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Supreme Court of the United States

CITY OF NEW ORLEANS, ET AL.,)

Appellants)

v.)

NANCY DUKES, dba LOUISIANA)
CONCESSIONS)

No. 74-775

Pages 1 thru 53

Washington, D.C.
November 11, 1975

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CITY OF NEW ORLEANS, ET AL.,

Appellants

v.

NANCY DUKES, d/b/a LOUISIANA
CONCESSIONS

No. 74-775

The above-entitled matter came on for argument
at 11:25 o'clock p.m.

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
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

JOSEPH NEVES MARCAL, III, ESQ., 2176 Esplanade Avenue,
New Orleans, Louisiana For Appellees

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 74-775, The City of New Orleans against Nancy Duke.

Mr. Loeffelholz.

ORAL ARGUMENT OF JOEL P. LOEFFELHOLZ, ESQ.,

ON BEHALF OF APPELLANT

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

The first issue presented by this matter is one of jurisdiction. We are here before this Court today under the provisions of 28 U.S.C. 1254 subparagraph two which comes from the Fifth Circuit Court of Appeal, the original case being heard by the United States District Court for the Eastern District of Louisiana on an attack upon one of our city ordinances regulating street vendors and hawkers in the historical district known as the Vieux Carre or French Quarter of the City of New Orleans.

That particular ordinance holds and provides that holders of permits not valid for eight previous years may not receive or apply for and get another permit for the coming year, what we would commonly call a "Grandfather Clause."

The District Court, on cross-motion for summary judgment, held in our favor. The Fifth Circuit Court of

Appeals after placing us on their summary calendar, reversed, holding that the ordinance -- the ordinance's Grandfather Clause was unconstitutional as applied.

We filed a direct appeal to this Court under 1254.2.

Now, under 1254.2, a municipal ordinance that is well-established by this time, it can be considered as a statute because 1254.2 merely provides for direct appeal from a Court of Appeals judgment which holds a state statute invalid.

The jurisprudence over the years has established one other requirement, this requirement being that the judgment of the Court of Appeals be a final judgment and what is "final" has been indeed an elusive question down through the jurisprudence.

Most recently, after my brief was filed, this Court, in Dorn versus Salem Inn, did not recognize the fact that this question is, indeed, a hard question.

All of the cases that I have been able to find, mainly Cox, MTM versus Miami, Baxley -- I'm sorry, MTM versus Baxley, North Dakota Board versus Snyder's Drug and Miami Herald versus Tornillo, seem to distill it down to one question.

If the Court of Appeals does finally determine the constitutional question before it and therefore the question will not survive the remand and the remand has no

material effect on the federal constitutional issue, then, for purposes of 1254.2, direct appeal to this Honorable Court, that is a final judgment.

QUESTION: Mr. Loeffelholz, where all that really is involved on this jurisdictional point is whether you should come here by appeal or by certiorari, isn't it?

MR. LOEFFELHOLZ: That is correct, Mr. Justice REhnquist, and we would also submit that the City of El Paso case would allow you to treat this matter as a matter on certiorari as well but at any rate, the Fifth Circuit Court of Appeals' opinion did finally determine that the Grandfather Clause is unconstitutional as it appears in that particular city ordinance.

The only thing left for the District Court to decide is whether that particular provision of the city ordinance is severable from the ordinance's general preclusion of hot dog pushcart vendors in the French Quarter.

There can be no question that the ordinance does create some form of statutory discrimination. That is well-established and conceded.

However, not all statutory discriminations are violative of the Fourth Amendment, as this Court has taught in many, many cases. States are afforded wide latitude in the area of regulation of their streets under the police power and presumption of validity must be presumed at the

time of the legislative enactment.

To be unconstitutional, there must be some form of invidious discrimination based upon some totally arbitrary ground which bears no rational relation to the legitimate government ends sought by the legislation.

The case the Fifth Circuit relied upon heavily in its decision was Morey versus Doud and Morey versus Doud, which was in 1957, some time ago, set forth four distinct requirements to be looked into before a statute is declared unconstitutional.

It starts out by stating the proposition that the Equal Protection Clause of the 14th Amendment does not take from the state the power to classify any adoption of police laws but admits of the exercise of a wide scope of discretion in that regard and avoids what is done only when it was without any reasonable basis and therefore arbitrary.

The second criteria established by Morey is that the classification, having some reasonable basis, does not offend against the Fourteenth Amendment merely because it is not made with some mathematical nicety or because in practice it results in some form of inequality.

The third criteria is that when the classification in such law is called in question, if any state of fact -- and this is important -- can reasonably be conceived that would sustain it -- the existence of that state of facts at

the time the law was enacted must be assumed. The legislature, the legislative body, we are talking about judicial restraint at this point, the legislative body, which is the embodiment of the whole entire City of New Orleans, the council's judgment must be presumed to have been valid at the time that the ordinance was enacted.

So what we come down to actually --

QUESTION: Well, I take it you feel Morey against Doud has no application here at all.

MR. LOEFFELHOLZ: Well, Mr. Justice Blackmun, I feel that it has application in that it is the guiding principle. It sets forth very succinctly what the legion of cases seem to all be saying in different ways. It sets out the requirements which we must investigate and the investigation we must proceed upon very succinctly in one, two, three, four terms.

QUESTION: But you didn't cite it in your brief.

MR. LOEFFELHOLZ: I mentioned it, I believe. I did not cite it.

QUESTION: Well, you did in your jurisdictional statement but I --

MR. LOEFFELHOLZ: I stand corrected.

QUESTION: -- I don't recall that it is in your brief at all so I assume you felt it had no application.

MR. LOEFFELHOLZ: Well, I feel that as far as the

law is concerned, it may have application in the area of the Equal Protection argument and I feel that the Fifth Circuit Court of Appeals, rightly so, looked at those requirements as expressed in Morey versus Doud but their interpretation of it strongly differs from ours.

What we must do, therefore, in the area of Equal Protection arguments, is weigh the society's interest, and the society is you and me and everyone else, against a particular individual's interest to see if the societal interest is compelling and this/important again and therefore predominant over the individual's rights and privileges.

If the state interest is compelling, then the legislation will and must be upheld.

QUESTION: Well, why are we talking about whether or not the state's interest is compelling when you are simply dealing with ordinary economic legislation? I thought that the test you read earlier is that if any set of facts can be conceived even hypothetically that would justify the legislature's actions, the law will be sustained.

