

ORIGINAL

In the
Supreme Court of the United States

WILLIAM RILEY HUGHES,

Appellant,

v.

OKLAHOMA,

Appellee.

No. 77-1439

Washington, D.C.
January 9, 1979

Pages 1 thru 25

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WILLIAM RILEY HUGHES,

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Tuesday, January 9, 1979

The above-entitled matter came on for argument at
1:51 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:

R. J. HELTON, ESQ., 713 Lamar Street, Wichita Falls,
Texas 76301; on behalf of the Appellant

BILL J. BRUCE, ESQ., Assistant Attorney General of
Oklahoma, Chief, Criminal Division, 112 State
Capitol Building, Oklahoma City, Oklahoma 73102;
on behalf of the appellees.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument next in No. 77-1439, William Riley Hughes v. Oklahoma.

Mr. Helton, you may proceed whenever you are ready.

ORAL ARGUMENT OF R. M. HELTON, ESQ.,

ON BEHALF OF THE APPELLANT

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

This case is before you on appeal from the Court of Criminal Appeals of the State of Oklahoma in which the appellant was convicted of violating the following section of the Oklahoma Wildlife Code, specifically section 4-115B, which provides in pertinent part as follows: "No person may transport or ship minnows for sale outside the state which were seined or procured within the waters of this state except that: 1. Nothing contained herein shall prohibit any person from leaving the state possessing three (3) dozen or less minnows; 2. Nothing contained herein shall prohibit sale and shipment of minnows raised in a regularly licensed commercial minnow hatchery."

It is my position here in support of the proposition that the subject law is repugnant to the commerce clause of the United States primarily, if it please the Court, based upon the decision of this Court of this past term of *City of Philadelphia v. New Jersey* in --

QUESTION: Mr. Helton, I take it you are relying solely on the commerce clause?

MR. HELTON: Yes, Your Honor, no other.

QUESTION: You are not relying on the privileges and immunities clause or anything else, just --

MR. HELTON: That is right.

QUESTION: You put your case on the commerce clause.

MR. HELTON: Yes, sir, no other constitutional ground do I position at all. That is to say that inasmuch as this law is one-hundred percent on its face blocked or curtailed against interstate commerce, that it constitutes therefore that discriminatory nature that destruction of the right to engage in interstate commerce by other states and their citizens, particularly within the rule of this Court in *City of Philadelphia v. New Jersey*, wherein, Mr. Justice Stewart, writing for your Court, said that whenever the discrimination reached a certain -- well, when it was that degree of discrimination, that it just constitutes a barrier, a curtain to interstate commerce, it is unnecessary, it is immaterial to determine whether or not the state in enacting its law properly exercises police power.

QUESTION: What if Oklahoma passed a statute that had as its preamble the recital of the supply of buffalo, if they have any, or elk, if they have any, being limited, there could be only one taken by any person within a certain limited

season and none could be taken outside the state?

MR. HELTON: All right, sir. Oklahoma did that in its conservation law in section 116(a), the very following section that follows this section, and I think that is a perfectly valid law.

QUESTION: Why?

MR. HELTON: The difference, sir, in this case and the supposed case that you gave me is the party here complaining is not the party with the right of access. In this case, a Mr. Fred Schokey is the man who took the minnows from the waters of the state. Mr. Hughes bought the minnows from Mr. Schokey under this law.

QUESTION: But under this particular statute that is before us now, there is no prohibition against his buying them, but there is a prohibition against his taking them out of the state, is there not?

MR. HELTON: That is right.

QUESTION: How do you distinguish that from taking the elk out of the state?

MR. HELTON: All right, sir. The difference between the right to take, in my judgment, is the state very likely, in fact I think without question the state has and is properly exercising its police power when it controls the access to its wildlife as distinguished from controlling the right -- that is, prohibiting the right to transport, when at

the same time they never prohibited, they never in any manner prohibited and attempted to control the disposition of the commerce in it from the license taker to the next party.

QUESTION: So that under the law you may commercialize with natural minnows as long as you transport and sell them inside the state?

