In the

Supreme Court of the United States

Joseph W. Jones, as Director of the County of Riverside, California, Department of Weights and Measures,

Petitioner,

v.

The Rath Packing Company, et al.,

Respondents.

No. 75-1053

Washington, D. C.
December 6, 1976
December 7, 1976

Pages 1 thru 55

HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

lnks

IN THE SUPREME COURT OF THE UNITED STATES

JOSEPH W. JONES, as Director of the County of Riverside, California, Department of Weights and Measures, Petitioner, v. THE RATH PACKING COMPANY, et al., Respondents.	No. 75-1053

Washington, D. C.,

Monday, December 6, 1976.

The above-entitled matter came on for oral argument at 2:29 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
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

LOYAL E. KEIR, ESQ., Deputy County Counsel, Riverside County, California, 3535 Tenth Street, Suite 300, Riverside, California 92501; on behalf of the Petitioner.

ALLAN J. GOODMAN, ESQ., Deputy Attorney General of California, 3580 Wilshire Boulevard, Los Angeles, California 90010; on behalf of California, et al., as amici curiae.

DEAN C. DUNLAVEY, ESQ., Gibson, Dunn & Crutcher, 515 South Flower Street, 47th Floor, Los Angeles, California 90071; on behalf of the Respondents.

- - -

C O N T E N T S

[Second day - pg. 25]

- - -

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 75-1053, Jones against Rath.

Mr. Keir, I think you may proceed whenever you're ready.

ORAL ARGUMENT OF LOYAL E. KEIR, ESQ.,

ON BEHALF OF THE PETITIONER

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

Before I begin my discussion of petitioner's contentions, I would like to invite the Court's attention to an error that appears in Petitioner's Reply Brief, and I invite the Court's attention particularly to page 8 of the Reply Brief, where we have quoted a portion of Handbook 67. I'm looking down towards the bottom of the page, which starts with the words "It is admitted that such indefinites" and so forth.

Actually that quotation ends in the middle of a sentence. And we think this was a publisher's or printing error, and the full quotation actually appears in the Appendix to the amicus curiae brief of 33 States that was filed in support of the petition.

I'm referring to the amicus curiae brief, that is, the first one filed by the several States; there was a later one filed concurrently with the petitioner's opening brief.

And at page --

QUESTION: Mr. Keir, why don't you do this by letter?

MR. KEIR: Beg your pardon, sir?

QUESTION: Why don't you tell this information by letter?

MR. KEIR: I was going to suggest, Your Honor, that I would write a letter to the Clerk and set forth the complete quotation, so that we can correct the record. If that is okay?

MR. CHIEF JUSTICE BURGER: Very well.

MR. KEIR: This is a case which comes to the Court on a writ of certiorari to the Court of Appeals for the Ninth Circuit.

It involves the enforcement of a California statute and California regulations pertaining to the weights and measures of packaged commodities.

Actually, we have two separate but related cases here, namely, the Rath Packing Company case, which involves packaged bacon, and the General Mills case, which involves packaged wheat flour.

Although there were a number of issues that were decided by the lower courts, the principal holding of both the United States District Court and the Court of Appeals for the Ninth Circuit is that the California statute and its inter-

pretative regulation are preempted by federal law. More specifically, the Federal Wholesome Meat Act of 1967 in the Rath Packing Company case, and the Federal Food, Drug, and Cosmetic Act, and the Federal Fair Packaging and Labeling Act in the General Mills case.

The issue of preemption is the only issue that petitioner has raised in the petition to this Court.

In discussing the inspection process that is followed by petitioner and other enforcement officers in California, I should first define a term that will be used during the course of the oral argument. This is the term "lot". A lot may be defined as a group of apparently identical packages found at the same place and at the same time.

For example, 500 packages of wheat flour found in a -- on the shelves of a Safeway Store on a certain date, each package stating that it contains ten pounds net weight. Now, this is a "lot".