MR. LOEFFELHOLZ: Well --

QUESTION: That's the McGowan against Maryland test.

MR. LOEFFELHOLZ: That is the McGowan test, Mr. Chief Justice.

QUESTION: Yes, isn't that what controls here?

MR. LOEFFELHOLZ: That should control. As far as our argument is concerned, we hope it controls and it is, Mr. Justice Rehnquist, as you pointed out, economic legislation, which is what we are dealing with here.

We have the French Quarter of New Orleans and we have an area that must be regulated in some way, shape or form and the way that it is chosen to be regulated definitely deals upon economics and finance.

QUESTION: Well, now, the rationality test did not save the exception in the Illinois statute in Morey and Doud.

MR. LOEFFELHOLZ: No, it did not.

QUESTION: And you have gotten out of Persuadis, I gather, that even though it did not there, the grandfather clause here is saved by the rationality test. Is that it?

MR. LOEFFELHOLZ: Well, that is what it boils down to, Mr. Justice Brennan. That is correct. And as far as -- if I may return for a second to answer Mr. Justice Rehnquist's question on the economic legislation, we do have economic legislation here.

We don't have individual fundamental rights per se in question. The Levy versus Louisiana, Palmer versus Thompson, San Antonio School District versus Rodriguez and legions of cases all held that there are no constitutional guarantees and rights to financial and economic equality,

only that all persons similarly circumstanced be treated alike.

QUESTION: Well, now, here you have, I gather, a hot dog vendor Lucky something-or-other, wasn't it?

MR. LOEFFELHOLZ: Lucky Dogs, that's right.

QUESTION: Lucky Dogs and they have been doing business in the French Quarter for eight years or more. Is that right?

MR. LOEFFELHOLZ: Twenty-two years.

QUESTION: Well, over eight years in any event.

MR. LOEFFELHOLZ: Yes, sir.

QUESTION: And this particular Appellee has been a competitor of Lucky Dogs for only two years. Right?

MR. LOEFFELHOLZ: No, sir, that is not correct. This particular Appellee is not a competitor of Lucky Dogs. In volume --

QUESTION: But it has been doing business for about two years.

MR. LOEFFELHOLZ: Well, it has been doing business for about two years but if you would look at volume one of the Appendix, page 80 and 81, which is all the District Court had before it when it decided, and the Fifth Circuit had before it as well, this is the entire record.

The sworn affidavit -- the sworn affidavit of Miss Dukes and her only employee, Mr. Frank D. Siliker,

state that their only business -- and I go to the middle of the first paragraph of Mr. Siliker's affidavit on page 80 -- their only business, which business"consists of selling drinks, confections and novelties."

It does not mention hot dogs. It mentions cold drinks, confections -- meaning, I would imagine, candy -- and novelties such as, I guess, stuffed animals, horns, buttons, whatever. It does not mention hot dogs and that is significant because in the French Quarter of New Orleans over so many years, the hot dog peddler, peddlers, whatever you want to call them, have been distilled down to this one company and I would say that the factual determination contained in these affidavits certainly would not put Mrs. Dukes and Mr. Siliker on the same footing or in the same class as Lucky Dogs.

Well, isn't the argument that this is a reasonable classification, that hot dogs may be classified one way and soft drinks peddlers another? Is that it?

MR. LOWFFLER: That is correct, and as the Fifth Circuit, in their decision, at footnote -- on page 709 -- footnote 2 -- and I quote -- the Fifth Circuit itself says that Dukes appears no longer seriously to press her original attack on discrimination between vendors of different types of goods.

In any case, we have no difficulty in concluding

that such an Equal Protection claim on Dukes part could not withstand analysis and they cite McGowan and this is all we are saying in the instant matter, that Mrs. Dukes is not within the same protected class, she is not similarly circumstanced as the -- one of the only two people who do qualify under the ordinance's grandfather clause.

Now, the economic legislation argument is important.

The 14th Amendment, we feel, was designed to protect those fundamental and personal rights and not economic interests and privileges.

The reason behind this statute or any other statute must deal with policy -- policy of the Government and with this in mind in the weighing test, which I have stated before, let us see what interest the City of New Orleans has in this legislation and if that interest is indeed compelling enough to overcome the incidental discrimination which is imposed.

QUESTION: Mr. Loeffelholz, why do we weigh any interest in this Court in connection with legislation like that? Isn't that the job for the legislature or the city council, to pick out an interest and support it?

I mean, what if they wanted to give Lucky Dogs a monopoly in the Vieux Carre? Is there anything wrong with that under the Fourteenth Amendment?

MR. LOEFFELHOLZ: No, sir, there is not, as long as the interest of the council was rationally guided and it does further a legitimate governmental interest.

QUESTION: And how do we determine what a legitimate governmental interest is?

MR. LOEFFELHOLZ: Well, I would submit this, Mr. Justice Rehnquist, as you pointed out, that it is not the function of the judiciary to determine that. I listen --

QUESTION: Morey and Doud said that kind of a monopoly couldn't withstand a Fourteenth Amendment --

MR. LOEFFELHOLZ: That is correct, but I believe Morey versus Doud stated that that type of unregulated monopoly could not --

QUESTION: Well, the only one allowed to sell without license -- whatever they were involved with, I've forgotten now -- was American Express Company.

MR. LOEFFELHOLZ: That is correct, but I think that --

QUESTION: By name, American Express Company.

MR. LOEFFELHOLZ: And Lucky Dogs is absolutely not mentioned in that ordinance and there is a very good reason for that because of the fact --

QUESTION: Well, does the ordinance save anybody except Lucky Dogs?

MR. LOEFFELHOLZ: Yes, sir, there is one other

person. His name is -- the name escapes me but it is an ice cream vendor in the Jackson Square area who has been there some 20-some-odd years. He was the only other person which was saved by the ordinance and I --

QUESTION: Any vendor, no matter what he sells, in the French Quarter, I gather, who has been selling over eight years, can continue to sell. It is only vendors of -- vendors, period.

MR. LOEFFELHOLZ: That is correct and I think we have to look at the overall scheme, Mr. Justice Brennan, because --

QUESTION: No, but the distinction here, I gather, is vendors, street vendors in the -- no matter what they sell they and / would if they were selling over eight years, I gather, be allowed to continue selling. Is that right?

MR. LOEFFELHOLZ: That is correct except there is a general preclusion of all vendors in the French Quarter except certain classes of vendors, as the ordinance so states.

