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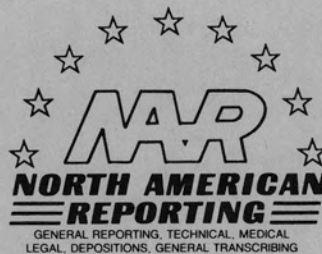
In the

Supreme Court of the United States

MINNESOTA,)
)
 PETITIONER,)
)
 V.) No. 79-1171
)
 CLOVER LEAF CREAMERY)
 COMPANY ET AL.,)
)
 RESPONDENTS.)
)

Washington, D.C.
November 3, 1980

Pages 1 thru 48.



1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - - :
3 MINNESOTA, :

4 Petitioner, :

5 v. :

No. 79-1171

6 CLOVER LEAF CREAMERY
7 COMPANY ET AL., :

8 Respondents. :
9 - - - - - :

10 Washington, D. C.

11 Monday, November 3, 1980

12 The above-entitled matter came on for oral ar-
13 gument before the Supreme Court of the United States at
14 1:01 o'clock p.m.

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on behalf of the Respondents.
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C O N T E N T S

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ORAL ARGUMENT OF

PAGE

| | |
|---|----|
| KENNETH E. RASCHKE, JR., ESQ., on behalf of the Petitioner | 3 |
| HARLON L. DALTON, ESQ., on behalf of the Amicus Curiae | 18 |
| LEONARD J. KEYES, ESQ., on behalf of the Respondents | 25 |
| KENNETH E. RASCHKE, JR., ESQ., on behalf of the Petitioner -- Rebuttal | 45 |

P R O C E E D I N G S

1
2 MR. CHIEF JUSTICE BURGER: We will hear arguments
3 next in No. 79-1171, Minnesota v. Clover Leaf.

4 Gentlemen, since we have only about four minutes
5 left we will not ask you to split your argument. We will take
6 your case up at 1 o'clock, after the lunch hour.

7 (Recess)

8 MR. CHIEF JUSTICE BURGER: Mr. Raschke, you may
9 proceed whenever you're ready.

10 ORAL ARGUMENT OF KENNETH E. RASCHKE, JR., ESQ.,

11 ON BEHALF OF THE PETITIONER

12 MR. RASCHKE: Thank you, Mr. Chief Justice, and may
13 it please the Court:

14 The State of Minnesota is here today asking this
15 Court to review and reverse a decision of the Minnesota Supreme
16 Court which struck down supposedly on equal protection grounds
17 a Minnesota law which would have stopped the sale at retail in
18 Minnesota of milk in single-use throwaway bottles which are
19 made 100 percent from oil and natural gas resources.

20 In reality, however, this case deals with the ques-
21 tion of whether we should return to the days when the courts
22 under the banner of substantive due process interposed their
23 judgment upon the legislature in terms of determining the wis-
24 dom and expediency of given pieces of legislation and weighing
25 evidence and testimony pro and con to determine whether a

1 particular piece of legislation will best do the job set out
2 for it.

3 The statute in question was proposed by the Minnesota
4 Pollution Control Agency and passed by the Legislature in the
5 spring of 1977 as an implementation of general State policy
6 and additionally as a reaction to a specific set of circum-
7 stances which were then existing within the State.

8 In general, the agency and the Legislature recognized
9 the ridiculous waste of resources and energy, and particularly
10 fossil fuels, in many circumstances, as well as the unnecessary
11 disposal problems which had been created by the proliferation
12 of single-use packaging which serves no other purpose but con-
13 venience. The legislative policy was to discourage such
14 packaging, and the plastic jug here in issue is a prime example
15 of that type of a package; and encourage better alternatives
16 where they're available, in this case alternatives such as
17 returnable containers either in plastic or glass, which have a
18 long history in the milk industry.

19 QUESTION: Do you think the Minnesota Legislature is
20 about next time to ban paper containers?

21 MR. RASCHKE: Do I personally feel they were, Your
22 Honor?

23 QUESTION: Well, whether -- was there legislation
24 introduced to that effect in the session in which this one was
25 passed?

1 MR. RASCHKE: This bill originally was introduced
2 in the form of banning specifically the plastic jug in reaction
3 to a then-pending move by major dairies within the State to
4 commit a lot of money and capital expenditures in long-term
5 commitments to the throwaway plastic jug.

6 At one point in time there was an amendment proposed
7 that would have banned paper but it passed in the form origi-
8 nally introduced banning only the plastic jug. I think the
9 idea was to wait and see what sort of effect this Act would
10 have had.

11 QUESTION: Well, the milk industry and the pulpwood
12 industry in Minnesota both have clout, and -- I guess my ques-
13 tion is, how political this is, rather than how environmentally
14 protective?

15 MR. RASCHKE: Well, I don't think it was necessarily
16 at all political in the sense of reacting without legitimate
17 policy to specific pressure groups. I think it was clear from
18 the motives of the agencies that supported the bill as well as
19 many of the statements made in debate that the idea of the bill
20 was to stop a trend that the Legislature and the agency saw as
21 harmful. And that was the situation in which we were commit-
22 ting ourselves to going down the road of throwaway containers
23 which would -- all parties, I think, here, concede that it was
24 not the best environmental alternative.

25 The specific situation that the Legislature was

1 reacting to, as I indicated in my prior answer, is that the
2 milk industry, major dairies within the State, were on the
3 verge of spending hundreds of thousands of dollars in commit-
4 ment to long-term production of these plastic jugs, and the
5 machinery necessary to produce these plastic jugs is both ex-
6 pensive and has a long useful life.

7 QUESTION: Production within the State?

8 MR. RASCHKE: Production within the State; that's
9 true. It was recognized that the paper container is not the
10 environmental ideal. The paper container became common during
11 the 1960s. However, it was further recognized that to permit
12 this move to plastic would lock us into a situation which would
13 virtually eliminate any chance of movement to environmentally
14 preferable alternatives.

