

MR. CHRISTY: It's only Section 11 --

QUESTION: -- I don't find it even in the record or in your brief, or anything; it's just Section 11.

MR. CHRISTY: It's a fairly confined issue, Your Honors. We feel that the statute in question is clearly a



burden on interstate commerce, and should be stricken for that reason.

After the permit was denied, A&P filed suit in Mississippi in a single-judge court, and asked for a temporary restraining order. This was denied. The company was given leave to amend, to ask for a three-judge court. The outcome of this eventually was that the three-judge court denied relief, and this appeal followed.

Your Honors, Mississippi defends its statute by claiming that its reciprocity requirement is health-related and is not economic in nature. And it seeks to avoid the rulings, the vast number of rulings by this Court, striking down similar statutes governing regulation of milk, the sale of milk, in which economic purposes were found.

We feel that logic shows that the statute, or at least the reciprocity provision, can only be economic in nature. Mississippi says, Well, if we get reciprocity from Louisiana, then we will accept their milk, even though their standards are lower, if they will accept our milk.

Well, if they accept it on the basis of --

QUESTION: Are there tandem conditions on getting into Mississippi? They must meet certain health standards first.

MR. CHRISTY: There's no question in this case. It's been stipulated that but for the reciprocity agreement

A&P's milk would be acceptable. And that Louisiana's standards are substantially equivalent to Mississippi's.

QUESTION: But you don't contest those provisions?

MR. CHRISTY: No, sir. Only the reciprocity provision.

My point, I was making, was that reciprocity has nothing to do with wholesomeness, because if the reciprocity statement is signed and submitted, then a permit is given and they will accept milk of a less wholesome nature.

Now, their --

QUESTION: Are you suggesting that it's nothing but a rule for administrative convenience?

MR. CHRISTY: I suggest, Your Honor, that the statute in question is an economic measure passed by Mississippi to insure that its processors have an available market, before it lets in foreign competition.

Also I think the record reflects that one of the purposes of the statute was so that Mississippi would not have to expend the cost for out-of-State inspection. Mr. Cottrell, the defendant, testified to that effect.

Further, along this line, Your Honors, --

QUESTION: But you wouldn't insist that, if they wanted to inspect, that they would have to pay the cost, you would pay the cost?

MR. CHRISTY: That was the basis -- well, I don't

think that question is before the Court. I realize that that could be an alternative --

QUESTION: But no one has ever suggested that it would burden interstate commerce to -- for the State to spread the cost of inspection among those whom it inspects?

MR. CHRISTY: I was going to point, Your Honor, that Dixie Dairy --

QUESTION: Inside or outside the State.

MR. CHRISTY: The Dixie Dairy case, which is cited by Mississippi, and was also relied on by the three-judge court that denied relief. This was a three-judge court in the Seventh Circuit, which held that the City of Chicago had the right to require out-of-State inspections of Indiana milk, that this was not a burden.

Well, Your Honors, that case was overruled by the Seventh Circuit and remanded to the District Court, and the District Court has since ruled that Chicago's requirement of its own inspections is a burden on interstate commerce, inasmuch as Indiana's inspections are sufficient to insure wholesome milk.

So what I'm saying is that if that is -- and that's now before the Seventh Circuit --

QUESTION: But you don't need to take that on here.

MR. CHRISTY: I don't believe that this case requires that. I think that the cases that this Court has decided in

the area of milk, regulation of milk by the States, made clear that a State cannot erect an economic barrier against foreign competition in consequence of its own local producers.

Furthermore, if -- and we recognize that milk, and these cases have recognized that the regulation of milk is in the State interest and that it's a matter of local concern. But if there is a regulation that burdens commerce, and there are alternative means available, which would be less of a burden, then the regulation must fall.

The Dean Milk case mentioned that.

There's no question here that if the reciprocity requirement is not economically -- is not related to the health, then they don't need it. There's no reason for it. The statute could stand without that requirement. And Mississippi would get just as wholesome milk as it would with it.

And along these lines, the record reflects that four dairies in Louisiana, four processors in Louisiana are at this time, and have been, exporting milk to Mississippi without a reciprocity agreement.

Now, Mississippi has been unable to explain why they allow four processors to do this, but they won't allow A&P to do it.

And this goes to the second part of our argument, that -- bearing on the equal protection point. But I think it illustrates, also, that the reciprocity has absolutely nothing



to do with wholesomeness of the milk.

