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In the

Supreme Court of the United States

James B. Hunt, Jr., Governor of the State of North Carolina, et al.,

Appellants,

v.

Washington State Apple Advertising Commission,

Appellee.

No. 76-63

Washington, D. C.
February 22, 1977

Pages 1 thru 48

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IN THE SUPREME COURT OF THE UNITED STATES

JAMES B. HUNT, JR., Governor of the State of North Carolina, et al., Appellants,	:	
v.	:	No. 76-63
WASHINGTON STATE APPLE ADVERTISING COMMISSION, Appellee.	:	

Washington, D. C.,

Tuesday, February 22, 1977.

The above-entitled matter came on for argument at 10:13 o'clock, a.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
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

JOHN R. JORDAN, JR., ESQ., Jordan, Morris and Hoke, 1414 Branch Banking and Trust Building, Raleigh, North Carolina 27602; on behalf of the Appellants.

SLADE GORTON, ESQ., Attorney General of the State of Washington, Temple of Justice, Olympia, Washington 98504; on behalf of the Appellee.

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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 first this morning in 76-63, Hunt, the Governor of North Carolina, against Washington State Apple Advertising Commission.

Mr. Jordan.

ORAL ARGUMENT OF JOHN R. JORDAN, JR., ESQ.,

ON BEHALF OF THE APPELLANTS

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

In 1971 the State of North Carolina enacted a general statute requiring that "no grade other than the applicable U.S. grade" be shown on closed containers or apples sold or offered for sale in North Carolina.

In 1973 the statute was amended to include the words "or shipped", an amendment which was probably not necessary, but to make a material amendment making the U.S. grade the exclusive grade marking on closed containers.

The statute has at all times, both in 1971 and in 1973 applied to apples grown within North Carolina as well as apples grown elsewhere, and, furthermore, there has never, at any time, been any prohibition on the labeling of apple containers so as to state that they were grown in Washington or in any other jurisdiction.

May we quickly explain that apples are graded by the use of terms such as "extra fancy", "fancy", "No. 1" and so

forth. These grades can be arbitrarily changed from year to year by various agencies of the thirteen commercial apple-growing States. And apparently this is sometimes done to create a market for a particular quality of apples.

Indeed, the Washington State Director of Marketing has this power and has changed the Washington State grade since this controversy began. Thus, what was a "fancy" apple last year may not be this year, although the name is the same.

The General Assembly of North Carolina exercised the police power of the State to prevent confusion in the wholesale marketplace, where apples are sold in closed containers and not available for ready viewing by professional apple purchasers.

QUESTION: Is your State, North Carolina, one of the thirteen States that commercially produce apples?

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

QUESTION: And would it be true that apples produced in your State, and sold to wholesalers in your State, would not be in closed containers?

MR. JORDAN: Not necessarily so. I believe that the practice in North Carolina is the same as the practice in Washington. Some are sold in closed containers intrastate and some are not.

QUESTION: But all apples imported into North Carolina from Washington and sold to wholesalers in North Carolina would be in closed containers, is that right?

MR. JORDAN: Yes, Your Honor.

Now, by use of the U.S. grade only, there can be no arbitrary manipulation of labels between Fancy and Extra Fancy, whether by North Carolina or by any other jurisdiction. The federal grades are the only uniform and consistent grades.

The Washington State Apple Advertising Commission filed a suit for declaratory judgment that the statute is unconstitutional and prayed that enforcement be permanently enjoined.

A three-judge district court sitting in North Carolina held that the statute contravened the commerce clause and enjoined its enforcement in so far as it precluded the display of the Washington State grade on the containers, but it did not strike down the requirement of the North Carolina statute that the U.S. grades must be shown.

And the Court will recall, as I indicated a moment ago, that that goes all the way back to the 1971 enactment, the original enactment by the General Assembly.

Three questions are presented by the appeal. They are the standing of the Washington State Commission to bring this action; the jurisdictional amount; and the district court's determination that the North Carolina statute contravened the commerce clause.

May it please the Court, we would like to briefly address each of those, and, first, to address the threshold

questions of standing and the jurisdictional amount requirement.

We respectfully submit that the Advertising Commission's pleadings do not contain the necessary allegation of injury in fact to establish standing. Rather, the complaint alleges an injury to individuals who are not parties to this action. I will come to the action in a representative capacity in a moment. At this time, may it please the Court, I am talking about an action by the Commission for itself.

Now, the plaintiff is an advertising activity. It's interesting to note that there is a self-serving portion of the statute creating the Advertising Commission, and it is set out in the Appendix, elaborately stating that it was enacted within the police power of the State of Washington. The very thing which is before us ultimately under the commerce clause, when we test the North Carolina statute.

QUESTION: Would you agree that the Washington Commission performs substantially the functions of the traditional trade association of growers or manufacturers?

MR. JORDAN: No, sir, we respectfully disagree. And I will --

QUESTION: Do you think the district court's reference in the opinion to the association was a Freudian slip then?

MR. JORDAN: May it please Your Honor, I believe that the district court misread the Warth case and others, because there we were referring to associations. This is not an

association.

QUESTION: This is a State governmental agency, isn't it?

MR. JORDAN: That's exactly what it is, may it please the Court. Not a single grower in the State of Washington has any option about this matter whatsoever. He is assessed, and he pays, and the Commission then spends his money to advertise his apples.

He can't refuse to join, may it please Your Honor; he is an individual who pays the Commission to do this, but there is nothing which disqualifies him, if he is injured by the North Carolina statute, from bringing an action. And certainly if his injury exceeds $10,000, he could bring it in the federal court; if it does not, he could bring it in the State court.