15 QUESTION: Are the paper-type containers divided
16 into two categories, one readily destructible and the other
17 not so readily destructible?

18 MR. RASCHKE: To my knowledge, Your Honor, there's
19 only one sort of paper container which was at issue. We talk
20 primarily about the gallon-size container because the plastic
21 is only sold in gallon-size, and the data and the studies only
22 contained -- there was one sort of paper container. The Act
23 was never permitted to take effect because this trial was com-
24 menced in the fall of 1977 before the 1978 effective date.

25 The '78 trial took on what can best be described as

1 the tone of the legislative hearing. There were copious
2 amounts of data, government reports, which were used -- the
3 same reports used by both sides in supporting their positions.

4 Opinions, expert and non-expert alike, were offered
5 on the question of whether the plastic jug is the single worst
6 container from an environmental standpoint or merely the
7 second-worst container possible for the sale of milk. Specula-
8 tion and ideas were offered concerning whether the milk indus-
9 try would or would not have a greater tendency to go to pre-
10 ferable containers with or without the plastic jug. And when
11 it was over --

12 QUESTION: General Raschke, does the record tell us
13 what happened during the last three years? Did they all con-
14 vert to plastic?

15 MR. RASCHKE: During the last three years while this
16 case was in litigation, Your Honor?

17 QUESTION: Yes.

18 MR. RASCHKE: I don't believe the record reflects
19 that at all. I'm not aware of anything in the record which
20 makes reference.

21 QUESTION: If they have in fact all converted, as I
22 guess they've been permitted to do, then the reason for the
23 legislation would have passed, wouldn't it? The idea was to
24 stop them from doing that.

25 MR. RASCHKE: Well, I think the idea, Your Honor,

1 was to prevent the situation in which the industry was permit-
2 ted to go ahead and make these types of investments and then
3 later complain of the tremendous impact it would have on them
4 to then come back and ban either the plastic or the paper.

5 I don't think that has significance in viewing the
6 rational basis of the Legislature. Otherwise any attempt of
7 this sort could be defeated by the regulated industry running
8 out, making the commitments, and by defeating themselves in
9 attempting to defeat the legislative purpose.

10 QUESTION: And the second question, this perhaps
11 duplicates what Mr. Justice Blackmun asked, but as I understand
12 it, part of the rationale was, you've to stop this because
13 we're going to get rid of all disposable containers and paper
14 containers would be next. Has there been any activity to get
15 rid of the paper containers at all? Is there anything on the
16 public record, subsequent to 1977?

17 MR. RASCHKE: There's nothing I'm aware of in the
18 public record, Your Honor. I think what we're doing, or what
19 may be happening is that the Legislature in the State of
20 Minnesota as well as perhaps other places is waiting to see
21 the outcome of this case, and to see whether the Legislature
22 will indeed be permitted to proceed a step at a time. A look
23 at the --

24 QUESTION: I don't see how the outcome, whichever
25 way the case is decided, if the goal really is to get rid of

1 these containers, I don't see any reason why they don't enact
2 the second statute.

3 MR. RASCHKE: Well, I think the goal of the Legisla-
4 ture, Your Honor, is to proceed a step at a time beginning
5 with the least intrusive sort of regulation. Now, this
6 statute --

7 QUESTION: Of course, the least offensive regulation
8 is to let the paper containers continue forever, I suppose.

9 MR. RASCHKE: In -- well, in moving in the direction
10 of our goal, this statute has never been permitted to take
11 effect. We don't know whether it would have the salutary
12 sort of effect that we hope for it.

13 QUESTION: In other words, you can't take the next
14 step until this case is resolved, is that your point?

15 MR. RASCHKE: I think that's a fair statement, Your
16 Honor. I think the legislation --

17 QUESTION: But I don't understand why not. If you
18 want to get rid of disposable containers, why don't you say,
19 no paper containers after five years, or whatever the time
20 would be? I just don't understand it.

21 MR. RASCHKE: That could be done, Your Honor. My
22 point is that I don't believe that it is a point of constitu-
23 tional significance, but --

24 QUESTION: Well, it would remove the constitutional
25 argument that your court relied on.

1 MR. RASCHKE: That's perhaps --

2 QUESTION: It would remove any constitutional ques-
3 tion and it would clearly accomplish your environmental goal.
4 The fact that you don't do it makes one wonder whether that's
5 really the purpose of the legislation.

6 MR. RASCHKE: There are a number of other factors.
7 Both the parties here that have been selling milk in plastic
8 containers and other dairies, most other dairies in the State
9 of Minnesota, are selling milk in paper containers, either
10 paper containers in addition to plastic or paper containers
11 themselves. And one of the rational reasons why the Legisla-
12 ture could well have chosen to first halt plastic and hope
13 for some voluntary movement towards better containers is that
14 if you pick a point in time and ban both plastic and the paper
15 containers at the same time you've got almost every dairy in
16 Minnesota scrambling to convert. And I think it's reasonable
17 for the Legislature to take the point of view that we'll stop
18 the plastic container, which is the single greatest competi-
19 tive enemy to better containers.

20 The record shows that at least in other states the
21 plastic throwaway jug has made its gains at the expense of
22 returnables. One party, Wells Dairy from Iowa, purchased a
23 plant which was producing in pouch-type containers, which the
24 data shows are environmentally preferable, and discontinued
25 that in order to go to the plastic.

1 So, hopefully, if we remove the greatest single com-
2 petitive enemy to more environmentally sound containers, there
3 may be some voluntary movement in that area. And I think
4 that's a judgment that the Legislature is entitled to make.
5 Certainly the option that you suggest and the option that was
6 suggested by the Minnesota Supreme Court would more quickly
7 accomplish the environmental goal, but I think that it's at
8 the expense of other things.