Your Honor, Mississippi also claims that their statute survives the constitutional attack because they have a safety valve built in there. The safety valve they claim is that the statute provides that the governing authority can inspect the milk and see if it meets domestic standards. So that if we don't have a reciprocity agreement, we can still get into Mississippi with our milk by meeting their domestic standards.

But, in a footnote in their brief, they admit that they have no means set up for any type of inspection at all. So, we submit, that if the statute does allow for my client to get in with an out-of-State inspection, it's being applied in an unconstitutional manner, because no basis or no procedure has been established to allow this.

Mississippi -- I think the brief indicates that the main thrust of their argument is that Mississippi is not to blame; Louisiana is to blame. "Don't come to us and ask to get your milk in; go to Louisiana and make them give you a reciprocity agreement."

Well, Your Honors, A&P is not Louisiana. We can't force Louisiana to enact legislation.

QUESTION: With whom is the agreement when there is one?

MR. CHRISTY: It is a statement -- when you apply for

a certification, the health officer from Mississippi sends you a form stating the requirements. One of the requirements is a form attached to that, which has a place to fill in, the name of the other State's governing authority, health authority, and they have to sign it, stating that --

QUESTION: That authority has to sign it?

MR. CHRISTY: That authority has to sign it.

And of course, Louisiana --

QUESTION: There is no other way of complying with the requirement?

MR. CHRISTY: There has been none. And Louisiana's position --

QUESTION: You have to place the requirement.

MR. CHRISTY: No, sir. Now, --

QUESTION: You think we have to get the Louisiana authorities to sign that form.

MR. CHRISTY: Yes, sir.

QUESTION: In the form that it's printed by Mississippi?

MR. CHRISTY: And this we have been unable to do. Louisiana's position is: we don't -- we're not going to sign a reciprocity agreement; we'll let anybody's milk come into our State if it meets our standards.

And Louisiana does conduct out-of-State inspections.

QUESTION: Louisiana does not have a reciprocity

agreement with any other State, does it?

MR. CHRISTY: No, sir.

QUESTION: And there's no statutory authorization for it?

MR. CHRISTY: There is, I believe, the regulations under which Louisiana operates, give the authorities the discretion to enter into a reciprocity agreement if they want to; but they have never done this.

QUESTION: Does the record show why not? If they have the authority to do it.

MR. CHRISTY: The record contains copies of all the various statutes and regulations, but I don't believe there's any explanation of why they have never entered into a -- we have a -- well, Your Honors, there is a letter from the Chief Health Officer in Louisiana, explaining the position of Louisiana. And that is basically what I said, that we don't believe reciprocity is necessary; we let anybody's milk come in if it meets our standards.

And that has been their position, and that's as far as they will go.

But Mississippi would not accept this, and refuses to issue the permit.

As I mentioned, we believe, although our principal argument is aimed at the commerce clause question, that the record reflects that A&P has been denied equal protection of

the law. Mississippi responds to this by saying: Well, you have brought out the regulations under which these four dairies were allowed to continue to do business in Mississippi without reciprocity.

I believe the record shows the only regulation in effect is Section 11. And if Mississippi applies Section 11 by allowing four processors to do business without reciprocity, while not allowing A&P to do business without reciprocity, then I believe that's a clear denial of equal protection as the statute is applied.

QUESTION: The justification, as I understood it, at least, on the part of the State is that these four others are permitted to do business under -- by virtue of a grandfather provision, that they were doing business at the time this new law came into effect.

MR. CHRISTY: That's what I understand, and --

QUESTION: And that you presumably were not.

MR. CHRISTY: And the State -- and the claim is made that we should have attacked the grandfather provision.

Well, frankly, nobody seems to know -- nobody knows about any grandfather -- the record doesn't contain a mention of any provision; there's been none brought to anybody's attention. And, frankly, I don't know of what grandfather provision counsel is referring to; and I don't believe counsel does.



We're talking about Section 11. If there's another law that says these dairies can come in without complying with the law, it was never brought to anybody's attention.

QUESTION: Is it a fact that these dairies were doing business in the State, --

MR. CHRISTY: Yes, sir.

QUESTION: -- at the time of the enactment of the law, and that you were not.

MR. CHRISTY: Yes, that's correct. They were doing business before '67, and A&P began operations about 1972.

QUESTION: Unh-huh.