MR. HELTON: Yes, sir.

QUESTION: You can take natural minnows and sell them within the state of Oklahoma?

MR. HELTON: I don't think there is any question about -- you are asking me about the right of Oklahoma to limit --

QUESTION: No, I am asking if I am a dealer in minnows I can buy natural minnows or I can go and mine them myself and sell them to anybody I want to inside the state?

MR. HELTON: You are right, that is --

QUESTION: And I can transport them anywhere I want to inside the state for sale?

MR. HELTON: Yes, sir.

QUESTION: But I can't transport them across the boundary for sale?

MR. HELTON: Correct.

QUESTION: Or he can destroy them if he chooses, burn them up?

MR. HELTON: I'm sorry, sir.

QUESTION: I say or he can destroy them if he chooses or burn them up, as long as he does it within the state of Oklahoma.

MR. HELTON: That would be right. What I think would help us is to understand that this overall conservation code of Oklahoma divides the commerce into two steps. There is a division in the commerce, and the first step of the commerce is from the water to the party authorized to take them out of the water. That is step number one of commerce. And if the Court please, that is internal commerce. What Texas people, Texas as a sovereign would have any interest in that, they would have none whatever.

Now, there is a second step in the commerce, and that second step is when the authorized taker sells and disposes, and at that point because, sirs, because Oklahoma never put any kind of restriction on his right, the second step of that commerce is one-hundred percent unregulated by Oklahoma. Oklahoma has not even enacted anything other than this one section that deals with that second step of commerce.

QUESTION: But that regulates, doesn't it, that one section that you just referred to?

MR. HELTON: It does, sir, but -- and I don't disagree with you, but the one object though is to prevent the exportation. But the very object of it at that point, since Oklahoma never by any other law limited that second step in

any manner, never controlled it in any manner, at that point it had become interstate commerce and at that point this law that they passed put the curtain that it cannot lift.

QUESTION: You say then that Oklahoma could prohibit any sort of commercial dealing in natural minnows?

MR. HELTON: I believe they can, sir, provided that they make the records of the necessary finding that is the basis of their exercising their police power.

QUESTION: Well, I thought the police power was always presumed to have been properly exercised unless the --

MR. HELTON: Well, I don't understand that it is always presumed, sir.

QUESTION: Well, aren't all state laws presumed constitutional?

MR. HELTON: I am aware of the burdens to that effect, but I am also aware that when a law shows on its face, for example, and refutes that presumption, then the presumption is refuted.

For example, if I am wrong in my position, that is, if I am wrong in my position that the rule of City of Philadelphia doesn't apply to the case, for example, if I am wrong in that, which I strongly believe I am not in error, but if I am wrong in this question, that in event that a law enacted under the police power is going to interfere with interstate commerce, there is a question of whether or not it

is -- the question then is it doing it incidentally. In other words, though there be a valid exercise of the police power in connection with the operation of that valid exercise, is there an incidental effect upon interstate commerce, and what is the law in that respect.

Well, at that point it has recently been determined by this Court that the burden shifts upon the state to justify its own use, its police power use, and in its justification it must among things show that it could not use its police power in a different manner thereby reducing the burdens on interstate commerce.

Now, then, in this case if we agree that the object of this law, which I find nothing in this law that supports this object either expressly or inferentially, but the Oklahoma high court did. They said the purpose was to prevent depletion of minnows by commercial exportation or portation. Oklahoma did not but could have put catch limits on the minnows. Oklahoma could have but did not make any control over how many minnows the dealers would have in possession at one time.

QUESTION: Could they put a limit on how many could be transported over the state line?

MR. HELTON: They certainly could, in my opinion, yes, sir.

QUESTION: And haven't they done so indirectly here?

MR. HELTON: No, sir, for the reason that -- well, the real object of the three-dozen rule, sir, we've got a lake down there between Texas and Oklahoma that Red River runs through, and the three-dozen rule in my opinion has reference to that lake.

QUESTION: Texoma or something, it is called?

MR. HELTON: Beg pardon, sir?