QUESTION: But you would say that this State agency does not perform substantially the same functions as a trade association?

MR. JORDAN: Your Honor, I would say it does not. Its principal function is advertising, and if you will look at the complaint, even in its amended form, with the second bite at the cherry, all that Washington State contends that the Washington State Advertising Commission does in the State of North Carolina is advertise. They say, "We spent $25,000 in advertising."

Well, there is nothing in the North Carolina statute which says you cannot advertise. Every carton coming into North Carolina can display in the largest possible wordage "Washington State Apples", and, indeed, in hearings before the North Carolina Advertising Commission, we showed that that was being done, and we have no objection to it. We welcome their advertising that they were grown in Washington.

What we are saying, though, is to put the Washington State grade on the carton, on the closer container, is offensive to the North Carolina statute because within the police power the General Assembly of North Carolina found that there was confusion in the marketplace --

QUESTION: You're talking now about standing, aren't you?

MR. JORDAN: Your Honor, I am. I'm getting ahead of myself, and --

QUESTION: Yes.

MR. JORDAN: -- if I may return to my notes.

The Linda case in 1973, which is cited to this Court so often, reaffirmed the requirement that a party seeking review must itself have suffered an injury, and when the constitutionality of a statute is attacked, the party invoking jurisdictional power must show that it has sustained direct injury as a result of the statute's enforcement.

And there, both the Sierra Club case and the Warth

case say that it must appear in the complaint. That's the --

QUESTION: Excuse me, would you say that the plaintiff would have standing if the statute said there shall be no advertising on the containers?

MR. JORDAN: There we run into a question, of course, of commercial freedom of speech, which we do not think is relevant in this case, because we do not say that you can.

QUESTION: No, I'm asking you if the statute said that, do you think the plaintiff in this case would have standing?

MR. JORDAN: That plaintiff would have standing, I would --

QUESTION: But isn't this statute similar to that in that it limits the kind of advertising that can go on the container? In other words, that says you may not advertise the Washington grade on the container.

MR. JORDAN: I think I follow Your Honor's thinking in that, in that Judge Dupree sitting alone, in passing on the jurisdictional question -- at our own request; we filed a letter with him, asking him if he would do that sitting alone, before the three-judge panel was convened -- Judge Dupree referred to commercial advertising, in saying that the Commission had this right to advertise.

But, of course, looking again to the two recent Virginia cases before this Court on commercial advertising,

they do not say that you can't regulate. And here, all we're saying is that you may advertise where your apples came from, but you can't confuse the wholesale purchaser by having multiple grades.

QUESTION: What you're saying, in effect, is that putting the grades on the label is not a legitimate form of advertising. And if you say that, haven't you conceded standing, is what I'm getting at.

MR. JORDAN: Only to this extent: that if other advertising is permitted, then the degree of advertising, which is the -- the degree test which is applied to commercial advertising,under the First Amendment, is met.

And, as we say,they can put any kind of identification in the world on that. This is different, may it please the Court, from the Arizona case in which the Court held that Arizona couldn't require that the name "Arizona produced" appear on the cantaloupe cartons.

QUESTION: Mr. Jordan, can you explain to me why the Court of Appeals did not discuss the standing point? Other than to say that it had been decided.

MR. JORDAN: May it please Your Honor, the Court of Appeals directed us -- or, rather, the three-judge district court directed us to go directly into the arguments on the merits, stating that it was accepting the memorandum and order of Judge Dupree, who heard it alone.

QUESTION: So it wasn't discussed?

MR. JORDAN: It was not discussed before the three-judge panel.

Now, I'd like to move very quickly to whether the Commission may bring it in a representative capacity, because, obviously, that is the next hurdle that we must cross.

Now, we say it cannot, as I indicated a moment ago to the Chief Justice, because this is not an association within the sense of a single association case that has been before this Court. Not one that we can find.

And I hope I am not misstating the situation.

QUESTION: Suppose, instead of designating this Commission, the Legislature of Washington had used the word "association" and had spoken in terms of memberships; would your view be the same because of the alleged exercise of police power?

MR. JORDAN: May it please the Court, I would look still to the nature of the organization. And when we look at the nature of this organization, as set forth in the Appendix, we see what its function really is. And that is to assess the apple growers and obtain money to advertise apples, and to do research into improving the growing of apples in the State of Washington, which is admittedly a major crop there.

QUESTION: What do trade associations do that this Commission does not do?

MR. JORDAN: Trade associations, may it please Your Honor, first, and I think the distinguishing characteristic, is trade associations are voluntary organizations, which --

QUESTION: Well, a union is still a union, even if people are compelled to join it, are they not? Is it not?

MR. JORDAN: Yes, it is, Your Honor. But we think --

QUESTION: Well, why is the compulsion a dispositive factor in your mind?

MR. JORDAN: Because there is no option on the part of the members in a controversy of this kind -- well, to start with, there is no option on the part of the members as to whether they wish to participate or not.

Now, there is an option, certainly, as to whether a person wants to belong to a union or not.

Here, if you are going to be an apple grower in the State of Washington, you are going to belong to this advertising agency whether you want to or not.

QUESTION: I didn't think it was a matter of belonging, I thought it was a matter of having a burden assessed in sort of a quasi tax by a governmental agency. I didn't know that this council had members.

MR. JORDAN: This council, this Advertising Commission has representatives from the growing and warehousing segments of the apple industry in the State of Washington, may it please the Court, and they are elected by districts according to the

Washington statute, as it appears in the Appendix.

QUESTION: But growers do not belong to this, they are simply taxed to support it.