MR. CHRISTY: I might add that A&P is sustaining a considerable loss of revenue as a result of Mississippi's recalcitrance, just in the cost of buying milk in Mississippi for its stores, as opposed to the price, the cost it could process the milk for itself, has been estimated at approximately \$195,000 a year.

And of course this is not the only damages they are suffering.

I would like to save a little time for rebuttal,  
Your Honor.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Ladner.

## ORAL ARGUMENT OF HEBER LADNER, JR., ESQ.,

## ON BEHALF OF THE APPELLEE

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

I am Heber Ladner, Jr., Special Counsel for Dr. Cottrill, in this matter.

Section 11 of our regulation is a part of the solution and not a part of the problem to the interchange of milk between the several States.

In the first place, this regulation has created wide-ranging commerce. It has brought in milk from sixteen dairies in nine States. It has worked, in short, under the commerce clause.

Second, unlike the Baldwin vs. Seelig line of cases, in this Court, this regulation does not favor local producers, it insures merely parity of local producers. That is to say, the reciprocity provision does have teeth, but it allows Mississippi producers to have access to the markets from which imported milk comes.

QUESTION: But you do not suggest that this milk doesn't meet the health standards?

MR. LADNER: I'm saying that once a certificate of reciprocity is not forthcoming, substantial compliance with Section 11 is impossible, and that an out-of-State producer is then thrown back --

QUESTION: So you don't say this milk is not meeting -- doesn't meet the health standards?

MR. LADNER: We do say that it fails to meet the health standards.

QUESTION: Because of the reciprocity provision?

MR. LADNER: Well, because of the standards applicable to domestic producers, absent reciprocity, in everything that Section 11 entails, then an out-of-State producer is thrown back upon the domestic standards; much as the State of Louisiana says it utilizes domestic standards.

But Mississippi does not at present conduct out-of-State inspections, because it adopted Section 11 to obviate that responsibility.

In other words, we say our constitutional responsibility was fulfilled by agreeing to let out-of-State milk come in upon a reduced standard of sanitation if, by the same token, Mississippi milk can move.

Now, that's the result of the regulation. The methodology of the regulation is to simply exchange standards of inspection. We say there is a health-related purpose in one State agreeing that a sister State conducts credible health investigations.

QUESTION: Of course, it's possible that Louisiana's standards may be higher than Mississippi's, is it not?

MR. LADNER: Your Honor, on this record, I would think

not. We made the assertion in our brief, and the trial court made the assertion much as a finding of fact, that Mississippi standards exceed Louisiana's. And I find that unchallenged in the appellant's brief.

We say that the regulation serves a health-related purpose because it gains out-of-State assistance in inspecting milk, and it ascertains a reasonably reliable interstate standard.

QUESTION: But is the position of Mississippi here so much different than that of the City of Madison in the Dean Milk case? There, too, Madison said, "We're just not going to make out-of-State inspections."

Now, you have, in addition to that policy, your reciprocity provision. But you pretty well have to defend the reciprocity provision, don't you?

MR. LADNER: Yes, Mr. Justice Rehnquist, we do. But we say that we're not isolating ourselves because of the fact that the Section 11 reciprocity policy has worked. It's produced. We are in the strange position of having complied with the commerce clause of the Constitution and, in the same breath, we're charged with not complying with it. We've used one of those reasonably nondiscriminatory alternatives. We decided we didn't want to make out-of-State inspections, and so, instead, we adopted a policy of reciprocity.

It is compulsory. But it does work.



Now, I think this Court's cases on the interstate commerce clause focus upon the whole thrust of interstate commerce, and not just one State vis-a-vis another.

QUESTION: But is the only goal of the interstate commerce clause to make sure that Mississippi has enough milk coming to suit its needs, or isn't it also to give the Louisiana producers the right to send milk into Mississippi if there are no health objections to it?

MR. LADNER: Well, we think it's somewhat broader than just giving Louisiana processors the right to come in. It is a substantial but incidental burden on Louisiana processors, who are not in compliance with Section 11. But we think the interstate commerce clause is broader than just Mississippi processors' rights or Louisiana processors' rights.

QUESTION: But it's not just a minor burden on them. They simply can't do anything, as I understand it; Louisiana processors that want to ship milk into Mississippi.

MR. LADNER: Well, we say to that that the State of Louisiana has the power to execute a reciprocity agreement.

QUESTION: But, as your opponent points out, A&P isn't the State of Louisiana.