9 I think the past decisions of this Court in many
10 cases permits the Legislature to choose a step at a time
11 approach if it feels that that is called for in the given
12 situation.

13 QUESTION: May I interrupt you for a minute?

14 MR. RASCHKE: You may.

15 QUESTION: You make the argument that the Minnesota
16 Supreme Court decided this case on substantive due process
17 analysis, and I would certainly agree there's a good deal of
18 language in the opinion that I would construe that way. And
19 yet I also read the opinion of the trial court saying positively
20 that the purpose of the statute, despite what the Legislature
21 said, was discriminatory. Its purpose was to discriminate
22 against the plastic industry, not represented in Minnesota, but
23 outside of that State. And the findings of fact of the trial
24 court were found by the Supreme Court on an independent review
25 of the evidence to be incorrect. So what do we do with those

1 findings?

2 MR. RASCHKE: I think there are a couple of problems,
3 many problems, with the findings of the District Court.

4 I think the problem with the District Court was that it clearly
5 said that it felt it was its job to review, weigh, and balance
6 the evidence, because the District Court saw itself as the
7 initial fact finder. The Minnesota Supreme Court, first of
8 all, did not I believe adopt the finding that the Act had a
9 protectionist motive. I think the Supreme Court, our Supreme
10 Court noted at A-35, I think it is, in the Appendix, that the
11 Act unquestionably deals with a proper public purpose, thus
12 rejecting the theory of the trial court.

13 But a problem that our Supreme Court shared with the
14 trial court is that they tended to agree that the trial court
15 was the basic fact finder rather than the Legislature. So it's
16 our contention that based on opinions of this Court, recently
17 reaffirmed in such cases as Exxon v. Governor of Maryland,
18 City of New Orleans v. Dukes, is that it is the legislative
19 judgment that must stand, so long as there's any rational
20 basis to support it.

21 QUESTION: May I ask you this question about what
22 the Supreme Court of Minnesota said? Look at page A-5 of the
23 petition. Down near the middle of the paragraph that begins
24 on the middle of that page.

25 MR. RASCHKE: 85, Your Honor?

1 QUESTION: A-5, the third sentence in the paragraph
2 beginning, "We are aware." On A-5?

3 MR. RASCHKE: A-5?

4 QUESTION: Petition for certiorari?

5 MR. RASCHKE: Oh, petition for cert. I was looking
6 at the Appendix. A-5?

7 QUESTION: It's the paragraph beginning, "We are
8 aware"?

9 MR. RASCHKE: Yes, Your Honor.

10 QUESTION: The third sentence: "Based upon the
11 relevant findings of fact by the trial court, supported by the
12 record, and upon our own independent review of documentary
13 sources, we believe the evidence conclusively demonstrates
14 that the discrimination against plastic nonrefillables..." and
15 then it goes on to pick up equal protection analysis which was
16 the analysis relied upon primarily by the courts below. But
17 the Commerce Clause issue is the one that concerns me, and I
18 think that language by the Supreme Court can be read as con-
19 firming the finding of fact with respect to discrimination made
20 by the trial court, unless you have some explanation for it
21 that hasn't occurred to me at the moment.

22 MR. RASCHKE: Well, our Supreme Court did not reach
23 the Commerce Clause issue and I guess I read that particular
24 phrase as referring to what -- and what comes after, con-
25 cerning --

1 QUESTION: Well, didn't the Supreme Court also say
2 that specifically the stated legislative finding of the Act is
3 that nonrefillable milk containers present solid waste prob-
4 lems and the stated legislative goal is that the use of
5 returnable milk containers should be encouraged? And then it
6 said, "The Act, undoubtedly, deals with legitimate State in-
7 terests."

8 MR. RASCHKE: Yes, it did.

9 QUESTION: Isn't that inconsistent with the trial
10 court's --

11 MR. RASCHKE: I think it's directly inconsistent, and
12 I don't think by affirming, by saying that they were generally
13 affirming the trial court's standards that they were getting
14 to that point. The important thing is that our court after
15 having said this, (a) was looking at its function as reviewing
16 the trial court's findings; and (b) undertook the task of
17 determining which of admittedly admissible evidence was more
18 or less credible than others, in making the ultimate conclu-
19 sions about which type of regulation would be best effective
20 and what the court felt was the single worst container. It's
21 clear that on a proper form of analysis that the Act must
22 stand.

23 First of all, there is data on the record that clear-
24 ly demonstrates the plastic jug is an environmentally poor
25 container. Second, there's clear data on the record which

1 shows that it's the greatest waster of fossil fuel energy and
2 will take up the most space in landfills. It's the greatest
3 competitive barrier to better containers. We're on the verge
4 of a -- we're on the verge of long-term commitments to that.
5 If we add the competitive advantage together with these long-
6 term commitments and the incentive to produce and promote the
7 throwaway container that that would entail, we would virtually
8 guarantee no movement towards the goal of better containers.

9 The plaintiffs here, as we've been discussing pre-
10 viously, have sought to make the Commerce Clause --

11 QUESTION: I don't understand that last argument
12 guaranteeing it. All they have to do is ban the other con-
13 tainer too, don't they?

14 MR. RASCHKE: We could do that, Your Honor, and I
15 think that would be a legitimate legislative choice, but what
16 we're arguing here is that it is not a constitutionally man-
17 dated legislative choice. Cases that this Court has decided
18 for a number of years have clearly indicated that legislation
19 is not to be struck down because it proceeds one step at a
20 time, and goes not as far as it might go to better accomplish
21 the goal.

22 And *City of New Orleans v. Duke*s, was the latest case
23 of that type.

24 QUESTION: The difference with the *Dukes* case is, it
25 was clear from that legislation that as time passed on the

1 people who were then in business would go out of business.
2 But there's nothing in this record to say that you're ever go-
3 ing to prohibit paper containers.