MR. JORDAN: That's right. That is correct.

QUESTION: Perhaps your use of the term "belonging" was the same kind of a Freudian slip as the district court made when they referred to "association".

MR. JORDAN: Perhaps so, Your Honor.

But we also think there is another distinction here, and that is one which this Court has pointed out in other cases. There is no disability on a single one of these growers from bringing an action if, indeed, it is injured.

Now, I know there is an affidavit in here, and this brings to mind the Warth cases. An affidavit in here which says -- in which the Director of Marketing of Apples of the State of Washington says that he owns an orchard. But it's significant that he never says he's been injured whatsoever by the North Carolina statute.

And surely if he had been injured, he would have said so.

In the Warth case, the opinion points out that there was one member of the council who actually pleaded that he had been injured. But still this Court said one is not enough to make the counsel the proper party. And in that case the Court did not go along with the court below.

Now, I would like to point out, because it's a very important part of this case, Mr. Brownlow's affidavit, on pages 103 and 107 of the Appendix, inadvertently misstates the genesis of the North Carolina law.

Now, actually, it was passed in 1971, two years before this controversy began. Not in response to the appearance of the Washington State Apple Advertising Commission before the North Carolina Board of Agriculture. It was in 1973 that the change was made, because of the constant and persistent refusal of the State of Washington to obey the law. Every other apple-growing State shipping into North Carolina was obeying the law.

Then, so the 1973 session of the State added the words that it would be the exclusive marking, whether they were North Carolina apples, Washington apples, Virginia apples -- and of course we have no greater competitor in North Carolina than these delicious Virginia apples.

But North Carolina did not change the rules after the controversy began. No, indeed. But Washington did. It went in and changed its grades and upped them to the equivalent United States grades.

Now, the harsh fact is that should they prevail here today, they can go back to Washington and change those -- lower those grades, change them back to what they were before.

If I --

QUESTION: You have now left the question of standing,

have you?

MR. JORDAN: Yes.

I would like to talk just a word on jurisdictional amount.

QUESTION: You didn't mention parens patriae, as a theory.

MR. JORDAN: No, sir, I have not covered that in our brief, either, frankly.

On jurisdictional amount, the only specific allegation in the complaint -- and again I refer to the insistence of this Court that this be determined from the allegations in the complaint. This is in Sierra Club, this is in Warth, and the only thing you find there is the $25,000 spent on behalf of the Commission in advertising in the State of North Carolina.

Well, they are welcome to continue to advertise in the State of North Carolina. There is no prohibition on that.

So they have to then go to the question of aggregation of claims.

Now, we find no case precisely in point, and that is not surprising. But there are analogous cases. The Zahn case, which we cite, involved four property owners claiming injury by water pollution caused by a paper company, and this Court held that their claims could not be aggregated to provide the $10,000.

If that's true, every single marketing association in

North Carolina could have ten growers coming into the federal courts -- I say in North Carolina; in the nation, and there must be tens of thousands of them -- coming into the federal courts and saying, "I'm injured $1,000"; ten of them, that's $10,000.

These are matters which this Court has persistantly said should be treated in the State courts.

Now, there is an interesting contradiction in what the district court did in this regard. The Brownlow affidavit, which appears on page 17 of the Appendix, attempts to meet the jurisdictional requirement which was not in the complaint, it's just not there. But they say that the requirement -- they estimate that it costs from 5 to 15 cents a box to obliterate the Washington State grade from what they allege are preprinted containers.

Now, the evidence is in dispute on that. There is an affidavit to the contrary there, as to whether they are all preprinted or not.

But, in any event, the district court accepted this, and, Mr. Justice Marshall, it was referred to by Judge Dupree and Judge Craven who wrote for the three-judge court specifically put it in his footnote 9 in great detail. So obviously the court felt that this was the basis for the jurisdictional amount.

But what did the court do? The court struck down

the requiremant which put the Washington growers to this expense, but left intact the requirement that they show the U.S. grade.

Now, mathematically, obviously one cancels out the other, and you are left with a zero.

Now, our point is that if you can't aggregate, there is absolutely no way to reach the jurisdictional point -- the jurisdictional amount in a representative capacity.

Now, to speak very quickly on the merits, I'd like to remind the Court that less than one percent of the Washington production is involved -- less than one percent of the Washington apples shipped are involved in this case. And that must be considerably less than one percent of the total production. Now, that's the backdrop for the exercise of the -- or the application of the balancing theory.

Now, there was a case in the Thirties, Justice Brandeis speaking for the Court held that it was proper for Oregon to require standard containers for raspberries and strawberries. Obviously interstate shippers were required to go to the expense of using a different container from that permitted by other States than Oregon.

Now, Mr. Justice Brandeis pointed out, and let me say with candor, he distinguished, he used some language which distinguished that opinion from the opinion that we seek in this case. Because he said that the plaintiff was a manufacturer

of crates, it was not a grower, a producer. There is that difference.

And he went on to say that actually probably interstate commerce is not involved because the real crux of what we're talking about here is intrastate.

But Mr. Justice Brandeis went on to point out one factual thing that comes home in this case. He said: "There are 34 other styles or shapes of berry baskets in use somewhere in the United States; obviously a multitude of shapes and sizes of packages tends to confuse the buyer."

And then he specifically applied the police power test to that kind of factual situation, and he said: The order here in question deals with a subject clearly within the scope of the police power, when such legislative action is called in question, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence of that state of facts; and one who assails the classification must carry the burden of showing by a resort to common knowledge or other matters which may be judicially noticed or to other legitimate proof that the action is arbitrary.