QUESTION: The lake is called Texoma?

MR. HELTON: Yes, sir, that's the name of it, Your Honor. Then --

QUESTION: What is the purpose -- what do you suggest was the purpose of the three-dozen limit?

MR. HELTON: To take care of Lake Texoma. In other words, I am a Texan and I --

QUESTION: Is there anything in the statute about that?

MR. HELTON: Beg pardon?

QUESTION: Is there anything in the statute about that?

MR. HELTON: No, sir.

QUESTION: What do you suggest on its face that the three-dozen limit implies or suggests?

MR. HELTON: Well, it --

QUESTION: It would hold down --

MR. HELTON: There really isn't anything from the

law that we could tell anything, Your Honor.

QUESTION: Well, isn't it the same kind of a limitation that you put that you can only take six trout or five pheasant or whatever, to conserve --

MR. HELTON: Well, I feel this way, that --

QUESTION: Isn't it a conservation measure?

MR. HELTON: I am unable to read a conservation measure into three dozen.

QUESTION: Well, isn't three dozen about what you might need for a day of fishing to catch whatever limit Oklahoma has? Isn't there a reasonable possibility that there is a relationship?

MR. HELTON: Well, my trouble, sir, is I fish too much and I can understand the relationship of three dozen to us local boys that fish. But that is not in this record, and I understand it.

QUESTION: You don't really need more than three dozen in a day, do you?

MR. HELTON: I know that no three dozen could have anything to do with conservation of minnows in Oklahoma, or at least that is my personal opinion. It is not supported by the record though. Now, if I may be indulging, I will say that.

QUESTION: Mr. Helton, I didn't understand -- and I guess I am just stupid -- but what is the reference to Lake

Texoma? Why would this problem --

MR. HELTON: All right, sir. On Red River, sir, there is a lake, they dammed up that river and thus the water of that river is in both states.

QUESTION: Right.

MR. HELTON: So consequently I think the legislature had in mind, if a Texas fisherman came over into Oklahoma to buy him some minnows and thus go back on the Texas side of the lake to fish, without this exception, he would be a violator of this law.

QUESTION: You want to make them fish on the Oklahoma side of the lake, in other words?

MR. HELTON: That is true.

QUESTION: I see.

MR. HELTON: I haven't thought about that, but that would be one effect of it, to make him fish where he didn't want to fish.

QUESTION: Of course, if they want to make him fish on the Oklahoma side of the lake, they would have no exception at all.

MR. HELTON: If I listened to you, sir, you are meaning to infer that if they wanted to leave the three dozen in the act --

QUESTION: They would force him to fish.

MR. HELTON: -- the effect would be to make the

Texan people fish on the Oklahoma side. Yes, sir, I think that would be right.

Now, after we read the residue of this law, that is, other than this section 4-15B, other than that one law there isn't a single law in the code that directs itself toward any kind of general welfare protection, that is protection of Oklahoma minnows. It is totally barren of any kind of a law.

Because it is totally barren of any kind of a law, why, automatically the only thing you can decide is that they wanted to give the hatchery men an economic benefit, that it is a discriminatory law that discriminated in favor of the hatchery men. There isn't a thing about the law that is to foster and carry out and further the general welfare power of the people of Oklahoma.

QUESTION: Mr. Helton, could I ask you one question before you sit down. Do you think it would be necessary if we were to rule in your favor for us to expressly overrule the case of Greer v. Connecticut?

MR. HELTON: Well, sir, yes and no. I will answer the yes part first and then the no part second. First, sir, the statute in the Greer case is basically and fundamentally different than this Oklahoma statute, and the difference is this: Greer directed the prohibition to the very act of taking. The Greer statute says that it hereby prohibits anyone to kill our wildlife and remove them from the state. Now,

I haven't quoted it to you verbatim, but I haven't deviated badly.

Now, this law, unlike Greer, isn't directed to the taking. The actual statute is unconnected with the power or the access to take. That distinguishes Greer, in my book.

QUESTION: Well, it makes the Oklahoma statute narrower than the one in Greer, doesn't it?