The inspection process that is followed by the inspection officers in California does not involve inspection of each package in a lot. Obviously, that would be too expensive and too time-consuming.

Instead, under the California system, and Article 5 is how we ordinarily refer to the California regulation, provides for lot averaging. And this is done through random sampling. For example, in the example that I gave of a lot of

500 packages, the inspection officer would select 25 samples, and he would take them from various parts of this lot, so that he would get a group of representative samples of the lot.

These are taken at random. These packages are weighed and the net weight of the average is determined. If that net weight is equal to or more than the labeled weight, then the entire lot is approved. If the lot average net weight is less than the labeled weight, then the entire lot is ordered off sale.

Now, this system that's followed in California is a statistically valid system, and it has so been held by the United States District Court.

One of the basic defenses that has been raised by the respondents is that the California system does not provide for reasonable variations. That is, variations caused by discrepancies in manufacturing processes, or gain or loss of moisture during the course of good distribution practices.

However, we wish to respond to this argument, and that is that the California system does provide for reasonable variations, and that these variations are taken into account through the lot-averaging system. In other words, variations are inherent, by the very use of the lot averaging system.

Although there is no specific mention in the California regulation as to variations caused by loss or gain of moisture, variations under the State system can be for any

reason or for all reasons.

We must emphasize that contrary to what the respondents would have the Court believe, reasonable variations do not mean shortages below the lot average. This warning was clearly set out in Handbook 67 published by the National Bureau of Standards of the Department of Commerce. And Handbook 67 states that this is the basic requirement of the National Conference of Weights and Measures, and of the Food and Drug Administration.

We would submit to this Court that the Court of Appeals for the Ninth Circuit made three basic errors.

To the extent that time permits, I will discuss one of the errors, and Mr. Goodman will discuss the other two.

The first one, the first error is the determination by the Court with regard to the time when accuracy of weights and measures is to be determined.

The second error is in the Court's interpretation of the concurrent jurisdiction provisions in Section 408 of the Wholesome Meat Act, which may be found in Title 21, Section 678.

And thirdly, the error by the Court in its interpretation of the provisions of the Fair Packaging and Labeling Act in so far as it related to the Food, Drug, and Cosmetic Act. In this connection I refer specifically to Title 15, Section 1461.

QUESTION: Each of these errors, Mr. Keir, I take it, is in the context of saying the Ninth Circuit was wrong in saying there was preemption?

MR. KEIR: That is correct, Your Honor.

All three of these errors deal strictly with the issue of preemption.

I go now to the first error, which we assert was committed by the Ninth Circuit, and that is in its determination as to the time when accuracy of weights and measures is to be determined. And that is, according to the Ninth Circuit, it's the time of packaging of the product.

The Solicitor General, in his amicus curiae brief filed with this Court, agrees with the Ninth Circuit, that the time of packaging is the key time.

Interestingly enough, however, the respondents, contrary to the Ninth Circuit and the Solicitor General, maintain that the proper time for determining accuracy is the time of shipment.

Petitioner contends that the State standard is the time of sale to the consumer, that this is the only correct standard, and it is the only standard that can be correctly identified with the interests of the consumer.

Surely, we would be hard-pressed to find even one consumer who, when he picks up a food package in a supermarket, and looks at the label, would think to himself that this label

speaks as of the date of packaging or as the date of shipment from some distant shipping point.

The natural thing for a consumer to think to himself, when he examines the package and looks at the label, is that "the label speaks to me now".

QUESTION: Mr. Keir, can I just be sure I understand your argument in this very point. You say the proper view is that the State requirement speaks of the time of sale to the consumer?

MR. KEIR: That's correct, Your Honor.

QUESTION: And that the Court of Appeals for the Ninth Circuit and the Solicitor General erroneously said that the time, the critical time was the time of packaging?

MR. KEIR: That is correct.

QUESTION: Now, were they talking about the critical time within the meaning of the federal statute or within the meaning of the State statute?

MR. KEIR: Well, they were referring to the federal standard.