MR. LADNER: That's correct. But we think that presently some litigation in the Louisiana State courts, that's come up since this case, we frankly question why Louisiana was not sued first. Why us?

In other words, there is a duty on the part of the Louisiana official to enter into reciprocity agreements. It's in the original record, it's paragraph 5.B.1. of the Louisiana regulations.

QUESTION: Who do you sue in Louisiana? The Legislature?

MR. LADNER: The State Health Officer, for failing to carry out his duty under paragraph 5.B.1.

QUESTION: Now, how do you work out this "duty" on the part of Louisiana to reciprocate?

MR. LADNER: Well, I say that the State -- the Louisiana regulations read as follows: "The State Health Officer" --

QUESTION: What page are you on there?

MR. LADNER: I'm on page 8 of my brief.

QUESTION: Thank you.

MR. LADNER: "The State Health Officer may accept the certificate of inspection of a duly authorized government representative, agent, or agency of such other State wherein such products are produced."

And we --

QUESTION: Why shouldn't the Mississippi producer sue Louisiana? He has the same constitutional rights to free flow of products among the States.

MR. LADNER: Perhaps one should. One hasn't. Mr.

?

Swegman, a well-known, perhaps nationally known -- I think Mr. Swegman helped bust the Fair Trade Law several years ago, and he's at it again on the milk regulations; and he has obtained an injunction in Louisiana State court. He and a Mississippi producer, his co-plaintiff, have enjoined Louisiana from refusing to accept Mississippi's milk.

QUESTION: If Mississippi's health standards and the production of milk in Mississippi are comparable to Louisiana's, Louisiana probably can't keep them out, can they?

MR. LADNER: Well, that Court ruled that Mississippi milk could not be kept out, but significantly, under the proviso that Mississippi milk must meet the Louisiana standards to come in.

QUESTION: Well, you don't object to that, do you?

MR. LADNER: No, I don't. I'd say that would be the result of this case if Section 11 were enjoined, I think we would be thrown right back to where we were before.

There's been no challenge in this case that our health regulations for domestic producers are arbitrary or capricious or violate the commerce clause. And of course there might be some question as to how far Section 11 falls, or what parts of it fall; but we would say it would be a sort of a status quo anti situation if our reciprocity provision were enjoined.

In effect, you'd have, almost admittedly you'd have

A&P's products, which do not meet our domestic standard, simply up against our domestic standard.

So, Section 11 is productive.

QUESTION: Well, you could turn them down on the basis of their failure to meet your domestic standards, then, couldn't you?

MR. LADNER: Yes, Your Honor, we could. We could.

QUESTION: Well, why don't you, then?

MR. LADNER: Well, I couldn't speak for the administrative officials I represent, but that possibility could be confronted later; but we say this regulation is wiser and more productive for interstate commerce through all the States than having these picayune problems of how many square feet of floor space is in the milk parlor, or what the temperature of the milk is when it goes to the cooling truck.

We adopted this regulation to try to avoid those hurdles, and it's -- But, at any rate, to get back to Mr. Justice Rehnquist's inquiry, what is the thrust of the commerce clause in a case of this import; do you just look at the two parties or do you look at all commerce coming through?

Now, we think there's authority in this Court's books in Polar Ice Cream vs. Andrews, a Florida case, wherein the local processors were required to buy all of the output of local producers at a certain price. And Florida came to this Court and argued that, well, in effect, we have competition on



the distributor level, milk comes from all over.

This Court, in a footnote, analyzed that contention and said, Well, Florida, of all the Southeastern States, has the least volume of interstate movement in milk at the distributor level.

Well, we have a high volume. Proof shows that this regulation has produced a high volume of interstate trade in milk; is not the kind of historic commerce clause case where a State is favoring its local producers or its local economy. All this regulation does is obtain them parity. It says, in effect, Mississippi-produced milk, under substantially equivalent regulations, can go wherever milk can come to Mississippi from.

And that's the result under Section 11.

Second, I've explained some ways in which this reciprocity regulation is health-related, but it also has other legitimate State interests behind it. As I've said before, it achieves parity for local producers. And there's an economic justification for the regulation, in that it holds down the price of milk. Regulation --

QUESTION: When you say that it achieves parity, you mean for the Mississippi producer, the processors and producers?

MR. LADNER: Yes, Your Honor.

QUESTION: In your view, is that a permissible factor

under the commerce clause?

MR. LADNER: I think it is, Your Honor. I think this Court's cases outlaw only favoritism, but not parity.