This record shows the contrary. This record shows that since the North Carolina statute was passed, the quality of apples coming into North Carolina has improved. This record shows that the United States Department of Agriculture,

conducting an independent survey of the apple industry from one ocean to the other, found that what North Carolina had done had had a salutary effect, and recommended that every apple-growing State do the same thing.

The General Assembly of North Carolina, hearing witnesses from the apple industry, enacted this statute within the exercise of its police power. There is an affidavit in this Appendix from a gentleman whose name, if I recall, is Barber, who has been in the apple business for fifty years; he pointed out that the use of multiple grades was not only confined to what appears on the container, on the closed container, but that apples are sold by price lists which are circulated, and I believe by telegram or by wire or electronically in some way, and that when all of these different grades appear on that list, and that when multiple grades, a federal and a State grade both appear on that list, it's confusing to the buyers. And that prices are depressed in this way.

Now, it has been shown that in North Carolina the growers there, since 1971, have been using the United States grade only. That has improved the quality of domestic apples. That is in this record.

What it seeks to do now -- and no other State significantly raises any protest, every other State, apple-growing State has acquiesced in what North Carolina is trying to

do.

It is contended by the State of Washington that this statute discriminates in favor of North Carolina growers. But nowhere, nowhere in the record or in the brief, are we shown how on earth does it discriminate in favor of North Carolina growers.

QUESTION: Mr. Jordan, does North Carolina provide a State grading system for apples?

MR. JORDAN: It uses, by statute, may it please Your Honor, the federal grades. However, the statute provides that you need not grade if you do not wish to, where you use a closed container. And of course that also applies to Washington or any other State shipping into North Carolina. I believe the same is true of Virginia.

QUESTION: Does that mean that the box containing the apples is not required to have any grade at all?

MR. JORDAN: Yes, Your Honor, that is true. And that seemed to bother Judge Craven.

QUESTION: Well, may I follow that up?

MR. JORDAN: Yes, sir.

QUESTION: How does it serve the purpose of informing the market as to the grades of apples, if the container may contain no grade at all?

MR. JORDAN: We have this situation: when apples come in in a closed container, and this has been agreed by all

parties, this was agreed in the oral argument before the three-judge court, that we are really talking about apple transactions at the wholesale level, where you've got experts, men who have spent their life, like Mr. Barber who spent fifty years buying and selling apples, men who look at apples and determine visually what that apple is worth. But when an apple is sold in a closed container, whether it's grown in Washington or in North Carolina, and when it's bought or sold from one of these price lists, which are transferred either electronically or by telegram or mail, you go by whether it says it is Fancy, Extra Fancy, an Ordinary or U.S. 1, or Washington 1, or what.

But the professional buyer knows that -- by the grade, that this is going to call for the best price. This is going to be the best grade. If there is no grade, then that's an apple that's going to be used for applesauce or vinegar or cider, or whatever the other uses for apples are. This is known within the trade, this is trade custom.

It's where they are available for visible determination that no grade is really necessary. It's where they are marked in a closed container that the buyer has to have something to guide him. And if there is nothing on it whatsoever, then the buyer knows he is not in the Fancy, the Extra Fancy, the No. 1 category anyway.

Now, of course, he has a right, and it is exercised,

to open that container and look at those apples, and give them a manual, visible inspection.

QUESTION: Mr. Jordan, the statute doesn't prohibit the use of the various grades for the purpose of quoting prices or reporting prices or anything like that, does it?

MR. JORDAN: No, sir, it does not. It just refers to their presence on closed containers.

I see my time is up. I'd like to sum up with just one word:

We feel that ultimately the principal thrust of the Apple Commission's position is that the North Carolina statute does not meet the balance of interest test. That is, that for a State regulation to be constitutional, its benefits must outweigh the burden on interstate commerce. In this context, the whole core of this case can be considerably restricted.

It boils down to whether the desire of a given State to advertise its State grade on less than one percent of its total volume of apples shipped outweighs the exercise of the police power of the State of North Carolina through its General Assembly, when the record shows that while the statute was in effect, the quality of apples shipped into North Carolina improve; the confusion was eliminated; and that the State's action received the laudatory commendation of experts surveying such matters for the U. S. Department of Agriculture.

When the balancing test is applied to these facts, we respectfully submit that the action of the General Assembly should prevail.

I thank the Court.

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

General Gorton.

ORAL ARGUMENT OF SLADE GORTON, ESQ.,

ON BEHALF OF THE APPELLEE

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

The production and sale of apples has played a major role in the economy of the State of Washington for many decades. As a result, the State itself has shown a considerable interest in the apple business. Some sixty years ago, Washington was the first jurisdiction in the United States to promulgate apple grades, anticipating the federal grading system by some fifteen years.

But there are several even more vital distinctions between the two grading systems. The federal system is optional only. The apple packer may choose to use it or to ignore it, without penalty.

The Washington State system, on the other hand, is mandatory. No apples may be packed or shipped in or from the State of Washington unless they have been graded and unless the grade is marked on the container.

The federal grading system permits the packer himself to grade his own apples, subject only to someone's later challenge.

The Washington State system, on the other hand, mandates grading by independently employed inspectors.

In summary, the federal system requires neither grading nor inspection. The Washington State system requires both.

The U. S. Department of Agriculture, therefore, has explicitly declined to preempt the field of apple grading or inspection. And no issue of preemption is involved in this case whatsoever.

While some 36 States -- not 13, Mr. Justice Stewart -- grow apples in commercial quantities, 30 percent of all of the apples grown in the United States are grown in Washington, and 50 percent of all fresh apples sold in interstate commerce in closed containers originate in the State of Washington.