QUESTION: And do you disagree with their interpretation of the federal standard?

MR. KEIR: I plan to come to that, Your Honor. Our position is that the time of sale is not only the State standard but is also the federal standard. This is part of what I propose to urge upon this Court.

QUESTION: That they have, in effect, enforced their own law incorrectly is what you're saying.

I'm having trouble, because it seems to me that you may be arguing your opponent's case, if you're saying the State standard is A, the federal standard is B, therefore they are different; then, within the meaning of the statute, it seems to me you lose, because the statute says you cannot have different standards.

MR. KEIR: Well, I propose to --

QUESTION: I just want to be sure I understand how your argument fits together.

MR. KEIR: I propose to urge upon the Court, Your Honor, that the standard which we submit here, namely, the standard of accuracy at time of sale, is not only the State standard but is also the federal standard. And that both the Ninth Circuit and the Solicitor General are in error in their conclusion that the time of packaging is the federal standard.

QUESTION: Then you're saying the federal statute requires the Department of Agriculture to use the time of packaging as the only permissible time for determining all this?

MR. KEIR: Well, --

QUESTION: Required to use the time of sale as the only permissible time.

MR. KEIR: The Ninth Circuit determined that the time of packaging is the correct time, not because the federal statute stated that, but because this was the conclusion of the Ninth Circuit.

And the Solicitor General agreed with it.

As I stated, the respondents, on the other hand, disagree with both the Ninth Circuit and the Solicitor General, and they claim that the correct time is the time of shipment.

QUESTION: When you say the correct time, how do you measure correctness, by federal law, by State law, or by what's a better way to do the job? I'm not quite -- that's what I'm having trouble understanding.

MR. KEIR: Petitioner is trying to urge upon this Court what is the proper time for determining accuracy of weights and measures, and, as we develop our argument, we intend to present to the Court the proposition that this principle of having accuracy of weights and measures at the time of sale to the consumer is a standard which is both a State standard as well as a federal standard.

QUESTION: One required by federal statute?

MR. KEIR: Yes.

QUESTION: Well, I don't like to beat a dead horse, but the question in this case isn't which time is the proper time, from the point of view of which is the best policy at which -- which time does the best policy require that it be

measured, but, rather, what does the federal standard require and what does the State standard require.

That's the questions, isn't it?

MR. KEIR: That is right, Your Honor.

QUESTION: And if they are different, then there is federal preemption. That is, they are different and incompatible, then there is federal preemption. Regardless of the wisdom of it.

MR. KEIR: Well, Your Honor, --

QUESTION: Isn't that correct?

MR. KEIR: That is correct.

QUESTION: And if they are not different --

MR. KEIR: I see that my time is up. Mr. Goodman and I are sharing our time.

I will now yield to Mr. Goodman.

MR. CHIEF JUSTICE BURGER: Mr. Goodman.

ORAL ARGUMENT OF ALLAN J. GOODMAN, ESQ.,
ON BEHALF OF CALIFORNIA, ET AL., AS
AMICI CURIAE

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

Let me begin by responding to Mr. Justice Stevens' question, and Mr. Justice Stewart's question, about the time of accuracy.

It is, in fact, as the Court will see from Mr. Keir's

brief -- I think he's just a little flustered in oral argument -- that petitioner's contention as is amici's contention, on whose behalf I rise today, is that the federal standard is true weight at retail.

The Ninth Circuit's reasoning is that --

QUESTION: That means true weight at sale?

MR. GOODMAN: That's correct, Your Honor, true weight to the business purchaser, true weight to the individual purchaser, because that is the only way in which a businessman, for example, --

QUESTION: If the federal statute is to be read "true weight at packaging time", that's the end of this case, isn't it?

MR. GOODMAN: Well, YourHonor, we don't think that it is.

QUESTION: I see.

MR. GOODMAN: And I will come to that point in a minute, if Your Honor please.

QUESTION: Mr. Goodman, if you crank it up a little higher, you'll get the mike -- no, see inside there? The other way.