I will admit that the ordinance may be inartfully drawn but not so inartfully drawn as to render it unconstitutional.

Certainly there are certain vendors, I believe, provided for in the ordinance other than hot dogs and hot dogs, actually, is not provided in the ordinance and I think you have to read both clauses of the same paragraph of the

ordinance to show, just as you stated, that if you have been there more than eight years, you can stay. If you have not, you will not be allowed in that area and now the central business district, which encompasses the French Quarter, as well.

QUESTION: What's her name, Mrs. Dukes? She doesn't sell ice cream.

MR. LOEFFELHOLZ: As far as I know she doesn't. I don't know. Confections may be ice cream. I really -- it depends upon your interpretation. Factually, I don't know.

At any rate, the waiting process must be had here and as I started to point out before, when the city council passed its ordinance, we must, under Morey versus Doud, as it teaches us, we must presume that their rationale was valid and invoke that presumption at the time the ordinance was passed.

The reason behind the ordinance is very clear. It is crystal clear, really. The historic district of the French Quarter is the oldest historic district continually in existence that I am able to discover in this country. It is 260 years old. It has been the same since the beginning -- since its beginning. It has not changed appreciably, other than, I would imagine, paving of streets, et cetera, but it has not changed appreciably and it is the quaint, unique, very delicate mixture of both residential and economic

interests in that area which make it the heart of the city.

QUESTION: You can't change it. The law says you can't change it. When you repair, you have to put up the same railing you put down.

MR. LOEFFELHOLZ: That is correct, sir. The Constitution of the State of Louisiana provides for the establishment of the Vieux Carre Commission which governs the exterior of all buildings, streets, et cetera in that French Quarter and you can't change it, by law.

It is that important. It is the heart; the economic heart throb of the City of New Orleans is the French Quarter. The whole city surrounds the French Quarter. Hotel and motel construction in the French Quarter is a good indication of real estate values and is a good indication of the economic conditions and important contribution this area makes to the City of New Orleans tax base.

The area is close to the city's employment and entertainment centers as well and many small businesses are established there to cater to the needs of local residents who live there, as well as the tourists who flow there, and citizen alike, by the thousands daily.

So we have a fairly unique situation. It is much akin, as I pointed out in my brief, to the Georgetown area of Washington and what it does for the City of Washington, D.C. and the single most important factor in the French Quarter's

economy is its retailing.

A large number of the many antique shops, gift stores, theatres, restaurants, nationally famous bars, restaurants, et cetera, are centered here and support from these establishments comes mainly from tourists and citizens who are charmed by this historic district so we are talking about not only favoring someone over someone else, we are talking about national historic preservation and we have a vested interest in this national historic preservation.

If that is not a valid and compelling interest, we don't know what is and when the Fifth Circuit declined to even balance the test and said it is enough that the Constitutional infirmities that they saw overcame any balancing necessary, I believe they erred gravely because this area is the most important area of the City of New Orleans.

The City definitely, therefore, has a valid, compelling interest in maintaining the French Quarter's physical, social and economic potential.

Preservation and protection, to be of any significance at all must encompass both the physical and functional elements of the French Quarter that contribute to its identity and environmental unity. You can't just say, like, Mr. Justice Marshall, as you pointed out, we'll make the buildings stay the same and leave everything else

unregulated because if you did that, then people would probably come there, both citizen and tourist alike and say, well, the buildings sure are pretty but I am being troubled and hassled and jostled on the street by so many either street peddlers or whatever that they wouldn't come back and it would begin to deteriorate.

QUESTION: Well, isn't everything you say -- wouldn't it be as applicable, if not more so, if these street peddlers were all eliminated and had no grandfather clause? Isn't this the crux of your problem?

MR. LOEFFELHOLZ: This is the crux of our problem, Mr. Justice Blackmun and I would state that it may well be in the regulatory scheme of things that after Lucky Dogs and this other fella failed to qualify, go out of business or whatever, there will be no peddlers in the French Quarter on the street, which we maintain we can constitutionally regulate.

QUESTION: Is Lucky Dogs -- do they have more than one of these carts?

MR. LOEFFELHOLZ: I believe they have about 17 or 18. They definitely have more than one.

QUESTION: Is it a corporation?

MR. LOEFFELHOLZ: Yes, sir, it is a corporation.

QUESTION: It is likely to be there quite a long time if it has virtually a monopoly, isn't it?

MR. LOEFFELHOLZ: Well, it has been there 22 years and you are correct when you say it may be a legislative monopoly insofar as hot dog peddlers are concerned.

QUESTION: And what about this other vendor, the ice cream vendor?

MR. LOEFFELHOLZ: He may be out of business. He is an individual in the Jackson Square area. He sells ice cream. He is a very colorful individual, as an aside. People seek him out to photograph, et cetera.

QUESTION: Is there any limit on the number of carts that Lucky Dog can put in -- 125 tomorrow, if they wanted to?

QUESTION: No, sir, Mr. Justice Blackmun, there is no limit. Again, this is what the Fifth Circuit seemed to be saying when they talked about -- excuse me, in their decision that the city may well regulate in another way than that which was accomplished such as limiting the number, the size, the way they looked, et cetera, but this is judicial legislation and we feel strongly that the presumption of the city council must be -- must override that judicial legislation and judicial restraint should be practiced in this particular matter.

QUESTION: The question I wanted to ask was, let's assume for the moment that Dukes had gone into business in the Latin Quarter at precisely the same time that Lucky Dog

went into business and that both conducted business in substantially the same manner. Would the city council of New Orleans have had authority to decide which one of those two vendors should remain in business?

MR. LOEFFELHOLZ: Well, Mr. Justice Powell, under this ordinance obviously it would not make a difference but under the hypothet and I think possibly under the Duke decision, if it was -- and the decisions that flow from the Duke -- if it was determined in the legislative body's wisdom that the maintenance of one individual over another would further the industry and that the competition would kill the industry, then I believe that that was a legitimate and valid and rationally-guided decision. Then it certainly would be within their power under those cases to favor one over the other.

We don't have that situation here but in answer to your question I believe we could validly enact such type of legislation.

QUESTION: So that the grandfather clause aspect of this case really is immaterial to your position in theory?

MR. LOEFFELHOLZ: In theory it is, yes, sir, it is, in theory.

QUESTION: And what cases? You said "those cases." What cases?

MR. LOEFFELHOLZ: Ladue --

QUESTION: Ladue?

MR. LOEFFELHOLZ: It is Ladue Local Lines versus Bi-State and Nebbia versus New York. They are cited in my brief.