4 MR. RASCHKE: Well, I think in the legislative --

5 QUESTION: This is no one step at a time argument.
6 It's just one step, period, is what you're saying. You're
7 going to take one step with no desire to take the other step.

8 MR. RASCHKE: I think the Legislature can be allowed
9 to take the first step without being constitutionally required
10 to guarantee when that second step will occur.

11 QUESTION: Or even to have any indication that it
12 ever intends to take the second step.

13 MR. RASCHKE: In the Railway Express case --

14 QUESTION: That's your position, isn't it?

15 MR. RASCHKE: In the Railway Express case this Court
16 indicated that the legislature is free to address one portion
17 of the problem and leave other portions for a later time.
18 I'm not aware of any case in which the second step must be
19 guaranteed at least --

20 QUESTION: It's been three years now, hasn't it?

21 MR. RASCHKE: Pardon me, Your Honor?

22 QUESTION: It's been three years now, hasn't it?

23 MR. RASCHKE: Yes, it has.

24 QUESTION: And have you begun to take the second step
25 or not?

1 MR. RASCHKE: I guess the Legislature ought to be
2 entitled after this case is over and hopefully this Court would
3 reverse the Minnesota decision and allow this step to take ef-
4 fect to see how less restrictive, less onerous regulations
5 work before we're constitutionally required by court decree
6 to take the most intrusive measure in accomplishing the goal.

7 QUESTION: Well, so, has the result of this case
8 been that plastics are now being used?

9 MR. RASCHKE: They are.

10 QUESTION: So the rationale has disappeared now for
11 saying that we started with plastics because they really hadn't
12 come in yet?

13 MR. RASCHKE: Well, we're trying to stop the major
14 financial commitments, for one thing.

15 QUESTION: Well, that's past now, isn't it?

16 MR. RASCHKE: We are not aware that those commitments
17 have been made. I'm not aware, the record does not indicate
18 whether those investments have been made. We know that there
19 is sale taking place in plastic, but as I said before, if we're
20 allowed to base a constitutional decision on the efforts of the
21 industry to defeat the goals, no regulation of that type can
22 stand. We can't continue indefinitely using up valuable energy
23 and solid waste resources. The important point here is that
24 these jugs are made 100 percent from fossil fuel energy, when
25 there are viable alternatives that can be used. This --

1 MR. CHIEF JUSTICE BURGER: Your time has expired now.
2 You're cutting into your colleague's time.

3 MR. RASHKE: I've granted ten minutes to Mr. Dalton
4 of the Solicitor's Office and if he has any time left I would
5 like to rebut.

6 MR. CHIEF JUSTICE BURGER: Very well. Mr. Dalton.

7 ORAL ARGUMENT OF HARLON L. DALTON, ESQ.,
8 ON BEHALF OF THE U.S. DEPARTMENT OF JUSTICE, AMICUS CURIAE

9 MR. DALTON: Yes, Mr. Chief Justice, and may it
10 please the Court:

11 I propose to first explain the Federal Government's
12 interest in and participation in this case; and secondly, to
13 capsulize more briefly than I had expected where the Minnesota
14 Supreme Court went wrong. And then I will turn to the Commerce
15 Clause issues that I think are behind Mr. Justice Powell's
16 questions.

17 The federal interest in this case is really two-fold.
18 First, we wish to encourage efforts like that of Minnesota
19 to conserve nonrenewable fossil fuels. The recent opinions of
20 this Court and several recent enactments of the Congress have
21 manifested the important national interest in conservation of
22 nonrenewable resources. The Minnesota Supreme Court, however,
23 in our view took insufficient notice of this statutory purpose
24 and concluded that the use of oil and gas in plastic con-
25 tainers, plastic milk containers, was small and that in any

1 event plastic can be recycled. Therefore there was no need to
2 give serious attention to the problem of depletion of non-re-
3 newable fuels.

4 The problem is that if you multiply the oil and gas
5 used in milk cartons in Minnesota across 50 states, a cross-
6 patching not only for milk but for other beverages and food-
7 stuffs and over time, then the problem may indeed be substan-
8 tial.

9 As for the question of the recycling of plastic,
10 there is nothing in the evidence to indicate that the plastic
11 container in Minnesota or anywhere else, in fact, is recycled
12 or that recycling is feasible. The Legislature certainly could
13 have concluded to the contrary, and in any event, even if
14 recycling of plastic was a way of reducing the dependence on
15 non-renewable fuels, the Legislature was free as a matter of
16 constitutional choice to select another alternative for dealing
17 with the problem of solid waste disposal and energy misuse.

18 The second Government interest, federal governmental
19 interest in this case, is in solid waste disposal generally
20 and more particularly in beverage container disposal. There
21 are a series of federal statutes that bear upon this question,
22 most particularly the Resource Conservation and Recovery Act of
23 1976. A federal interagency commission convened pursuant to
24 that statute addressed the question of beverage containers,
25 beverage container disposal, contemplated whether or not to

1 pass a national statute and decided instead to look to the
2 states and see what the states' experience would be in various
3 methods directed to beverage container disposal.

4 Now, that proposal was directed to beer and soft
5 drink containers but the same notion of using the states as a
6 laboratory applies with equal force to milk containers. Indeed
7 not only is it in the Federal Government's interest to use the
8 states' experimentations in this area as a laboratory, it's in
9 the interest of each of the individual states including
10 Minnesota to take a step and look empirically at their exper-
11 ience and then take the next step.

12 The experience of Vermont in this respect, we find,
13 very instructive, and that's detailed in Footnote 6 of our
14 brief.

15 QUESTION: Mr. Dalton, can I ask you, on this ques-
16 tion of federal interest, if there is a choice presented in
17 any commerce situation between using plastic containers and
18 paper containers for dairy products, are you saying that
19 there's a federal interest in choosing paper over plastic?