MR. GOODMAN: Very good. Thank you, Your Honor.

The federal -- the Ninth Circuit decision holds that the standard is true weight at the time of shipment from the packaging plant, but that -- and that reasonable variations

are allowed thereafter.

Our principal contention on this point is that the phrase "reasonable variations" has been misconstrued by the Ninth Circuit.

For example, we know, and the Court will of course recall its own decisions, which say that the purpose of the three federal statutes in issue here -- the Food, Drug, and Cosmetic Act, the Fair Packaging and Labeling Act, and the Wholesome Meat Act -- are all,in the language of the Fair Packaging and Labeling Act, to provide consumers with accurate information as to the quantity of contents and other statements on the package label.

Secondly, there is a decision of the Second Circuit, United States vs. Great Atlantic & Pacific Tea Company, 92 Fed 2d 610, in which a State inspector found prints of butter, one-pound packages of butter, to be -- to contain less product than stated on the label at the retail store. In affirming the district court's conviction of the Atlantic & Pacific Tea Company for misbranding, the Second Circuit said, and I quote: "There can be no dispute that the under-weight prints of butter were misbranded, specifically focusing upon the reasonable variations language in the statute."

Let us consider the analogous statute, the Federal Insecticide, Fungicide and Rodenticide Act. That Act provides, as do two of the three Acts here in question, that the Food,

Drug, and Cosmetic Act and the Wholesome Meat Act, that the Secretary shall require true weight, provided that reasonable variations may be permitted.

Pursuant to that statutory command, first the Secretary of Agriculture, and later the Environmental Protection Administration, both require that some packages may be over and under, so long as at retail the packages are full weight.

Thus, in that case, as the Court may recall from looking at the briefs, the standard under the Insecticide Act is true weight per package poisonous. There should be no reason why the statutes in issue in this case, which use the same language, should permit short-weight in food products.

Let me turn now to the questions of preemption. Thus -- the first step is, is there a conflict between the statutes?

We have to deal with the three statutes in terms of historical perspective. The first is the Food, Drug, and Cosmetic Act, which, as the Court, I am sure, recognizes, does not have any preemptive language. So the question is, in this Court, for example, in Campbell vs. Hussey, does this statute impermissibly conflict, does the California law impermissibly conflict with the federal?

It's our position that it doesn't, because, as I have just discussed, the federal law requires true weight at retail.

Moreover, even if there is a conflict, prior

decisions of this Court, especially the decision last term in Great Atlantic & Pacific Tea Company vs. Cottrell, specifically permit the States to have more stringent standards, provided those standards are not discriminatory.

QUESTION: But is that the language that's important or controlling in this case? Or is it the language dealing with requiring information different from, as between the federal and State standards?

MR. GOODMAN: Mr. Chief Justice, I think Your Honor is referring now to Section 408 of the Wholesome Meat Act. Let me proceed directly to that point, and discuss both that point and 1461 of 15 U.S.C., which is the Fair Packaging and Labeling Act standard.

The language in Section 678 of 21 U.S.C., or Section 408 of the Wholesome Meat Act, only prescribes that States may not have marking, labeling, packaging or ingredient requirements which are in addition to or different than the federal law.

However, in the same sentence, later in the same clause, it gives the States concurrent jurisdiction to enforce adulteration and misbranding requirements and the standard to be met is so long as the State requirements for adulteration, misbranding are consistent with the requirements under the Wholesome Meat Act.

And thus, the only standard which the State must

follow, which the States must follow under the Wholesome Meat Act, is the same as under the Food, Drug, and Cosmetic Act. What Congress said, marking, packaging, labeling and ingredients are preempted, but misbranding is not.

Now, contrary to respondents' assertion and contrary to the assertion, for example, in the amicus brief filed by the National Independent Meat Packers Association, there is a distinction between labeling and misbranding.

What NIMPA argues in its amicus brief is that the term "labeling" has swallowed up the term "misbranding", and this is almost a direct quote, "labeling includes misbranding".