QUESTION: All right. Thank you.

MR. LOEFFELHOLZ: Simply stated, therefore, when a weighing process is involved effecting the long-range economic welfare of an entire city -- and in the shape that the nation's cities are in today, we'll all recognize that we must give some form of judicial -- we must give some form of judicial recognition to the legislature's wisdom in this area because cities today are in bad financial shape and so we must weigh the cities interests as opposed to the short-range desires of one individual and therefore the judgment of the city council, which is the representative of the people, must, in this matter, be given a wide latitude and liberal construction unless it is patently offensive to the notions of equal protection and fair play which, we submit, it is not.

I would reserve any further time I have for rebuttal, if necessary.

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

Mr. Marcal.

ORAL ARGUMENT OF JOSEPH N. MARCAL, III, ESQ.

ON BEHALF OF APPELLEE

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

I would like to first begin by pointing out that when you consider the legislative history of this permit law, it takes on an entirely different aspect as presented by the city.

This is not simply an identification of a public interest, a sending out of bids, obtaining people to bid on a Lucky Dog push cart or whatever may be that particular interest. This legislative history, as I tried to point out and outline in my brief, is nothing but an indication to me of what I would, in best terms, describe as legislative chicanery and I followed this permit ordinance through other controversies and if I can back up and demonstrate first to the Court, as I have tried to touch in my brief, where the City of New Orleans is doing something other than it would pretend in this situation, that is, preserve the charm and beauty of the Vieux Carre.

Firstly, the City of New Orleans, long ago in 1942, treated with its permit ordinance in a legitimate effort to regulate peddlers on the street and people who generally go about the streets of New Orleans hawking their wares or attempting to sell their wares.

It was not about until around 1970 -- as I treat in my brief -- that the city first began to regulate such things as religious activity, benevolence in education among the streets of the Vieux Carre.

It is no coincidence that at the same time that the city took upon itself to legislate and actually prohibit religious activity on the streets of the Vieux Carre which precipitated a case before the eastern district of Louisiana which I did handle and was successful in denouncing that particular ordinance as it restricted the religious activity, but they also took upon themselves to begin to create -- first they created exemptions.

They said, generally all permits are banned from the French Quarter, except the following exemptions, and this is where they began in their scheme, their discriminatory scheme.

Now, whether or not that was correct or not, I am not going to deal with at this time. That is not the issue here but I am giving the Court, hopefully, an idea of the background and reiterating the background.

They said all permits are banned with the exception of the following, paragraph 5, which is the important and crucial paragraph dealing with hot tamale and push -- hot tamale push carts and hot tamale and hot dog push carts and the like.

They were satisfied with this for a time. Now, at the time that they passed the ordinance, which is in the latter part of 1971, Nancy Dukes was operating her push cart selling foodstuffs, hot dogs, cotton candy, confections and the like on the street. She was selling hot dogs.

QUESTION: Mr. Marcal, your brother on the other side has pointed to an affidavit in this record indicating that your client was not in direct competition with Lucky Dogs, that her push cart, indeed, did not sell hot dogs.

MR. MARCAL: That is a term of a phrase, Justice Stewart, which I feel is unfortunate. I did not supervise the confection of that document but --

QUESTION: That is what the record shows.

MR. MARCAL: That is what the record shows, undoubtedly. It does. My understanding and appreciation was that she was selling hot dogs, among other things.

QUESTION: We have to decide this on the record, now, don't we?

MR. MARCAL: That is correct.

QUESTION: And therefore, so far as Judge Goldberg's opinion for the Court of Appeals states -- and it does state in the first sentence -- that your client maintained a push cart business in the Vieux Carre of New Orleans selling hot dogs, drinks, confections and novelties, that is simply mistaken, so far as the record goes when it says "hot dogs,"

isn't it?

MR. MARCAL: Not as far as the record, as I understand it.

QUESTION: Well, where in the record does it show?

MR. MARCAL: The record -- my understanding, it was before the lower court, Judge Gordon, and he did consider that and this --

QUESTION: Well, the only part of the record bearing on this to which we have been directed is the affidavit to which your brother directed us.

Now, if there is anything else in the record indicating otherwise, please, I'd be interested in knowing. Otherwise, it is --

MR. MARCAL: It is inarticulately termed and that is the only explanation I can offer this Court. It is inarticulately -- and within "confections" was hot dog.

QUESTION: It is a little more than inarticulate. It is just in conflict, direct conflict, with what the Court of Appeals saw.

MR. MARCAL: I was responsible for the Court of Appeals --

QUESTION: Was there some stipulation in the Court of Appeals in oral argument or any agreement at the time that Nancy Dukes was selling hot dogs?

MR. MARCAL: There was no stipulation before the

Fifth Circuit Court of Appeals.

QUESTION: Well, where did the Court of Appeals get that information?

MR. MARCAL: Obtained it from my brief. I handled the brief before the Fifth Circuit Court of Appeals and it was my understanding, based --

QUESTION: Was there oral argument in the Court of Appeals in this case?

MR. MARCAL: No. No, your Honor, there was no oral argument.

QUESTION: But it was obtained from your brief, then, in the Court of Appeals.

MR. MARCAL: That is correct, apparently so. That was my understanding. I did not represent Ms. Dukes before the lower court and that was my understanding based upon the records and documents I had in my file.

There are several statements contained in the record indicating this to me and I had reason to believe it was correct.

QUESTION: Well, perhaps you will have opportunity at lunchtime to find them and direct our attention to them.

QUESTION: Well, incidentally, I notice at page 84 of the record something called "Defendant's separate statement of material facts." That is signed by your brother and that states that she was engaged in the sale and

distribution of "foodstuffs, drinks, confections and novelties."

What is that separate statement of the material facts?

MR. MARCAL: That was the material facts submitted by the city in --

QUESTION: Submitted to whom?

MR. MARCAL: Submitted to the lower court, the District Court, Justice Brennan.

QUESTION: Well, this mentions at least foodstuffs in addition to drinks, confections and novelties. Whether this is significant or not I am not too sure.

QUESTION: Well, I have in mind, though, Counsel, that the very first proposition stated in Nebbia against New York, a leading case cited by your brother, states no more than the well-established law in any area and I read it as a basis for attacking a discriminatory regulation under the Equal Protection clause of the Fourteenth Amendment that party complaining must show that he himself is adversely affected by it.