20 MR. DALTON: No, I'm saying there's a federal interest
21 in leaving Minnesota free to choose paper over plastic, and
22 then in seeing whether that in fact does advance the statutory
23 goals of the --

24 QUESTION: Is the Federal Government indifferent as
25 to whether paper or plastic is used, or does it have a

1 preference?

2 MR. DALTON: I think the Federal Government has a
3 very clear preference for returnable bottles.

4 QUESTION: I understand that but if there's a choice
5 between two disposables, one paper and one plastic, does the
6 Federal Government have an interest in one over the other?

7 MR. DALTON: Only to the extent that plastic does use
8 nonrenewable fossil fuels. To that extent. Assuming the
9 paper and plastic --

10 QUESTION: Well, then your answer is, yes.

11 MR. DALTON: Yes; my answer is, yes.

12 QUESTION: You do. There is a federal interest in
13 preferring plastic disposable containers over paper disposable
14 containers?

15 MR. DALTON: Assuming that they are -- ? Yes.

16 QUESTION: I mean, we shouldn't make assumptions.
17 You're telling us what the Federal Government's interest is,
18 and presumably you've made the factual determination that makes
19 one preferable to the other.

20 MR. DALTON: What I'm saying is that, assume that in
21 other respects they are environmentally equally destructive or
22 harmful or nondestructive, that the Federal Government's pre-
23 ference for conserving fossil fuels would make plastic pre-
24 ferable over paper. We have not made an independent judgment
25 of whether in fact plastic as opposed to paper is more

1 environmentally disruptive. The State of Minnesota's
2 Legislature has made that judgment --

3 QUESTION: I understand, but I'm curious about the
4 federal interest in this particular issue, and is there a
5 federal interest in preferring plastic over paper in disposable
6 containers? I'm not quite clear on whether you've answered
7 this or not.

8 MR. DALTON: Okay.

9 QUESTION: Seems to me it's a yes or no question.

10 MR. DALTON: Well, in that case the answer must be,
11 yes, given the federal interest in conservation of fossil
12 fuels.

13 QUESTION: Would you have the same interest if a
14 neighboring state said, we will allow plastic but not paper,
15 because we think that's environmentally superior? Would you
16 also say that choice should be defended in the same rationale?

17 MR. DALTON: Yes, we would have an interest in that
18 statute because we have an interest in seeing whether that
19 process is an appropriate one or a successful one in leading
20 toward the ultimate goal of returnable containers. In other
21 words, we think that that would also withstand a rational scru-
22 tiny test, which is the only one to be applied in this case.

23 QUESTION: Is it the premise here that the pulp used
24 in the other containers is a renewable, because it's a fast
25 growth?

1 MR. DALTON: Precisely. I'd like to speak briefly
2 to the question of pulp and the fact that there is some evi-
3 dence in the record -- at least, statements by legislators --
4 that this bill is related to the interests of the timber indus-
5 try in Minnesota.

6 First off, this Court has recognized in the United
7 States v. O'Brien that legislation which on its face is consti-
8 tutional ought not to be struck down because some legislators
9 have made statements without which the statute would survive.

10 Secondly, it's not a sufficient criticism to say that
11 a statute is in part politically motivated. Legislatures are
12 supposed to take into account the political, that is the
13 economic and the social interests of their citizens. What they
14 can't do is to place burdens on interstate commerce that vio-
15 late the Commerce Clause. Our position is that this statute
16 does not do that. This statute is not protectionist on its
17 face. There are statutory purposes which are set out at the
18 beginning of the statute. This statute is not protectionist
19 in effect. I think Mr. Justice White was correct in noting
20 that the Minnesota Supreme Court essentially disavowed the
21 District court's factual finding that the statute had a protec-
22 tionist purpose. Nor is the statute protectionist in terms
23 of the means that are chosen to effect its purposes, as was the
24 case, in the case last term, Lewis v. BT Investment, the
25 Florida case involving --

1 QUESTION: You are not saying, I am sure, that the
2 legislative purpose would prevent any factual inquiry as to
3 whether or not the effect of this statute really was discrimi-
4 natory against interstate commerce, are you?

5 MR. DALTON: No, I'm certainly not saying that
6 by simply enunciating what legislative purposes that seem
7 consistent with the Commerce Clause, a state can insulate that
8 statute from Commerce Clause challenge. But what I am saying
9 is that in this case there is no evidence that there was in
10 fact a protectionist purpose and --

11 QUESTION: Well, the District Court found to the con-
12 trary.

13 MR. DALTON: But our position is that the Supreme
14 Court --

15 QUESTION: You want us to weigh the evidence?

16 MR. DALTON: Again, please?

17 QUESTION: You want us to weigh the evidence?

18 MR. DALTON: No, on the contrary. I think that the
19 District Court found to the contrary because it weighed and
20 sifted the evidence, because it took the wrong approach, in
21 essence. But beyond that, I think if you look at the effect
22 of the statute, this statute does not prohibit out-of-state
23 paper interests from producing paper cartons and marketing them
24 in Minnesota. It doesn't prohibit in-state Minnesota plastics
25 manufacturers from manufacturing plastic cartons and shipping

1 them out of the State. There is no barrier to interstate com-
2 merce. What the statute does is prohibit a product, not the
3 product manufactured at a particular location.

4 QUESTION: Are there any plastic manufacturers in
5 Minnesota?

6 MR. DALTON: My understanding is that there were not
7 at the time that the statute was enacted, but that there was a
8 move afoot to have in-state manufacturing of plastic cartons.
9 That's part of what motivated the statute. That's part of the
10 capital investment to which Mr. Raschke referred that indeed
11 was the impetus for the statute.