Now, there is an aspect in which Mississippi processors are disadvantaged under our Section 11. That is, their standard for sanitation and health and other inspection requirements are higher than those of the State of Louisiana.

Now, I do not know whether that results in increased production costs, but at least Louisiana would be bringing in milk under Section 11 if the State complied at a relaxed standard.

Now, why doesn't Louisiana comply? We think it's relevant to this case, a court of equity to look at all of the facts in this case, including the fact that Louisiana stubbornly refuses to enter into reciprocity with any State. They have the power to do so. We've wondered why a lawsuit has not been filed against the State of Louisiana, and then, at last, one was while this case was brought up on appeal.

The regulation of health, sanitation, --

QUESTION: Mr. Ladner, what would be the basis of that lawsuit? Why does Louisiana have a duty to reciprocate?

MR. LADNER: Well, Your Honor, I spoke about duties earlier, and I was leading myself several steps down the way. They have a discretionary duty under this statute to enter into reciprocity agreements. We think it cannot be said that the

statute is there for no good purpose. They have the discretion. They cannot exercise the discretion capriciously or in a fashion that's at war with the commerce clause; and we say they are. They're failing to accept out-of-State milk, not just from Mississippi but from everywhere.

QUESTION: Well, aren't they a sovereign State?

MR. LADNER: Well, I suppose that, as much as that concept has meaning, they are; but I'm just simply saying that they're exceeding the bounds of their discretion in not considering reciprocity when that position disadvantages out-of-State producers for commerce clause reasons. They're acting unconstitutionally, acting beyond the bounds of their discretion under the commerce clause.

Louisiana has the trade barrier in this case, and Mississippi has the solution; yet Mississippi is sued in this case, and we're here worrying about whether a regulation, in effect, works and produces the widest possible scope of commerce.

QUESTION: But you're not saying that Mississippi doesn't have the solution, either, are you?

MR. LADNER: Well, they would have the solution if Louisiana would cooperate. Nine other States have. And we see no --

QUESTION: You think Mr. Swegman should have won his case in Louisiana? Based on the Constitution.

MR. LADNER: I think that he probably should have, Your Honor.

QUESTION: Because Louisiana must, under the Constitution, accept clean milk from other States.

MR. LADNER: With the distinction that Louisiana is not enjoying an intercourse in milk from all other States.

QUESTION: Well, I know, but that would be the grounds that Swegman would win on, isn't it?

MR. LADNER: Yes, yes, sir, it would.

QUESTION: And Mississippi is subject to that same requirement.

MR. LADNER: That's correct. But once again, he won empiric victory.

QUESTION: There is reciprocity under the Constitution.

MR. LADNER: I take it the Interstate Commerce Clause is constitutional reciprocity.

QUESTION: It works both ways, in other words.

MR. LADNER: Yes, sir.

QUESTION: Well, what if Louisiana's position is that the milk approved by Mississippi inspectors is just not sufficiently healthy compared to what we demand in Louisiana, and therefore we're not going to let it in?

MR. LADNER: Well, that was their position, and the Court said that -- the State Court in Louisiana said that in



order for Mississippi milk to come in, it must meet Louisiana's health requirements.

QUESTION: Now, that's certainly not a violation of the commerce clause, is it?

MR. LADNER: That's correct. That's correct. Nor would it be a violation of the commerce clause for Mississippi to exact those same standards from Louisiana, absent Section 11.

So A&P could win the battle and lose the war, if it succeeded in having this Court enjoin Section 11. Because the record contains indications that Mississippi standards exceed those of the State of Louisiana.

And of course no one has spoken about the cost of out-of-State inspections necessary to verify the quality of Louisiana milk. That might bring about a price differential in its own way.

So --

QUESTION: But A&P is an old hand at assessing those costs, I take it; it's been marketing milk for a long time.

MR. LADNER: Well, that's correct, Your Honor. It's presently having milk processed by Mississippi producers under its own label, and marketing them at a less advantageous profit ratio than it would like.

I have a hard time -- even though I see a substantial burden with respect to Mississippi-bound Louisiana commerce in

this case, I do not see any discrimination of constitutional import. There's certainly no intentional discrimination. And such discrimination as results, if you call disparity of results discrimination, it's produced by the action of the State of Louisiana.

In other words, what did it have to lose by signing a reciprocal agreement with Mississippi that was valuable or that could be reconciled with the interstate commerce clause? We say nothing.