Now, perhaps, as I say, during lunchtime you can --

MR. MARCAL: From a reading of the record in the stipulations, it left me with the conclusion that she was selling hot dogs among other foodstuffs. She does not concentrate. She never has and never suggested that she

sold merely hot dogs. She sold other foodstuffs and thus you have the two-prong attack.

Unfortunately, the first attack, that is, the discriminatory treatment as to the other exemptions, was the only attack contained in the original complaint.

Subsequent, in an amending complaint, with the amendments brought on by the city council, there was indicated that the grandfather clause was also objectionable and of course there were also statements of material facts contained in the record.

QUESTION: Well, the record does show that Lucky Dogs sells something more than hot dogs?

MR. MARCAL: No, they only sell hot dogs.

QUESTION: Only hot dogs.

MR. MARCAL: My client sells foodstuffs generally which is, inarticulately it is termed in the stipulation. As I said, I had no supervision over the confection of the lower court's pleadings. I was in the Fifth Circuit and it is my understanding from --

QUESTION: You are stuck with the record.

MR. MARCAL: That is correct, Mr. Justice Marshall, I am stuck with it.

QUESTION: And what Mr. Justice Stewart, my brother Stewart was trying to tell you is that, over lunch time, can you find something in this record that says hot dog?

MR. MARCAL: I certainly hope I can, sir.

QUESTION: Well, we'll give you a little leeway, or frankfurters.

QUESTION: Well, what does the word "confection" mean? That is a pretty generally broad one.

MR. MARCAL: I would think it would be sugar-based foodstuffs that would be generally sold. I have relied heavily on foodstuffs in arguing this.

By the way, there was no indication, to my knowledge, that -- before the Fifth Circuit, of an objection to the statement throughout my brief before the Fifth Circuit, that we were dealing with hot dogs and it only comes before your Honors now. I think this issue could have been pointed out before the Fifth Circuit at least by my brother opponent.

If I may get back to what I consider as a treatment of the facts in this case as relates to the law.

First, the city dealt with its exemptions and they said "All permits are banned with the following exemptions," and paragraph 5 was the exemption which dealt with the hot tamale and hot dog push cart.

They said you could obtain a permit to do this in the French Quarter area.

Well, lo and behold, my client, acting under the assumption that they have authority not only to sell hot

dogs -- they took it upon themselves, other foodstuffs -- but they were selling hot dogs at the time of her arrest.

One of her employees, in January of 1972, was arrested for selling hot dogs and foodstuffs in the Vieux Carre, in the face of this very specific paragraph 5 exemption from the general ban in the French Quarter and, of course, this made her very wary. As indicated in the record, these charges were ultimately dismissed.

Subsequent to that, in April of 1972, there appears the grandfather clause which says that all persons as of January of 1972 -- it was retroactive, but passed in April of 1972 -- "All persons prior to January of '72 who have not operated in the Vieux Carre area for more than eight years cannot obtain any permits," aside from the fact they did create some -- they still had the exemptions there.

Now, this lawsuit was filed in August of 1972. Subsequent to that time, the city again amended its statute and deleted paragraph five, the hot dog and hot tamale push cart exemption. And I submit that that is an indication that they had a particular specific design as to hot dogs and hot tamale pushcarts. They wanted to favor them very specifically.

Now, why didn't they do the same thing for the flower vendors in the Quarter? They are exempted. I think that is in paragraph four below but paragraph 45 or 35 or

something like that.

No, they concentrated on the hot dog and hot tamale pushcart exemption because, obviously, they saw the conflict there, that we could not on one hand grant them an exemption but then on the other hand take it away with the eight-year grandfather clause.

QUESTION: Well, that ordinance isn't -- that was replaced by the present ordinance.

MR. MARCAL: That is correct. The -- I don't understand the question, Justice --

MR. CHIEF JUSTICE BURGER: We'll resume there at 1:00 o'clock, unless you want to put the question, Mr. Justice White.

[Whereupon, a recess was taken for luncheon from 12:00 o'clock noon to 1:02 o'clock p.m.]

AFTERNOON SESSION

MR. CHIEF JUSTICE BURGER: Mr. Marcal, you may continue. You have about 18 minutes remaining.

MR. MARCAL: Thank you, Mr. Chief Justice, and may it Please the Court:

As to the mention of hot dogs and foodstuffs, in the lower court, the statement of material facts at page 78 of Appendix Volume I submitted by the City indicates in a statement made by then attorney representing Ms. Dukes, Okla Jones, that plaintiff Nancy Dukes does business under the name of Louisiana Concessions and is engaged in the sale and distribution of foodstuffs, drinks, confections and novelties and at page 84 of the same Volume I --

QUESTION: Well, wait a minute, at 78, paragraph 5 says -- no, I beg your pardon, no. That has reference to the ordinance division, doesn't it? Yes.

MR. MARCAL: That is correct, --

QUESTION: I'm sorry.

MR. MARCAL: -- Mr. Justice Brennan. And at page 84, Mr. Loeffelholz, then still representing the city, indicated the same thing in a separate statement of material facts, that Plaintiff Nancy Dukes was engaged in the sale and distribution of foodstuffs, drinks and confections and novelties.

I submit that hot dogs are within foodstuffs.

Further, I also submit that whether or not -- oh, excuse me.

QUESTION: Why did Judge Goldberg, then, in his opinion, so pointedly emphasize the revision of its ordinances removing hot dog vendors from the list, if that is not important. If the distinction between --

MR. MARCAL: It was -- oh, excuse me, Mr. Chief Justice. I would suggest that it was a point of reference by Judge Goldberg in the Fifth Circuit Court of Appeals and I submit that ultimately it is irrelevant to these issues insofar as we have an unconstitutional statute which I submit not only is unconstitutional in its application but also on its face.

Getting to the statute itself and aside from the arguments on jurisdiction, which I have submitted in brief form and I would not dwell on that particular issue, the unusual character of this discrimination created, while it does not make it subject to the language of the court cited in NAC versus Button, NAACP versus Button or any such cases where they are dealing with the elected franchises very, very fundamental rights, nevertheless, I submit that the language of Morey versus Doud and nothing is taken away from Morey by McGowan, I submit, I argue to the Court, that there must be some relationship between the objects sought in the statute and the discrimination created by the statute. It is --

QUESTION: Mr. Marcal, how do you know what the object sought is in a statute?