12 Well, I'll cede the balance of my time back to the
13 petitioner.

14 MR. CHIEF JUSTICE BURGER: Mr. Keyes.

15 ORAL ARGUMENT OF LEONARD J. KEYES, ESQ.,

16 ON BEHALF OF THE RESPONDENTS

17 MR. KEYES: Mr. Chief Justice, may it please the
18 Court:

19 The Court today has before it a unique Minnesota
20 statute. It's a criminal act that hasn't been adopted by any
21 other legislature in the United States. It affects only milk.
22 Milk cannot be packaged or sold at retail in Minnesota in a
23 gallon, plastic, non-returnable container. It does not affect
24 windshield wiper fluid or kerosene or any other liquid sub-
25 stance. It's an absolute bar, and it is not an anti-littering

1 statute. The State of Minnesota has been referring in their
2 brief to throwaway bottles. The Solicitor General in his brief
3 talks about the anti-littering statutes which have been held
4 constitutional throughout this country. This is not an anti-
5 littering statute on either side. Nobody drinks milk and
6 throws the bottle out the window, whether it's a plastic bottle
7 or a paperboard bottle.

8 Therefore, the question is simply --

9 QUESTION: Sooner or later, Mr. Keyes, someone must
10 dispose of the container, whatever it is, must they not?

11 MR. KEYES: Surely. Surely.

12 QUESTION: It may even take about four drinks but
13 it is --

14 MR. KEYES: They don't litter it, Your Honor. They
15 do not litter the container. That's our position. Obviously,
16 it has to be disposed of some way, either by recycling, by
17 combustion, or by landfill, are the basic --

18 QUESTION: And are these plastic containers combusti-
19 ble?

20 MR. KEYES: They are completely combustible. No
21 noxious gases of any kind, completely combustible at a higher,
22 much higher BTU temperature than are the paperboard, Your Honor.
23 They are also completely recycleable, and contrary to the Soli-
24 citor General's statement, there is quite a bit of evidence in
25 the trial of the recycling programs which are in practice in

1 Minnesota right now.

2 Furthermore, this is not a novel product for Minne-
3 sota --

4 QUESTION: Do you agree that the trial was much like
5 a legislative hearing?

6 MR. KEYES: I do not agree with that, Mr. Justice
7 Marshall. There was evidence produced. There was evidence
8 produced which the court found preponderant, rated overwhelm-
9 ingly in favor of the plaintiffs. Obviously there was evidence
10 produced at the trial; that was what the trial was for. There
11 was also evidence, I'm sure, produced before legislative hear-
12 ings. But I would say that the result of the lower Minnesota
13 court's decision, keeping in mind that the Minnesota court un-
14 derstands those principles on which it must decide these consti-
15 tutional issues, found that the plaintiffs had sustained the
16 tremendous burden which is placed upon them in attacking the
17 constitutionality of a statute.

18 QUESTION: Would you be here if the statute had said,
19 no plastics and also no paper, five years from now?

20 MR. KEYES: I assure you that we would not be here
21 if it had said no plastic or no paper right now. Five years
22 from now, I don't know. I can tell you this, Mr. Justice
23 White, however, that at the trial the head of the Pollution
24 Control Agency in Minnesota said there were no plans whatsoever
25 by that agency to introduce any legislation in regard to any

1 other type of milk container. We also had a witness from the
2 Environmental Protection Agency from Washington, who testified
3 on behalf of the plaintiffs in the lower court in Minnesota,
4 who testified that there were no federal statutes or regula-
5 tions contemplated in regard to regulating plastic containers.

6 QUESTION: No one knows really very much about this
7 problem as yet, do we? Scientists, environmentalists, govern-
8 ments, it's really -- we're going into a fog bank, aren't we,
9 to a large extent?

10 MR. KEYES: We did have, of course, the MRI report
11 which, and the expert witnesses from both sides who testified
12 in the lower court.

13 QUESTION: I was speaking of experience. There's
14 very little experience to go on, isn't that true?

15 MR. KEYES: Very little experience in this type of
16 statute, Your Honor, yes. And also I would agree that --

17 QUESTION: The technology?

18 MR. KEYES: Technology? Right. Because we talk
19 about nonrenewable resources being used here to make plastic.
20 Plastic can be made out of anything with carbon and hydrogen.
21 It can be made out of air, made out of grass. As of now
22 petrochemicals are being used because they used to be burned
23 off, not flared off. They never -- the plastic which goes
24 into the polyethylene is not a component of the heating fuel
25 which the State seems to indicate we're being deprived of in

1 this matter. They used to be flared off; they're now being
2 used in this country for petrochemicals.

3 The Minnesota court found two basic factors. One,
4 both courts found there was no rational nexus between what
5 the State of Minnesota said it wanted to accomplish, that is,
6 environmental purpose, and the means selected to accomplish
7 it, that is, banning this container of one liquid.

8 QUESTION: Suppose that at the time the legislation
9 was passed the industry was using plastic and paper half and
10 half, and the Minnesota court said, well, we want to get to
11 returnables and we're going to start with plastic. So no
12 plastic. Wouldn't that be rationally connected with it?

13 MR. KEYES: We submit, not on the evidence.

14 QUESTION: Well, it may not be. I didn't ask whe-
15 ther it would be constitutional. I just said --

16 MR. KEYES: Would it be rationally --

17 QUESTION: -- would it be rationally connected? If it
18 prevented half the nonreturnables, I suppose it's rationally
19 connected, isn't it?

20 MR. KEYES: Yes. I have no quarrel with that propo-
21 sition.

22 QUESTION: Well, why isn't it rationally connected
23 if the Legislature said, well, plastic's about to come, we're
24 going to keep it from coming?