MR. HELTON: Sir, I'm sorry?

QUESTION: Doesn't it make the Oklahoma statute narrower than the one in Greer?

MR. HELTON: Narrower?

QUESTION: Because the Oklahoma statute regulates less conduct than the Connecticut statute did in Greer.

MR. HELTON: Well, sir, to me the Greer statute, the emphasis is on the initial right to take. The Oklahoma statute doesn't focus on that. It focuses trying to enforce something that is not visible within the law.

I said yes and no. Now, the other part, the other side of the coin is to me this Court in the last term, in the last recent terms, in Baldwin v. Montana and all the cases you debated there, remedied to interstate commerce only. I think that you have more or less terminated now the ownership doctrine. I am not talking about that you've terminated the power of the statutes under the police power. You said in the majority opinion relative to the ownership of wild game in

the state was in error.

MR. CHIEF JUSTICE BURGER: Mr. Bruce.

ORAL ARGUMENT OF BILL J. BRUCE, ESQ.,

ON BEHALF OF THE APPELLEE

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

In order to focus upon Oklahoma's argument before this Court, I feel it incumbent upon me to bring to the Court's attention the posture of the appellant's argument and the court's decision below. The posture of the argument below by the appellant was in the form of distinguishing Greer v. Connecticut from the case of Foster Fountain Packing Company v. Haydel.

Now, as this Court is aware, the Greer decision involved wildlife. The statute there prohibited the transport of that wildlife across the state line. In Foster Fountain Packing Company v. Haydel, this Court looked at the underlying fact situation involved in that case, where the Louisiana statute in the name of conservation prohibited the exportation of shrimp in which the heads had not been removed, thereby requiring their removal in the home state of Louisiana.

This Court held in that case that the purpose and effect of that statute was economic protectionism for Louisiana residents, that is, that that statute favored Louisiana simply because by the very nature of the statute,

the packing was required to be done in Louisiana to the exclusion of other states.

Now, in the lower court, as I mentioned, the appellant distinguished Greer v. Connecticut from Foster Fountain Packing Company v. Haydel and relied upon the Foster case, stating that it was applicable to this case. The posture, however, on appeal by the appellant here is that, as I read his brief, that Greer v. Connecticut is no longer viable when subjected to a commerce clause tact.

It is the view of Oklahoma that the concept in Greer is still viable today. The concept of the state's interests, the state's interest in controlling its wildlife is as much to life today as it was in the time when Greer v. Connecticut was rendered.

QUESTION: What in your opinion, Mr. Attorney General, is the justification for the Oklahoma statute?

MR. BRUCE: As a conservation measure, Your Honor.

QUESTION: Well, do you agree with counsel on the other side that a Texas resident could go into Oklahoma and buy minnows and burn them up in front of the commercial establishment from which he bought them?

MR. BRUCE: I would agree that there is no statutory prohibition, no, sir.

QUESTION: What?

MR. BRUCE: The statute does not address that

possibility, no, sir.

QUESTION: Well, if that is a possibility, why may it be characterized as a conservation measure?

MR. BRUCE: Well, as argued by the appellant below, in which the state concedes, the only viable commercial use for minnows is as bait for other fish. It serves no other purpose, as far as man is concerned, in his commercial interests. Of course, the state maintains that minnows also serve other important functions, of course, as a natural food supply for game fish and that the maintaining of the balance of the minnow population in the natural streams --

QUESTION: And for ducks and birds and a lot of others, too, don't they?

MR. BRUCE: Yes, Your Honor.

QUESTION: They live off of minnows.

MR. BRUCE: Yes, sir.

QUESTION: Isn't that interest served just as much on the Texas side of the lake that straddles the state boundary?

MR. BRUCE: Are you speaking of Lake Texoma, Mr. Justice Blackmun?

QUESTION: Whatever the lake is.

MR. BRUCE: Yes, I think that interest would serve Texas as well as Oklahoma.

QUESTION: Wouldn't it serve just as much on a lake

ten miles inside Texas as the Oklahoma lake?