MR. MARCAL: The object as stated by the city on appeal, Justice Rehnquist. That is, to preserve the charm and beauty of the Vieux Carre. It is beyond myself to understand. I do not understand how eight years -- as I have pointed out in the brief -- of spreading the mustard on hot dogs somehow or other is going to contribute more to the charm and beauty of the Vieux Carre than really, one year or a year and a half of doing the exact same thing on the part of Ms. Dukes.

QUESTION: What if they just wanted one hot dog peddler in the Vieux Carre?

MR. MARCAL: Very well, if that is what they wanted, what they could have done -- which they did not do and this statute does not do -- they could have set standards of behavior for hot dog salesmen which promote the charm and beauty of the Vieux Carre. This --

QUESTION: Well, what if the city council sits down and decides, we don't want five well-behaved hot dog vendors. We want one well-behaved hot dog vendor. Is there anything unconstitutional about that?

MR. MARCAL I would suggest that that be a regulation and that opportunity would be given to all individuals who apply for that position to be the one

well-behaved hot dog vendor.

QUESTION: Is that a constitutional requirement?

Who owns the Astrodome in New Orleans?

MR. MARCAL: It is the Superdome.

QUESTION: The Superdome?

MR. MARCAL: It is owned by the State of Louisiana.

QUESTION: Well, does the State of Louisiana have to have public bidding on its concessions there or can it just pick somebody out and say the Superdome can only accommodate one concessionaire, you are it, period.

MR. MARCAL: There is a great deal of question as to whether or not they have complied with Louisiana law but my understanding is that there is a requirement for public bidding in Louisiana.

QUESTION: Well, supposing there weren't? As a matter of federal constitutional law would there be a requirement for public bidding?

MR. MARCAL: I think that the operation of Morey versus Doud, McGowan, and the language of this Court consistently reiterated would come into play that when you seek to regulate someone's right to earn a living which is certainly one of the privileges and immunities granted to each individual citizen of this country, you must base your discriminatory scheme upon some rational basis which promotes

what you are trying to protect, your public interest created and I don't think that any ordinance or any city council or any state legislature can simply decide that it is going to favor one man over another person for no other reason other than it desires to favor him.

Now, I suspect that the city council -- I feel that the city council only had one purpose and it was not to promote the charm and beauty of the Vieux Carre, it was simply to favor Lucky Dogs and I point to the legislative history behind this particular ordinance.

It doesn't speak to the deliberation about what is the public interest in the Vieux Carre? What should we do about this problem? There is great -- it is taken for granted by myself that it is one of the interests of the City of New Orleans to protect the Vieux Carre.

However, the manner in which they proceed, that is simply saying, well, if you have been there for eight years it is all right. You can continue to be there.

Now, how that promotes, how that can be made to promote in anyone's mind the charm and beauty of the Vieux Carre is beyond me.

There are no standards as to design and decor of these push carts or the hot dogs, what type of hot dogs, what grade of hot dogs.

There are no standards of behavior for the hot dog

salesmen. There are not even minimal health standards applicable to the sale of hot dogs which somehow or other would promote the charm and beauty of the Vieux Carre.

There is none of this. All we have is a rather colored legislative history which I detailed in my brief before this Court and before the Fifth Circuit, which, I might add, your Honors, was not mentioned before the lower court in any detail whatsoever.

The first time that a United States court of any moment had before it the legislative history was before the Fifth Circuit Court of Appeals, before the lower court and I did not represent this lady before the lower court.

There was not one mention of the legislative history. There was not one detail on how this particular ordinance evolved into its present state. There was no --

QUESTION: Whose fault is that?

MR. MARCAL: Excuse me?

QUESTION: Whose fault is that?

And what does it have to do with our issues now?

MR. MARCAL: The issues now I would submit that the legislative history is very important to the Court's consideration because I think it, in and of itself, belies the statement that this particular ordinance promotes the charm and beauty of the Vieux Carre. There is nothing in that ordinance -- if anything, there is a damning trend apparent in

the ordinances to simply get rid of what the City of New Orleans considers undesireables. In one case they thought it was the Hari Krishna people going about the Vieux Carre and in another instance it happens to be the flower people.

All of these exemptions did not come about merely because the City of New Orleans decided that these exemptions promote the charm and beauty. Each one of them practically has a story behind it, the ice cream vendor, a story of litigation, the flower salesman has a long history of litigation behind it.

I mean, this is not such a thoughtful, objective consideration of what is in the best interests of the charm and beauty of the Vieux Carre, and I want to point that out because much is vague of the charm and beauty of the Vieux Carre.

I think the legislative history belies that, besides the act itself. There are no standards set. There is no reasonable relationship between the discrimination -- that is, if you have been there for eight years, you can sell hot dogs, but you can't if you have been any less and the charm and beauty of the Vieux Carre, how is it promoted?

Being a lifelong resident of the City of New Orleans, I can say, as I have stated in the brief, that these hot dog push carts in no way contribute to the charm and beauty.

I think that much was made in the Appendices provided by myself in the jurisdictional statement and the City of New Orleans in its -- attached to its brief -- of the character of these push carts. They don't lend to the charm and beauty of the Vieux Carre which is that most of the architecture goes back to the 1700's and the 1800's, as New Orleans was then, it has been preserved and then we have what subsequently followed, which I mentioned in the brief, that the city expanded the operation of this ordinance, this grandfather clause, not only it went beyond the Vieux Carre area, it went to the central business district.

Now, as it stands, though it was not the case when this case was decided in the lower court and I point this out to demonstrate that this is a bogus suggestion made by the city that this promotes the charm and beauty -- now, the grandfather clause operates not only in the Vieux Carre but in the central business district, which has no relationship to the -- there is nothing charming or beautiful about concrete and asphalt and this -- the city continues to do things and pass ordinances subsequent to this which really contradict their position here taken today and I think the Court should be apprised of that and now she can't even sell -- Ms. Dukes can't even sell in the central business district and now there might be a different reason for that, I don't know. Who knows why, but --

QUESTION: Is that in the record, Mr. Marcal?

MR. MARCAL: That is in the record. I cited those particular ordinances and put them in my Appendices.

QUESTION: So she is not, in fact, engaged in business there?

MR. MARCAL: I stated in the brief, Mr. Chief Justice, that she is not in there, though it is not in the record because at the time she could have possibly gone into the central business district but I point this out simply to reiterate the point that this is not a serious position taken by the City of New Orleans that somehow or other allowing hot dog salesmen to be in any place in the city simply because he has been there eight years which just happens to coincide with the fact that no one has been there longer than eight years who was selling hot dogs or any other thing -- that doesn't somehow add to the charm and beauty of the Vieux Carre.