25 MR. KEYES: Well, for two reasons in this case.

1 One, plastic has been there for ten or twelve years. Second,
2 the second --

3 QUESTION: Well, then, you're back in my first ques-
4 tion, then.

5 MR. KEYES: All right. That is, that the trial court
6 found after taking voluminous evidence that in Minnesota there
7 would be no return to returnables. If plastic is abandoned,
8 the housewife and the dairy would go only to the paperboard,
9 nonrefillable, nonreturnable container. The evidence -- that
10 was a finding by the trial court upon the evidence in this
11 case. So, when we're talking about this type of statute pro-
12 moting refillables, it just as a practical matter does not do
13 it.

14 Furthermore, the Department of Agriculture of
15 Minnesota is opposed to refillables. The City of Rochester
16 would not permit refillables because of the fact that the
17 sewage system couldn't stand it from the washing at the home
18 and the washing at the dairy. There was much evidence to that
19 effect.

20 QUESTION: That may be so but if the statute had
21 banned all nonreturnables, that certainly is rationally con-
22 nected to an end, isn't it?

23 MR. KEYES: Yes, it is.

24 QUESTION: And they wouldn't have gone on using non-
25 returnables.

1 MR. KEYES: That's right.

2 QUESTION: They would have shifted to glass or some-
3 thing.

4 MR. KEYES: Yes.

5 QUESTION: Well, then, why can't the Legislature say,
6 half at a time?

7 MR. KEYES: Because the half that they are going to
8 take out isn't going to accomplish the purpose of getting
9 refillables.

10 QUESTION: It would be one step, though. You can't
11 say that --

12 MR. KEYES: Not necessarily, when -- 100 percent of
13 the consumers would then go to the paperboard, as the evidence
14 showed. You wouldn't get refillables. They didn't get them
15 in Canada in Ontario, where they banned both. In Canada they
16 go to the polyethylene nonrefillable soft plastic. The house-
17 wife will not go to refillables.

18 QUESTION: So, if the Legislature had started with
19 paper, you would suggest that everybody would have gone to
20 plastic?

21 MR. KEYES: Yes, sir.

22 QUESTION: Mr. Keyes, isn't there some evidence in
23 the record that with respect to gallon jugs, if you ban plas-
24 tic, they will go back to glass instead of the paper, because
25 the paper gallon container, as opposed to the quart or

1 half-gallon, is pretty unsatisfactory?

2 MR. KEYES: If there was, Mr. Justice Stevens, I
3 don't recall it. However, I do believe that, obviously, there
4 was conflicting evidence on many points in this case, and the
5 court did make a determination on what it considered to be the
6 great preponderance of the evidence.

7 The Minnesota courts found, again -- if there is --
8 plastic is banned, there is no return to refillables, and the
9 milk market will be preempted by paperboard. There are no
10 plans as I indicated for federal or State additional regula-
11 tion, by the Commission of the State of Minnesota.

12 QUESTION: Well, what if the legislative findings had
13 in so many words found that, if we ban plastic, there will be
14 a substantial switch to returnables?

15 MR. KEYES: What if they had said that?

16 QUESTION: Yes, what if they had said that, and then
17 -- is a court then free to re-find that, to make some contrary
18 findings?

19 MR. KEYES: I certainly believe so. I think the
20 Court in its --

21 QUESTION: Do you have to take that position? I
22 suppose you do, don't you?

23 MR. KEYES: Yes. And I think the Minnesota courts
24 took that position. I think this Court has taken that posi-
25 tion in --

1 QUESTION: In what case is that?

2 MR. KEYES: I would say in the Hunt v. --

3 QUESTION: In the Apple case?

4 MR. KEYES: The Apple case. A New Jersey case,
5 Philadelphia v. New Jersey. And in Craig v. Boren, and in
6 Raymond Motor Freight, all of which, the state had an ostensi-
7 ble purpose. And the trial court found on the basis of volumi-
8 nous evidence that that purpose was not being effected by the
9 statute. And because of that, this Court found, or agreed,
10 that the mere statement --

11 QUESTION: Well, what is the standard? That there
12 isn't any rational basis for the legislative finding, or that,
13 although it may be rational, we find the facts to the contrary?
14 What is the standard?

15 MR. KEYES: Well, the standard as I understand it --
16 -- and I think the standard our Supreme Court used -- is there
17 was no rational basis for the Legislature to have conceived
18 that these means would bring about the end that they sought
19 to bring about. And I believe the Dukes standard on equal
20 protection is the one that was followed by our Supreme Court.

21 The Minnesota courts found, both the Supreme Court
22 and the lower court, that the big problem with disposable
23 waste today is landfills, and the effect that refuse has on
24 landfills. It found that because plastic is not biodegradable
25 -- and this is not an anti-litter statute -- there is no

1 leaching of the surface waters through the vegetable matter
2 into the underground aquifers which are so important in our
3 state, and I'm sure in most state; no methane gas. In fact,
4 many -- the evidence showed that many landfills are lined with
5 plastic to stop the leaching. Furthermore, you have stable
6 landfills. As I indicated earlier, plastic is completely re-
7 cycleable and completely combustible. None of those are pro-
8 perties of the so-called paperboard container, which incident-
9 ally is coated with plastic; not the wax that you used to get
10 years ago, it's plastic-coated, melded.

11 Furthermore, the Court found, both courts, that
12 plastic containers are as environmentally sound as paperboard
13 in a number of other matters, and in no case is it inferior.
14 Therefore they found that the statute is really not an environ-
15 mental statute. The statute is not an environmental statute;
16 the statute is for the purpose of -- the lower court: insu-
17 lating local industry from out-of-state competition; and the
18 Supreme Court: --

19 QUESTION: That's no longer in this case, is it?

20 MR. KEYES: I believe it is.

21 QUESTION: How does it stay in after the opinion of
22 the Supreme Court?

23 MR. KEYES: The Supreme Court said, we do not ad-
24 dress it because we don't have to, Your Honor.

25 QUESTION: Well, then, how do we get it?

1 MR. KEYES: Pardon?

2 QUESTION: Then how do we get it?

3 MR. KEYES: You get it on the same basis that you
4 got the Barchi, when an issue was not litigated in Barchi, you
5 asked that it be briefed. Beazer -- New York City Transit
6 Authority v. Beazer, where the lower trial court decided a case
7 on the constitutional issue, filing the statutory issues,
8 and the circuit court, if I recall, addressed only one of the
9 issues, and you decided on the statutory issues.