MR. BRUCE: I am not sure I understand your question, sir.

QUESTION: Well, suppose Mr. Hughes here took his minnows and sold them to Texas fishermen on a lake ten miles inside the Texas boundary, isn't that natural preservation purpose just as well served there or are you restricting it entirely to Oklahoma nature?

MR. BRUCE: Well, I would concede that certainly that would serve Texas interests, but such wholesale exploitation of minnows, natural minnows in Oklahoma streams, if Oklahoma permitted the export, it would require Oklahoma to not only keep track of what is happening but to make sure that additional minnows were added to make up for those which were exported.

QUESTION: But at the same time, now, I could go into Oklahoma and buy them and burn them up --

MR. BRUCE: Well --

QUESTION: -- and there is no statute that would prevent me from doing so.

QUESTION: Maybe the next legislature, counsel, would take that into account and make that kind of prohibition.

MR. BRUCE: Well, sir, we've never had that type of problem in Oklahoma.

(Laughter)

QUESTION: I doubt if you will, either.

MR. BRUCE: Now, one other case cited by the appellant is the City of Philadelphia v. New Jersey, of course, a recent case by this Court involving a dispute between New Jersey and other states regarding the use of landfill sites. In my brief, I distinguish that case as I did other cases in that in that case it involved the discrimination provision, in other words, the state of New Jersey discriminated against out-of-state citizens as opposed to the citizens of its own state.

QUESTION: Also the subject of commerce wasn't wildlife, the Greer case didn't have anything to do with that case.

MR. BRUCE: Yes, sir. And as I pointed out in my brief or I hopefully pointed in my brief, that wildlife is a unique area of the law and that the state has a special interest in conserving the wildlife.

QUESTION: So you think in serving that end you can permit commercialization with seined natural minnows within the state but prevent their export?

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

QUESTION: Just as a way of limiting the take?

MR. BRUCE: A way of conservation, yes, Mr. Justice Blackmun.

QUESTION: Even though there are no limits on the amount or number of minnows that your own people can take?

MR. BRUCE: I might say that I believe other states

do use the possession limit as a means of protecting their interests as a device to --

QUESTION: And any out-of-staters who come to Oklahoma, they are free to buy minnows and use them in Oklahoma waters --

MR. BRUCE: Yes, Mr. Justice, they are.

QUESTION: -- and your Oklahoma supply people then have the exclusive on the sale of the naturally seined minnows?

MR. BRUCE: Well, they are licensed by the state, yes, sir.

QUESTION: Well, there is no prohibition against buying minnows in Texas and bringing them into Oklahoma and using them as bait, is there? There is a prohibition on buying Oklahoma minnows.

MR. BRUCE: Well, that is the focus of our statute in issue here. There is an Oklahoma provision regarding an import license.

QUESTION: Now, what is that?

MR. BRUCE: But that is not the focus of our inquiry here.

QUESTION: What about it, can I bring minnows from without the state and use them in Oklahoma waters?

MR. BRUCE: The statute provides a procedure for that.

QUESTION: For the licensing?

MR. BRUCE: Yes, sir.

QUESTION: You don't object to commercial raising of minnows and taking minnows?

MR. BRUCE: Commercial hatchery minnows, no, Mr. Justice Marshall.

QUESTION: Or you don't object to people taking them and seining them, do you, as such?

MR. BRUCE: No, sir.

QUESTION: Because this man here was a professional, that was his business, of seining wild minnows?

MR. BRUCE: That is correct.

QUESTION: So if you allow that unlimited, how are you preserving wildlife or protecting wildlife?

MR. BRUCE: Well, the very nature --

QUESTION: You let it be unlimited, the taking is unlimited, right?

MR. BRUCE: That's correct.

QUESTION: No control at all.

MR. BRUCE: As to the number taken, no, sir.

QUESTION: Yes.