In fact, from one relatively small portion of the State, on the east slope of the Cascade Mountains.

As a result of this combination of facts, a number of developments in the apple business were either logical or almost inevitable, or both.

In our State, one such development was a detailed and careful State regulation of the apple business, to insure the quality and the reputation of Washington apples. That regulation

includes our mandatory grading and inspection system, and a State grading system which is more rigorous for the top Washington grades, Extra Fancy and Fancy, than are the comparable voluntary federal grades.

In addition, Washington is the only State in which there is extensive use of what's called controlled atmosphere storage, a system permitting a year-round supply of fresh apples from one harvest to the next.

Obviously, such a regulatory system assures quality at a relatively high price, to which is added the punishingly high costs of transportation to markets thousands of miles away. Nevertheless, Washington apples compete successfully with the local product, even in the East and in the South.

As a matter of fact, that competition is too intense for the tasta of the apple growers of North Carolina, and that is really why we're here today.

QUESTION: Well, one of the reasons you're here today is whether or not your client had standing to sue. And now you're going to get to that --

MR. GORTON: Yes, I will be addressing that.

QUESTION: -- and it seems to me the threshold question. But, so long as you're going to get to that, that's fine.

MR. GORTON: Yes.

In 1973, the North Carolina Legislature not only

banned but made criminal the use of grades other than U.S. grades on closed containers of apples shipped to or sold in that State.

A year later, on our protest, the North Carolina Commissioner of Agriculture wrote us and said, and I quote: "I naturally want to have the sentiment from our apple producers" -- on a change in the law -- "since they were mainly responsible for this legislation being passed." End of quote.

And quite obviously we obtained no relief.

Now, the North Carolina statute contains a number of interesting and relevant features. First, the statute does not require any apples shipped to or sold in the State to be either graded or inspected at all. Second, the statute does not apply to any fruit product other than apples, though many other fruits are the subject of State grading systems.

Third, State grades may continue to be used on open containers of apples, though Washington apples, by virtue of their storage and the distance from which they come, are all shipped to North Carolina in closed containers.

But, Mr. Justice Stewart, we have made a misstatement on pages 16 and 17 of our brief, in stating that all North Carolina apples are sold in open containers.

QUESTION: Some are and some aren't.

MR. GORTON: Some are and some aren't.

And fourth, State grades may not be used on closed containers of apples in North Carolina even though the U.S. grade is also shown.

Thus, all Washington apples sold in North Carolina will be graded. Other apples may not be graded at all. The North Carolina statute has substantially disrupted the Washington apple business. For some time most Washington apple containers have been preprinted, with a prominent display of grade in order to facilitate not only their handling and storage, but their sale as well.

Now, Washington producers have four choices, all unpleasant.

First, a manual obliteration of the Washington grade from each containers, which might possibly be shipped to North Carolina; a mutilation which detracts from its appearance and raises questions about the quality of the contents to all who see it. And this at a cost of between 5 and 15 cents a box, or as much as $72,000 a year for boxes bound to North Carolina alone.

Now, while the North Carolina trade takes only one percent of the Washington apple crop, that involves some $2 million worth of apples, and our shippers simply cannot determine in advance which one percent will eventually go to that State.

So their second alternative is to eliminate pre-

printed boxes entirely and hand-stamp manually the grade on each box as it is utilized, at an obvious increase in cost.

Thirdly, of course, they can abandon the North Carolina market; or, fourth, they can abandon an historic grading system and --

QUESTION: I understand from Mr. Jordan that all of this is in dispute. Did they agree that you have all of these -- how many do you have printed already?

MR. GORTON: The vast majority of the --

QUESTION: How many?

MR. GORTON: -- boxes -- oh, it would number in the millions, Mr. Justice Marshall.

QUESTION: Well, I mean, do you print them up for ten years --

MR. GORTON: Oh, no.

QUESTION: -- or a hundred years?

MR. GORTON: No. Probably one year's supply is printed at a time.

QUESTION: "Probably" doesn't help me. I want to know just how much it does cost.

MR. GORTON: I believe that it -- oh, the cost is not in dispute, Your Honor. The cost was found by the district court --

QUESTION: The total cost?

MR. GORTON: The total cost of this obliteration or

change is --

QUESTION: Is how much?

MR. GORTON: -- is 5 to 15 cents a box, or between 23,000 and 72,000 dollars.

QUESTION: For total?

MR. GORTON: Yes.

QUESTION: Out of how much?

MR. GORTON: Well, presumably that would be out of -- that would be one percent of all of the boxes utilized in the State of Washington.

QUESTION: And one percent is very heavy.

MR. GORTON: It's a tremendous amount. That one percent is $2 million worth of apples.

QUESTION: You spend 25,000 for advertising in North Carolina.

MR. GORTON: That's correct.

QUESTION: You don't have any trouble with that.

MR. GORTON: And we would like to be able to advertise more. But this mutilation or this -- the amount of the boxes is at a tangible --

QUESTION: I'm not talking about mutilating them, I'm talking about stop printing them. That doesn't cost you anything.

MR. GORTON: Yes, it would. If we stopped printing them and continue to use --

QUESTION: No, no. You stop printing those for North Carolina. One percent. You stop printing one percent of the number you print.

MR. GORTON: The problem with that, Mr. Justice Marshall, is that we don't know which one percent are going to go to North Carolina, even at the time at which they're shipped. When we have sold, say, to the Safeway chain in its headquarters here in Washington, D. C., which covers North Carolina and a number of other States as well, or when we ship to an apple broker in Augusta, Georgia, who has customers in several States.