I mean, they first set the reason for this legislation and I would submit that they are making a suit to fit a man, they are taking a man that is Lucky Dogs and having him fit the law and it is an afterthought and that is all that this is and it is nothing more than a bare faced monopoly and it is not like the situation of Ladue cited by my brother opponent insofar as there, you had a situation of a creation of a monopoly of a -- of a statewide monopoly for the transit

system, granted there was a legitimate state interest to maintain a transit system which was reliable which could be controlled by a state agency and in that situation undoubtedly there were bids put out. Somebody had to qualify for that position or whatever. There were qualifications and there was a standard set.

Here we don't have any of that. All of a sudden in the middle of April in 1972, they pass a law retroactive to January of '72 and said everybody who was here, was here beyond eight years past and going back to January of 1972 can stay here and Ms. Dukes, you have only been here for two years and you can't stay here.

That is irrational. To allow these people to do this would allow them to run roughshod over other individuals of the calibre of Ms. Duke who obviously, I think the Court can take notice, is not financially well-heeled and is a small person as opposed to Lucky Dogs.

And I would say, as to monopolies, they are generally created only after an interest is established -- an interest which here is protection of the charm and beauty of the Vieux Carre but still you cannot -- though you can establish a monopoly, you still cannot get away from the language of Morey v. Doud and McGowan. You have to establish some rational relationship between the discrimination and the particular purpose of the law. There has to be some

supportive -- some facts that support this discrimination and here we find none except that it is supposed to support the charm and beauty of the Vieux Carre.

Using some of the language of Judge Goldberg, it is inconceivable to me how favoring a venerable hot dog vendor with the skins of eight seasons over one with merely the skins of two seasons somehow promotes the charm and beauty of the Vieux Carre. It does not and I would also submit, as I have touched upon before, that the statute itself, and I reiterate, establishes a monopoly for a lucky business, that is, Lucky Dogs. It gives no opportunity to anyone else to provide a hot dog which is better able to promote the charm and beauty of the Vieux Carre, if you would assume that a hot dog can somehow or other promote the charm and beauty of the Vieux Carre.

And also, it creates a closed class.

There is no possibility, as pointed out by Judge Goldberg, though it usually, in the Morey v. Doud situation, you had there someone who was identified in the act. As Judge Goldberg pointed out in his decision before the Fifth Circuit, it is a matter of record that the only person who could possibly qualify for this would be Lucky Dogs. I mean, there is just nobody else who could possibly ever qualify for this and Judge Goldberg took notice of this in his decision in the footnote and I submit -- and as I have

pointed out before, there is nothing which one could assume as far as I am concerned that a hot dog can do for the charm and beauty of the Vieux Carre by virtue of the fact that the person who is selling it has been there eight years selling it.

We are not talking about, as in the Eslin case out of Florida, which I cited for your consideration, the situation of favoring doctors, such as doctors who would seek to be licensed and exempt these doctors from the operation of the licensing law on the basis that they had been practicing for four years.

I mean, we are not dealing with doctors, we are dealing with what has generally been conceded that are transient vendors who are selling hot dogs on the street corners of New Orleans and there is nothing so qualifying about continually putting transient vendors in the streets for eight years which would justify this type of discrimination and go into and violate and deny Nancy Dukes her right to earn a living which was one of the established constitutional rights and privileges.

It has been established in Coryell versus Corfield, cited with approval in Shapiro v. Thompson and noted by this Court. I mean, a right to earn a living is something you simply cannot take away from a person and this is what this statute does without any rational basis whatsoever and if you really look at it -- and I submit further and again in

repetition, there is nothing so unique about selling hot dogs for eight years that could somehow or other contribute more to the charm and beauty of the Vieux Carre than one selling it for nearly two years.

Thank you, sirs.

QUESTION: Mr. Marcal, what kind of a vendor's wagon did she have? I don't find any photographs of hers as I do of the others. Was it much like the others?

MR. MARCAL: There is nothing in the record but it is my knowledge and I have it from reasonable sources, that her pushcart was painted over. It was -- it had a flower arrangement or something on the side of it and it has now been, I think, dismantled and she is trying to go on to another business though, certainly, she would like to get back into Vieux Carre. It is a very lucrative area and certainly, she would be subject to any reasonable regulations but if this statute is declared unconstitutional.

Of course, that doesn't really --

QUESTION: Nothing was made of the type of rig that she was using, I take it.

MR. MARCAL: No, there was nothing in the record and I know of nothing as to the distinctiveness of her rig as opposed to Lucky Dogs.

Lucky Dogs is a tin arrangement which is supposedly resembling, as I think you have pictures of them in the

appendices.

QUESTION: Yes, they were in the record. Well, we have them out here in front of the building. Sometimes they get in the way.

MR. MARCAL: Well, I think they are subject to reasonable regulations in that they must move on and not interfere with the flow of traffic. However, I don't think that you could simply eliminate them from the streets in favor of one person that had been there merely for eight years.

QUESTION: Can you eliminate them entirely?

MR. MARCAL: I would think so, if they desired, but you cannot, you know, have this type of discriminatory scheme.

QUESTION: Well, you could eliminate them step-by-step, couldn't you?

MR. MARCAL: Subject to certain regulations, I would think reasonable regulations.

QUESTION: You could say they were eventually going to phase out all pushcart dealers and were going to start with the ones who had been in business the least -- the shortest length of time in order to minimize the upset and this year, these people will go out of business. Next year, some other people. Finally, in five years, everyone is going to be out of business.

MR. MARCAL: Again, we go -- I would begin with the right which is regulated, the right to earn a living, whether that is reasonable, whether that promotes the purposes.

QUESTION: You are getting into a substantive argument there, then, that --

MR. MARCAL: Correct.

QUESTION:--the state couldn't put you out of business.

MR. MARCAL: I would think that there is some regulations where people can't comply which would give a reasonable -- which have a basis --

QUESTION: -- on that basis --

MR. MARCAL: Excuse me. Want me to continue the question?

QUESTION: All right.

MR. MARCAL: There are regulations which are certainly -- can be supported, can be substantiated insofar as they have some rational connexity with the desired purpose. That is, it is not in the interest of the Vieux Carre to have any push carts, i.e., we are going to phase them out over a period of time.

I can speculate all sorts of regulations and it is difficult for me to do that.

Thank you, your Honors.