Now, as I say, once this Baldwin vs. Seelig line of cases is analyzed, the result will simply be that we're not favoring domestic commerce with respect to all other out-of-State commerce.

Now, on the matter -- to conclude, the matter of the equal protection claim: Jurisdictionally we say it's not here.

There's just simply been no amendment to the complaint to reflect a practice or procedure by the State of Mississippi in allowing grandfather clause access. This was simply an after-thought in the case. Counsel for A&P at one point determined that some dairies from the State of Louisiana were coming in. So he decided that was an equal protection violation, because others could come in, but he couldn't.

Well, how is A&P to be advantaged if this Court should enjoin Mississippi from carrying out its grandfather policies? In effect, that would just disadvantage A&P's competitors without

helping itself.

But, jurisdictionally, the --

QUESTION: Well, isn't that the point? Put them all on an equal basis.

MR. LADNER: Well, I cite Golden vs. Zwickler for the authority that as a standing matter, you don't have standing merely to disadvantage your competitors if you cannot attain any beneficial relief yourself.

But this controversy about the equal protection belongs in the Court of Appeals. That's what I'm saying.

Louisiana makes the statement in its Jurisdictional Statement that Mississippi has adopted this grandfather clause policy ultra vires, without any statutory authority.

Well, that, in itself, implicitly concedes that you don't have an injunction of a Statewide statute of Statewide import. What you have is sort of a quasi-declaratory judgment.

As a jurisdictional matter, the controversy is just simply -- the equal protection controversy is simply not here --

QUESTION: Have you explained why Mississippi permits the grandfather operation?

MR. LADNER: Well, that was a matter that, of course --

QUESTION: Aren't the reasons just as applicable to those other producers as they are to A&P?

MR. LADNER: Well, Your Honor, once again I'm supposing, because it was not developed in the record in this case; but

one supposes that when Section 11 was adopted, there were predecessor regulations of some sort under which these companies in Louisiana qualified. And I have never -- I don't -- I don't get the constitutional implications, even from an equal protection standpoint, of the grandfather clause treatment.

In other words, there were rational reasons at the time for these dairies in Louisiana to come in, and at the time Section 11 was adopted, it applied only looking forward and not backward.

Now, access by these grandfather clause dairies is, in one or two instances that I know of, merely local access. That's another reason why the regulations allowing grandfather clause treatment aren't a Statewide statute or Statewide import.

In other words, some of the dairies in Louisiana had access to merely three counties, the coastal counties in the State of Mississippi, adjacent to New Orleans. But it's largely undeveloped on this record, and we say it's merely an after-thought that it, jurisdictionally, is not proper in this Court and can't be raised except in the Court of Appeals.

Thank you for your attention.

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

Do you have anything further, Mr. Christy?

MR. CHRISTY: Just briefly, Your Honor.

MR. CHIEF JUSTICE BURGER: Very well.



## REBUTTAL ARGUMENT OF WALTER W. CHRISTY, ESQ.,

## ON BEHALF OF THE APPELLANT

MR. CHRISTY: As to the last matter raised, I think the record will show that the information as to the four other dairies, processors came out during the testimony at the initial hearing, A&P had no prior knowledge of this. The matter of the issue as to equal protection was raised before the three-judge court. It was brief by the parties. And the three-judge court specifically ruled on the issue.

It's in their opinion, their reason that they could not enjoin Mississippi in that practice, because if they did it might prevent Mississippi from later on requiring reciprocity from the four processors.

I don't exactly understand their reasoning, but they did rule on it.

I would just like to make a final point.

Counsel, perhaps inadvertently -- I'm sure it was inadvertent -- but he made the statement: Louisiana makes the statement in its Jurisdictional Statement.

We are not Louisiana, we're A&P. And I think the whole case, as far as the appellee is concerned, is that we are to be treated as though we are Louisiana. We are simply a processor in Louisiana, trying to sell our milk in Mississippi. And we feel that the barriers erected by Mississippi to our doing this are an unconstitutional burden on interstate commerce,

and they should be stricken.

And we should be allowed a means of bringing out milk in. This is what the Constitution requires, and it's not sufficient, I submit, to say, Well, we are the good guys, and we have reciprocity, and that's all we have to do.

That's not all he has to do, and I submit that although their goals may be laudable, the effect of the law is to lock us out. And we submit that the law should be stricken.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 2:19 o'clock, p.m., the case in the above-entitled matter was submitted.]

- - -