QUESTION: Well, where did you get the one percent figure? Your one percent is a firm figure.

MR. GORTON: The one percent is a firm figure, but we cannot determine which one percent of our apples will go to the State of North Carolina.

We can, of course, as North Carolina would like us to do, abandon this historic grading system, which has wide trade acceptance. Incidentally, the --

QUESTION: I don't think North Carolina wants you to -- is North Carolina interested in what you ship to New York? Of course not.

MR. GORTON: They seem to be, and they may affect us by this case. In any event, the affidavits which are found in the Appendix to this case, which talk of confusion, are all

from people in the apple growing or selling business in North Carolina, who do not deal in out-of-State apples at all. All of the evidence in the record from those who do deal in out-of-State apples, even in North Carolina, want to be able to use, and they have, the Washington State grade.

So the effect of this system has been added costs to Washington sellers and to North Carolina consumers, because of this cost, some refusals by Washington apple producers to sell to North Carolina buyers, and some refusals -- and this is in the record and undisputed -- by North Carolina purchasers to purchase Washington apples.

The Commission itself has been frustrated in its duty to enhance the market for Washington apples and in an advertising program which, since it obviously cannot emphasize price, needs to speak to the quality of the apples concerned.

But the North Carolina consumer, who must pay more, receives less, because a practical Washington packer who cannot use the higher State grade is likely to ship apples to North Carolina which meet only the U.S. grade.

The North Carolina wholesaler or retailer who wants the highest grade of Washington apples is now denied this grade information, at least as a representation on the container in which the apples are received, and it makes it more difficult for him to get what he wants.

The only economic group which gains is the North

Carolina grower who spawned the statute in the first place, and he gains by lessening his competition.

And this Court has consistently ruled that while a State may regulate commerce to protect the health or safety or its citizens from fraud, even though there may be some effect on interestate commerce, it has a lack of power to retard the burden or restrict the flow of commerce simply for the economic advantage of the people within the State.

The Court has been particularly careful in scrutinizing restrictions placed on imported food products, which compete with those produced locally, invalidating a whole series of such restrictions on commerce in meats and milk cases. It permits State restrictions on interstate commerce only when the State's interest in its citizens' health or safety or the prevention of fraud or deception outweighs the adverse effect on commerce.

It will permit a producing State to enhance the reputation and quality of its agricultural products, but not where commerce is seriously burdened, simply to increase local employment or only incidentally to benefit its reputation.

Here we have a regulation which costs consumers money, deprives wholesalers and retailers of desired information, and all of the people in the business whose testimony is in this record indicate that, and works to the detriment of out-of-State businesses as well as businesses in North

Carolina who deal in apples at wholesale or retail.

The regulation is unique as well as dubious, and,it seems to us, falls within several of your prohibitions, perhaps most particularly Bibb vs. Navajo Freight Lines.

And a final and added vice to the North Carolina scheme is that it establishes no standard for apples at all; it simply prevents the use of someone else's standards.

Now, North Carolina asserts that the Commission lacks standing to challenge its statute, either on its own behalf or as a representative of Washington apple producers.

You've most clearly set these requirements out in Warth v. Seldin and, just a month ago, in Boston Stock Exchange vs. State Tax Commission, as follows: And association may have standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy.

Even in the absence of injury to itself, an association may have standing solely as the representative of its members. The association must allege that its members or any one of them are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit.

But, even apart from that, whether an association has standing to invoke the Court's remedial powers on behalf

of its members, depends in substantial measure on the nature of the relief sought. If, in a proper case, the association seeks a declaration, injunction, or some other form of prospective relief -- which is exactly what we sought -- it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured.

Now, the Commission in the State of Washington was created to engage in research for the use and improvement of apples, to advertise for those apples, to educate the public about its grades, and to stabilize and protect the apple industry of the State of Washington, and to expand its markets.

QUESTION: And that was done by the State Legislature.

MR. GORTON: And that was done by the State Legislature, explicitly by statute.

QUESTION: Right. And the Commission, represented by you as the Attorney General of the State, is part of the government of the State of Washington, isn't it?

MR. GORTON: It is.

QUESTION: So it's not an association and it doesn't have members. Is that correct?

MR. GORTON: I think that the apple growers and the packers of the State of Washington are not described as members of the association --

QUESTION: But they are not members.

MR. GORTON: -- as members in the statute. They have all of the indicia of membership, however, Mr. Justice Stewart. They vote and they -- and only they vote.

QUESTION: The taxpayers have all the indicia of members in a State government, I suppose, too, by that.

QUESTION: They vote.

QUESTION: They vote. They pay dues.

MR. GORTON: There's more to it than that. These people, as union members do, vote for their governing body, which set all of the policies of the Commission. They also vote on any increase in the assessments. The Commission may not, of itself, increase the assessments which it uses to promote the system.

QUESTION: But, to come back, this is a part of the government of the State, represented by you as Attorney General of the State, --

MR. GORTON: It is.

QUESTION: -- and whether or not you have standing depends, then, ultimately upon whether or not the State has standing, as parens patriae; doesn't it?

MR. GORTON: That is an interesting question. It is not briefed by --

QUESTION: I know, but that is the ultimate question, isn't it? You're the State.

MR. GORTON: -- either side. But we are the State, and --

QUESTION: And there are many cases holding that the State does not have standing as parens patriae, are they not? At least in the original jurisdiction of this Court.

And in the antitrust field, Hawaii v. -- what was it -- Standard Oil.

QUESTION: Standard Oil.