MR. CHIEF JUSTICE BURGER: Do you have anything

further?

REBUTTAL ARGUMENT OF JOEL P. LOEFFELHOLZ, ESQ.

MR. LOEFFELHOLZ: Yes, sir, Mr. Chief Justice.

And may it Please the Court:

Before the luncheon break, the question was put to me or to Mr. Marcal -- I can't remember exactly which one of us -- as to why or was it pointed out to the Fifth Circuit that Lucky Dogs and that Nancy Dukes was not a hot dog salesman.

I would draw your attention to Volume II of our Appendix at page 16, which is a reproduction of my brief to the Fifth Circuit and the bottom paragraph does so point out the fact that Nancy Dukes was not a hot dog peddler in the French Quarter.

QUESTION: Yes, but she was doing confections, wasn't she?

MR. LOEFFELHOLZ: Confections. And it was our understanding at the time of the attack originally, when it was brought in 1972, Mr. Justice Blackmun, was that this was an attack by a vendor of different forms or different types of foodstuffs or different types of things.

She made the contention orally that she was going to sell sandwiches, et cetera, nothing about hot dogs. We are talking about semantics. But nothing particularly about hot dogs per se and I think we can see by the --

QUESTION: Is her case any better or worse whether she did or didn't sell hot dogs?

MR. LOEFFELHOLZ: I believe --

QUESTION: As far as this ordinance is concerned.

MR. LOEFFELHOLZ: I believe, Mr. Justice Blackmun, it may be in this respect because she is -- we maintain that she is not within that protected class that she claims she carries the banner for, a hot dog salesman.

QUESTION: Well, it depends whether she has been eight years a vendor, not whether or not she sells hot dogs, doesn't it?

MR. LOEFFELHOLZ: Well, it depends as it stands today. Maybe it doesn't in a certain respect but she claims to be within a class of people who is favored because they were there eight years and she has only been there two and therefore she says she is discriminated against.

This is where the Fifth Circuit started in the very first sentence of its opinion, as Mr. Justice Stewart pointed out, under the faulty premise, that she was one, a hot dog vendor, and then it goes on in the same paragraph or the next paragraph to state that Lucky Dogs -- it implies that Lucky Dogs had been there only eight years and these two factors combined must be the reason the city council sought to favor the one over the other when, in fact, the facts do belie that.

The facts are strong; in her own sworn affidavit she sells confections, novelties and cold drinks and --

QUESTION: Foodstuffs.

MR. LOEFFELHOLZ: In her affidavit she does not say that, Mr. Justice Marshall.

QUESTION: Your statement did say foodstuffs.

MR. LOEFFELHOLZ: That is correct because the contention she made to the District Court via her counsel, which I was compelled to answer, was that she wanted to go there and sell. She did not vend -- this was the reason that her vendor was arrested, because the hot dog was accepted and he was not selling hot dogs.

At that particular time, there was no eight-year -- hot dogs were accepted. They could be in there and there was no eight-year grandfather clause.

QUESTION: Can I get to another point?

MR. LOEFFELHOLZ: Yes, sir.

QUESTION: In this protection of the French Quarter, et cetera, what are there, too many of these or you want to get fewer numbers or what --?

MR. LOEFFELHOLZ: I believe the overall regulatory scheme shall be, in the future years, to eliminate all transient vendors, street peddlers and hawkers. This is one of the steps in that scheme.

QUESTION: But there is no restriction on the

number that Lucky Dog can have, is there?

MR. LOEFFELHOLZ: There is no restriction at the present time.

QUESTION: So Lucky Dog can put out twice as many as were displaced.

MR. LOEFFELHOLZ: That is correct. However, I would respectfully point out --

QUESTION: Could Lucky Dog also put out one that sold the same things that Ms. Duke sold?

MR. LOEFFELHOLZ: I don't believe they could under the ordinance as it now stands.

QUESTION: Why not?

MR. LOEFFELHOLZ: Because I think that the policy behind the ordinance is clear. I think it is seeking to regulate vendors and eventually eliminate all of them.

QUESTION: But it said --

MR. LOEFFELHOLZ: As it is written, you may be correct. As it is written.

QUESTION: That is why I don't understand what you are driving at. If you give one man unlimited -- could he -- could Lucky Dog buy over Ms. Duke's business and keep it operating in his name, under this ordinance?

MR. LOEFFELHOLZ: As far as --

QUESTION: The answer is yes.

MR. LOEFFELHOLZ: Maybe under the ordinance as it

stands.

QUESTION: Well, that is what we have before us.

MR. LOEFFELHOLZ: Well, that is correct, but we also have to look at the intention of the city council as well. Now, since this suit has been filed in 1972, Lucky Dogs has not done any of the things that you have suggested that it might, under the ordinance. Okay?

QUESTION: That is because the case has been in court.

MR. LOEFFELHOLZ: Well, that may be -- that may be because the case is in court and it may not be, because they were under no restraint.

At any rate, when his client was arrested, he was selling hot dogs -- he was not selling hot dogs, which is the only thing he could sell, and therefore he was arrested.

The Court of Appeals opinion, we would respectfully submit, begins from the two faulty premises and flows therefrom. The entire tenor of the opinion is set by those first couple of paragraphs and the questioned grandfather clause is, in this case, illustrative of the desire not to favor any particular business but to maintain only those features which over the years have become landmarks in the area of the City of New Orleans, over 260 years, not to suggest that Lucky Dogs has been there that long, but all of the features, the sum total of the functional and physical part of the French

Quarter.

It is this entire area of the city which is intentionally preserved and not individual establishments and such intent must -- must be viewed in its entirety and not as the Fifth Circuit Court of Appeals did, dissected into each of its incidental side efforts.

Therefore, we urge this honorable Court to consider such action on the part of the City that it is representing a legitimate and compelling government interest and the presumption, therefore, should be applied as the case law states, and judicial restraint, which is exactly the point as well, should be invoked.

And the Fifth Circuit Court of Appeals' opinion should be overturned and the District Court's opinion reinstated.

Thank you.

QUESTION: I take it, then, you stick on compelling interest.

MR. LOEFFELHOLZ: I would stress compelling interest. That is correct, Mr. Justice Blackmun.

QUESTION: You go that far. And you think you have to go that far.

MR. LOEFFELHOLZ: I believe that in this Court we must go that far.

Thank you.

MR. CHIEF JUSTICE BURGER: The case is submitted.

[Whereupon, at 1:26 o'clock p.m., the case was
submitted.]