But, if that is the case, then how do respondents and respondents' amici solve the problem of misbranding, including definitions of things other than labeling?

For example, 601(n)(5) in 21 -- 601(n) of 21 U.S.C. also says that a package is misbranded if it's deceptively filled. That is clearly not a labeling requirement.

So there is a distinction between labeling and branding, something that we discuss in further detail in our brief. And that same distinction applies to 15 U.S.C., Section 1461, under the Fair Packaging and Labeling Act.

Finally, let me respond to a question which was asked before, Is preemption the only grounds upon which we urge reversal?

The answer to that is no.

Assuming that the federal law does not require accuracy at time of retail sale, and assuming that this Court would otherwise -- or thereby hold that there is an impermissible conflict between the State and federal laws, it is amici's contention that this Court's decision last June, after we filed our amicus brief, in National League of Cities vs. Usery, still compels reversal of the Ninth Circuit's decision.

The Ninth Circuit's reasoning is that the States may not exercise our sovereign police power to protect our business and consumer purchasers against deception in the sale of food products.

QUESTION: Is this a constitutional argument?

MR. GOODMAN: Yes, Your Honor, it is.

QUESTION: The National League of Cities decision might be very relevant and even persuasive here, if it were the State that were in the business of producing and selling the bacon or the flour; but it isn't.

MR. GOODMAN: Mr. Justice Stewart, what Section 678 of the Wholesome Meat Act says is marking, labeling and packaging, ingredients may not be imposed by any State. The State is in the business of assuring true weight at retail, has always been, that is a historic police power recognized by this Court --

QUESTION: Well, if one should accept that argument, one could just forget the preemptive effect of federal law,

couldn't they?

MR. GOODMAN: No, Your Honor, --

QUESTION: Isn't that right?

MR. GOODMAN: -- it doesn't necessarily follow. This case is even easier than Usery, because, in this case, the activity engaged in by the State is the activity of a sovereign power, this is a power which, in Turner-vs. Maryland, this Court recognized --

QUESTION: It's a sovereign power imposing regulations on private individuals, not acting for itself, isn't it?

We didn't say in National League of Cities that the federal law governing wages couldn't preempt State law governing wages, where you're talking about applying it to private concerns. And isn't that what you have here?

MR. GOODMAN: No, Mr. Justice Rehnquist, I don't think so.

The activity of the State here is an activity that can be engaged in only by a State.

QUESTION: Well, regulating people.

MR. GOODMAN: Yes, Your Honor.

QUESTION: By a State or, in our society, by the State government or by the local government or by the federal government or by whatever; but it's pretty well accepted that if there's incompatibility, then the federal regulation preempts the others.

MR. GOODMAN: Let me return to --

QUESTION: Is that correct?

MR. GOODMAN: In response to Your Honor's question, let me return, then, to Great Atlantic & Pacific Tea Company vs. Cottrell, in which the Court again held that the State of Mississippi could enforce its own more stringent laws with respect to the adulteration of milk products. And let's discuss the respondents' argument in this case in light of that decision.

We know that in the Food, Drug, and Cosmetic Act, and in the Wholesome Meat Act, the terms "adulteration" and "misbranding" are statutorily linked; thus, in Section 408 of the Wholesome Meat Act, it says the States may enforce adulteration or misbranding requirements, so long as they are consistent with.

The respondents' contention is that they cannot be held accountable for the standard of the product, the quality of the product, the contents of the product at the time it leaves the shipping dock.

What that means is that applies not only to the net weight, which is the question presented in this case, but to bacteriological standards as well; and thus, if they cannot be required to have true weight at retail, then can they be required to have wholesomeness at retail? We submit the answer to that question is: All three federal statutes --

excuse me, the Food, Drug, and Cosmatic Act, and the Wholesome Meat Act require wholesomeness at retail, as well. And the issue in this case turns on the question of whether we're going to revert to a standard of wholesomeness when packed, as opposed to wholesomeness at retail.