MR. GORTON : The Hawaii case indicates that the Attorney General of the State or the State itself does not have antitrust standing to sue for general damages to the citizens of his State.

QUESTION: Quite right.

MR. GORTON: In this case, however, the Commission, though it is created by State statute, --

QUESTION: And is a State agency, as you told us.

MR. GORTON: -- and is a State agency, is given a very specific grant of authority, and a very specific limit, which grant of authority includes the right to sue and to be sued in its own name.

QUESTION: Let's say the State of Washington had a Department of Commerce that had the same statutory right to sue or be sued, and its function was to represent the business interests of your State, you'd have the same situation, wouldn't you?

MR. GORTON: I think we would have a somewhat consistent --

QUESTION: That wouldn't be the same thing, it would be the State.

MR. GORTON: -- an amorphous situation. Because that Department of Commerce would not directly represent these growers of a specific commodity.

QUESTION: Well, that --

MR. GORTON: The difference -- the difference between the Department of Commerce and this situation, it seems to me, is a very considerable one. The difference between a group engaged in a single business which controls the conduct of that business -- the Chief Justice asked whether or not this isn't the functional equivalent of a trade association, and of course it is.

QUESTION: Well, the answer by your opponent was "no, it isn't".

MR. GORTON: The charge -- but the statute sets out the duties of this Commission as being identical to those of any normal trade association.

QUESTION: General Gorton, are you, by statute, representing any trade associations in Washington?

MR. GORTON: Pardon?

QUESTION: Do you, as Attorney General, represent any trade associations in Washington?

MR. GORTON: I do not.

But, by the same token, --

QUESTION: So they're not the same, are they? They're different.

MR. GORTON: Many apple commissions in other States, or agricultural commissions in other States are represented by private counsel, whom they choose themselves. The majority of such State agencies are.

QUESTION: We're talking about Washington State, yes.

MR. GORTON: Pardon?

QUESTION: This is -- you admit it's a State agency?

MR. GORTON: There's no question but that it is a State agency. I cannot see --

QUESTION: Well, how can it be an association and a State agency?

MR. GORTON: I was just going to answer that question in advance, Mr. Justice Marshall.

QUESTION: Thank you.

MR. GORTON: It does not seem to me that there is a distinction between a State agency of this nature and an association. There is no reason why, in law as it is in fact, an agency may not at the same time be a State agency and an association of the type which you have clearly given authority

to bring lawsuits on behalf of its members.

QUESTION: Well, you don't have any members.

MR. GORTON: We have the functional equivalent of members, however.

QUESTION: Yes, just as a Fish and Wildlife Commission of a State. Every State acts through its agencies, and that department of a State would be representing the conservation interests of the State and the fishermen and the hunters of the State. They would still be the State, though, when it sued.

MR. GORTON: There's no question about the fact that we are the State. I think that the question as far as -- one question as far as our standing here is concerned, however, out of two, is whether or not, in addition to being a State, unlike a general agency of the State, we are not also, for the purposes of the law, an association entitled to represent our membership, which directly sets our policies.

QUESTION: You have told us you don't have any membership. You say you have something like a membership.

MR. GORTON: Our growers, those people who pay for the --

QUESTION: The people who produce apples in the State of Washington.

MR. GORTON: In addition, of course, we have our own interests, you know, as a State and as an agency of the State.

QUESTION: And that's a parens patriae interest, isn't it?

MR. GORTON: No. Oh, no. Not a parens patriae interest. The interest of the Commission, both in promoting and enhancing its market, and specifically in its advertising budget, is a direct interest in which it can sue on its own behalf, even if it were not -- and even if it is not deemed to be an association entitled to sue on its own.

Incidentally, --

QUESTION: On that point, General Gorton, could I just ask this question: As I understand it, your budget is made up of -- the revenues come in on a per -- the growers in your State are assessed a fixed amount per bushel shipped, or something like that.

MR. GORTON: Yes.

QUESTION: So that the number of bushels shipped determines your revenues.

MR. GORTON: Precisely.

QUESTION: Have you alleged, and I don't think you have, but I want you to correct me if I'm wrong, have you alleged that the volume of your shipments is adversely affected by this statute?

MR. GORTON: We have alleged that we have lost business in North Carolina by reason of this statute, and we have proved it.

We have not --

QUESTION: But that doesn't really answer the question, because if the apples go elsewhere, your budget would be the same.

MR. GORTON: Exactly. If the apples go elsewhere, the budget would be the same. And, to be perfectly honest with you, you know, to the best of my knowledge, in the market for apples in recent years, for all practical purposes, all of the apples have been sold.

We are, however, effectively denied, at least in part, a significant portion of our market, which would adversely affect our sales in a year in which there was --

QUESTION: Who is "our"? There's a single plaintiff here. Isn't there?

MR. GORTON: In this case, it would be either the Apple Commission as such, the income of which is dependent upon the shipment of apples --

QUESTION: But you don't make any sales, do you?

MR. GORTON: No, but we do other things.

QUESTION: You don't have any income except the assessments made on the growers.

MR. GORTON: We have income which comes from assessments on the growers, which we expend on a number of activities --

QUESTION: Right.

MR. GORTON: -- one of which is advertising, in which --

QUESTION: But your sales haven't been affected, the Commission's, the agency's sales haven't been affected because it doesn't make any sales; its income hasn't been affected because its income is the assessment made on the Washington growers.

MR. GORTON: And it --

QUESTION: So that was my question; who is "we", who has been affected by --

MR. GORTON: But that income could easily be affected by this kind of restriction. Certainly the income --

QUESTION: It hasn't been, though, has it?