MR. BRUCE: Mr. Justice Marshall, in response to your inquiry, it is true that Oklahoma has no numerical limit on the actual taking of minnows from its natural streams. There is really no need for that in light of the exportation bar, that is, since, as appellant and appellee both agree,

the only commercial interest in minnows is as bait. That is the sole commercial interest in minnows. Then those that are seined from Oklahoma streams are returned to Oklahoma streams in the form of bait, so there is really no need --

QUESTION: Well, suppose they were returned to the streams in a state above Oklahoma, wouldn't they in turn return to Oklahoma?

MR. BRUCE: Well, if it adjoined, if the stream ran into Oklahoma, yes, sir, conceivably they would.

QUESTION: So that is not the only point, is it?

QUESTION: Mr. Bruce, when they are returned to the streams as bait, their life expectancy isn't very long, is it?

MR. BRUCE: Well, Mr. Justice Stevens, I won't debate that. I am not a fisherman, unlike Mr. Helton. I am not a fisherman.

QUESTION: A minnow's life expectancy isn't the longest anyhow.

QUESTION: Would you take the position that Oklahoma could have a statute that said that any fish caught in Oklahoma shall be consumed in Oklahoma? Isn't that what this statute does?

MR. BRUCE: Yes.

QUESTION: With respect to one kind of fish?

MR. BRUCE: Yes.

QUESTION: They could say any fish caught here had

to be consumed, cannot be shipped out of the state.

MR. BRUCE: Yes.

QUESTION: That's the same issue, isn't it?

MR. BRUCE: Yes.

QUESTION: That is like Greer.

MR. BRUCE: Yes, sir.

QUESTION: You were discussing in response to some questions the fact that there is no limit on how much, what quantity of natural minnows can be seined within the state. But the only rational purpose of seining them within the state would be for a dealer to sell them under that three-dozen limit to other fishermen, is that not so? You wouldn't go about seining fish just for the --

MR. BRUCE: For recreational purposes, no, Mr. Chief Justice. That is --

QUESTION: They are not too edible in that sense and it would be pretty expensive fertilizer. You would only be seining them to probably sell them three dozen at a time to fishermen.

MR. BRUCE: That's correct, Your Honor. The statutory scheme is self-executing, so to speak, that the natural and commercial object of minnows serves as a natural limitation. If Oklahoma bars the exportation, then they would be returned to Oklahoma streams in the form of bait.

Thank you.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Helton?

ORAL ARGUMENT OF R. M. HELTON, ESQ.,

ON BEHALF OF THE APPELLANT -- REBUTTAL

MR. HELTON: Your Honor, I wish to, in answer to Mr. Justice White's question to counsel, in section 4-115A, it provides that no person may ship or transport minnows for sale into this state from an outside source without first having first procured a license for such from the Director. So if you come to Oklahoma to fish from your native state of Colorado, don't bring any minnows with you.

QUESTION: Without a license.

MR. HELTON: And you can't get one -- that is talking about a minnow dealer's license. You can't get a minnow dealer's license unless you are a resident of Oklahoma.

QUESTION: I see.

MR. HELTON: So I am pointing out to you that nobody can come into Oklahoma to fish and bring your minnows into Oklahoma.

QUESTION: So no out-of-state minnow dealer, a fellow who would like to sell you the fishing equipment can sell you any minnows from outside the state, for two reasons: one, he can't get any Oklahoma minnows --

MR. HELTON: And then, of course, an outsider that wanted to bring minnows into Oklahoma, a Texan who wanted to

bring minnows to feed the fish in Oklahoma, could not do it.

QUESTION: Could you read that language again, Mr. Helton? I wasn't sure from its literal language that it applied to someone who wasn't planning to sell them in Oklahoma.

MR. HELTON: No person may ship or transport minnows for sale -- you were right, sir, yes, sir, I'm sorry, sir, you are right.

QUESTION: So I may bring my minnows with me?

MR. HELTON: Yes, sir.

QUESTION: As long as I haven't bought them --

MR. HELTON: Yes, sir, Mr. Justice.

QUESTION: That is a great relief to Mr. Justice White.

MR. HELTON: Thank you, gentlemen.

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

(Whereupon, at 2:27 o'clock p.m., the case in the above-entitled matter was submitted.)

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