Thus, under the language of A&P v. Cottrell, the State has a concern, an interest, a need to require true weight and wholesomeness at retail and, moreover, so does the federal government. And that's why the three federal statutes must be interpreted as requiring true weight at retail.

QUESTION: There was no preemption question involved in the A&P case, was there?

MR. GOODMAN: That, Mr. Justice, is --

QUESTION: It was just the commerce clause, was it not?

MR. GOODMAN: That is correct, Your Honor, and I appreciate the Court pointing that out, because, in this case, there is no commerce clause question, because the respondents have not cross-petitioned.

But the language of this Court in Cottrell, we believe, does stand for the proposition that there is an inherent interest on the part of the States in requiring true weight at retail.

Let me, in closing, make one other point, and that is that, as in the Solicitor General's brief, they refer to

the proposed revision of Handbook 67 and have lodged that with the Court.

One of the statements in Handbook 67, one of the conclusions of the author that were by the National Bureau of Standards, is that the present packaging practice is for packagers to overfill between 70 to 90 percent of their product. That appears in the Handbook, which has been lodged, on either page 8 or page 12.

The present packaging practice of industry is to overpack.

In conclusion, we contend that, for each of the reasons set forth in our brief and as discussed today with certain brevity, that the Ninth Circuit decision ought to be reversed.

What respondents seek is a rule that short-weight -- by their interpretation of the reasonable variations provision -- that short-weight packages must remain on sale, and that overweight packages must be removed from sale. And thus, the Ninth Circuit held that one of the reasons why the State law was less stringent than the federal law was because we did not require enforcement action against overweight packages.

And it's our contention, as set forth more fully in our brief, that that simply doesn't make good enforcement sense, it is very expensive to the packer, and it doesn't do anyone any good.

Thank you.

QUESTION: General, could I -- has the State abandoned the -- any arguments about Younger v. Harris?

MR. GOODMAN: No, Your Honor. The problem, if I may say so, in this case is that the Court granted the petition for certiorari in No. 1053, but did not -- is still holding the petition in No. 1052.

QUESTION: I see. So you haven't abandoned it?

MR. GOODMAN: We have not abandoned those arguments, Your Honor. I am, of course, the principal author of that brief, and the Court has simply not acted upon that petition.

QUESTION: And I suppose that if there are really jurisdictional questions, we necessarily must reach them?

MR. GOODMAN: I'm sorry, I didn't hear the end of that.

QUESTION: If there are jurisdictional questions, we necessarily must reach them, I suppose?

MR. GOODMAN: Well, it's an interesting procedural posture in this case, Your Honor.

There were, in fact, two complaints filed in the district court. The Rath vs. Becker action, upon which 1052 is based, proceeded through trial, after objections were made and after a writ was taken on the Ninth Circuit, and a writ denied on the jurisdictional question. And this action, although filed, was not served until after the trial in Becker.

So that it would be possible, I suppose, for the Court to decide this --

QUESTION: Well, the jurisdictional issue certainly survives, no matter what.

QUESTION: And isn't it lurking in this case?

MR. GOODMAN: Well, Your Honor, that's not the only issue lurking in this case. In fact, we have some evidentiary problems which are set out --

QUESTION: Well, I know, but the jurisdictional issue is certainly here, I think.

MR. GOODMAN: Yes, Your Honor, it is.

Now, if Your Honor would like me to respond on this --

QUESTION: No. No, I just wanted --.

QUESTION: But you haven't abandoned them, --

MR. GOODMAN: No, Your Honor, we have not abandoned them.

QUESTION: -- even if you could.

MR. GOODMAN: We certainly do not want to. That same question has come up in subsequent cases.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Mr. Dunlavey, we will ask you to begin the first thing in the morning, at ten o'clock.

[Whereupon, at 3:00 o'clock, p.m., the Court was recessed, to reconvene at 10:00 o'clock, a.m., Tuesday, December 7, 1976.]