MR. GORTON: -- the income generated from sales to North Carolina by Washington apple growers has been affected.

QUESTION: But Washington apple growers are not -- either as a group or individually, are not the plaintiffs in this case.

MR. GORTON: Yes, but they are the source of the income of the Commission, Mr. Justice Stewart.

QUESTION: By assessment.

MR. GORTON: By assessment, which assessment is based on production and on shipment.

QUESTION: Right.

QUESTION: But your assessment has not dropped a nickel.

MR. GORTON: Pardon?

QUESTION: Which assessment has not dropped a nickel.

QUESTION: Yes.

MR. GORTON: Well, the actual production of apples has increased over the last few years, but the portions of that assessment which --

QUESTION: So how much has the party lost?

MR. GORTON: The party has lost the effectiveness of its advertising --

QUESTION: How much money has the Washington State Apple Advertising Commission lost?

MR. GORTON: It is affected to the amount of $25,000, which is its advertising budget in North Carolina.

QUESTION: It has lost -- has it lost $25,000?

MR. GORTON: It considers the value of the right to advertise in North Carolina to be worth at least the $25,000 which it expends there.

QUESTION: Well, how does this stop your advertising?

MR. GORTON: It does not stop our advertising, but it makes our advertising far less effective.

QUESTION: How much?

MR. GORTON: I think --

QUESTION: You couldn't estimate it; there's no way.

MR. GORTON: By the amount we use for advertising in the State of North Carolina in a given year. Which is

$25,000. We have alleged, of course, and the court below did not get to the question of our First Amendment rights to advertise in the State of North Carolina, and in that case we, in all probability, don't need a minimum jurisdictional amount.

But the Commission has considered the right to advertise in North Carolina to be worth, to have been worth an expenditure of something over $25,000 a year.

At this point we are denied the right to use what the Commission considers to be its most significant method of advertising in the State of North Carolina, i.e., the use of its grades, by the action of the State.

QUESTION: Did you bring your original suit in this Court?

MR. GORTON: No, we did not.

There is --

QUESTION: In your statutory authority, General Gorton, to sue and be sued, is your statutory authority in the name of the State or simply to sue in the name of the Commission?

MR. GORTON: To sue in the name of the Commission. And this action is brought in the name of the Commission.

QUESTION: So that if the case of City of Milwaukee v. -- or, rather, the State of Illinois v. City of Milwaukee, several years back, would be any guide, that at least might suggest that you actually would not have an original case here.

MR. GORTON: We had no original jurisdiction in this Court. No, Your Honor. The right to sue and to be sued is only in the name of the Commission. And, as a matter of fact, the statute specifically exempts the State, other than the income of the Commission itself,from any adverse judgment.

The general credit of the State is not involved in any suit for monetary damages.

QUESTION: When you use the term "association", I take it you're using it with lower case on the "a", that is, a small letter "a" association. These people are associated together by law, are they not?

MR. GORTON: They are associate together by law, and the fact that they are mandated to engage in such an association makes them no different than the analogy which you made earlier of membership in a labor union, which has a closed-shop agreement with a particular employer. That membership is mandated, of course, as a condition of having a job, just as here, in order to grow or to ship apples in the State of -- to produce apples commercially in the State of Washington --

QUESTION: All taxpayers of the State are associated by mandate of law in the government of the State.

MR. GORTON: In the government, all citizens who are --

QUESTION: All taxpayers at least.

MR. GORTON: Or all taxpayers. All taxpayers or all citizens are at least so associated.

It seems to me, however, that the thrust of your concern with the right of an association to sue for its members is based not on whether that association is created by statute or created voluntarily, not whether or not its membership is free to join or not to join, but by whether or not the representative will in fact properly represent the interest of its members.

Whether or not a judgment entered on behalf of or against the so-called association will bind or will affect, if the judgment is what they seek, will affect affirmatively the members of the association.

QUESTION: Generally, the real problem that one grower would not have $10,000 jurisdiction.

MR. GORTON: That may be the --

QUESTION: I think that's the real problem.

MR. GORTON: I simply can't answer that. I suspect that while we have many growers, there are almost 6,000 growers in the State, we have only some 120 packers and shippers, and it's very, very possible that a given packer or shipper might have that amount involved in the sales to the State of North Carolina, when you reflect that there are $2 million worth shipped there.

QUESTION: Did you show any by affidavits?

MR. GORTON: No, that is not -- there is nothing in the record to indicate that.

You're right, though, as to growers, Mr. Justice Marshall, probably we would have that amount as to a shipper.

In summary, it seems, both from your questions and from the argument of opposing counsel, there is little question here as to the interference in commerce of the particular proposal, of the particular statute which the State of North Carolina has passed. It quite obviously falls within the consistent ban this Court has placed on in-State producers affecting commerce simply for the benefit of those producers, even though they set forth some kind of guise of the protection of the consumer or the health and safety of the people of the State.

The problem of standing can be resolved either by treating the Washington State Apple Advertising Commission itself as the sole party in an unrepresentative nature in the State, but permitting it to deal with the losses to the business in which it is solely engaged, or by reason of its own advertising budget in the State of North Carolina.

Alternatively, it can be treated appropriately as an association, since the decision here would affect all of the growers and all of the shippers in the State of Washington.

Thank you, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: Thank you, General Gorton.

Mr. Jordan, you have one-half minute left. Is there anything you want to tell us in that half minute?

MR. JORDAN: Thank you. May it please the Court, I have no rebuttal.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 11:12 o'clock, a.m., the case in the above-entitled matter was submitted.]

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