10 QUESTION: Did you rely on the Commerce Clause issue
11 in both courts below?

12 MR. KEYES: We did. We relied on it in both courts
13 below, we briefed it in both courts. We briefed it in our
14 opposition to cert. in this Court.

15 QUESTION: Then you won in the District Court on all
16 your grounds, didn't you?

17 MR. KEYES: We won on all grounds except that the
18 District Court found that the due process, substantive due
19 process and equal protection were both based on the rationality
20 nexus.

21 QUESTION: Yes.

22 MR. KEYES: And so it didn't address it too well.
23 Minnesota did not decide it on the Commerce Clause issue be-
24 cause it said it did not --

25 QUESTION: It was just on Equal Protection, wasn't it?

1 MR. KEYES: Solely on Equal Protection.

2 QUESTION: Was there an Equal Protection Clause in
3 the Minnesota Constitution?

4 MR. KEYES: There is, Your Honor, but there is no
5 Commerce Clause.

6 QUESTION: I understand that. So -- but you didn't
7 present any State grounds?

8 MR. KEYES: We did not.

9 QUESTION: Why didn't you?

10 MR. KEYES: Because the two clauses are identical,
11 and we felt that the --

12 QUESTION: Well, I know, but if you'd have won on
13 the State ground, they could never have come here.

14 MR. KEYES: That would have been -- we didn't under-
15 stand that. It was our feeling that if the two are identical
16 that --

17 QUESTION: If the two are identical, you would have
18 won on the State ground in the Minnesota Supreme Court. And
19 there would have been no resort to this Court.

20 QUESTION: Mr. Keyes, on the equal protection theory
21 of the case, the Equal Protection Clause says that no state
22 shall deny to any person within its jurisdiction equal protec-
23 tion of the laws. Who are the persons that you say have been
24 denied the equal protection of the laws?

25 MR. KEYES: The persons, Your Honor, are the

1 suppliers, fabricators, and --

2 QUESTION: They're not the dairies?

3 MR. KEYES: Not the dairies; no.

4 QUESTION: Now, the dairies are parties to this
5 litigation?

6 MR. KEYES: They are.

7 QUESTION: So this argument isn't really advanced on
8 their behalf?

9 MR. KEYES: It's on their behalf to the extent that
10 they fabricate plastic milk bottles in Minnesota. Some of the
11 dairies do.

12 QUESTION: Well, they want to sell their --

13 MR. KEYES: Pardon?

14 QUESTION: They want to sell their milk in plastic
15 containers, don't they?

16 MR. KEYES: Yes. Yes, they do.

17 QUESTION: So they are real parties in interest, your
18 client is a dairy, isn't he?

19 MR. KEYES: Our client is a dairy who fabricates
20 these plastic milk containers.

21 QUESTION: But even if he didn't, he would presumably
22 want to sell. Other dairies that don't fabricate them still want
23 to sell their milk in plastic containers, don't they?

24 MR. KEYES: That's correct.

25 QUESTION: They may want to, but how are they being

1 treated differently than any other dairy? Every dairy has
2 the right to sell milk in paper containers but not in plastic
3 containers. Aren't all dairies being treated alike?

4 MR. KEYES: Not to the extent that the plastic con-
5 tainer, we feel, or at least the evidence showed, was a much
6 more attractive container and permits the sale --

7 QUESTION: Well, I understand you think it's better
8 and it's irrational. I'm just addressing myself to the equal
9 protection theory. Are there any cases that you know of in
10 which all businesses within the State are treated alike, it's
11 just that they can't engage in the laundry business or the
12 plastics business, whatever it might be. Does that violate the
13 Equal Protection Clause?

14 MR. KEYES: Not internally. However, milk is com-
15 peting at all times with many other, with soft drinks and many
16 other liquids. And in that case the package or container, we be-
17 lieve, does assist the sale of milk by these dairies.

18 QUESTION: Well, I understand that. I asked if there
19 is any precedent for holding that denying a business the right
20 to engage in a particular kind of activity violates the Equal
21 Protection Clause?

22 MR. KEYES: It does when there's no rational basis
23 for it.

24 QUESTION: Do you have any cases for that proposition?

25 MR. KEYES: Again, I think that there's no rational

1 nexus for the discrimination generally speaking.

2 QUESTION: Your answer is, no, you don't have any
3 cases for that proposition?

4 MR. KEYES: I don't have any cases --

5 QUESTION: Mr. Keyes, what's the competition between
6 gallons of milk and soft drinks?

7 MR. KEYES: What is the -- ? I'm sorry, I didn't
8 understand.

9 QUESTION: The competition between a gallon con-
10 tainer of milk and soft drinks?

11 MR. KEYES: The only --

12 QUESTION: They're both liquids?

13 MR. KEYES: They're both liquids, but --

14 QUESTION: Now, what else?

15 MR. KEYES: That's -- the dairies, I believe, find
16 that in order to compete in the liquid, consumer market,
17 they should have an attractive package and should be entitled
18 to use a package which is not an environmentally harmful
19 package, and we're back again to the lack of rationality for
20 the discrimination, Your Honor.

21 QUESTION: I hear what you're saying.

22 MR. KEYES: We submit that the State
23 of Minnesota, and the evidence shows, could not pass an
24 effective littering bill, or could not pass an effective con-
25 tainer deposit bill. It was not possible for them to do it

1 politically. So out-of-state interests were banned. There
2 was no political problem whatsoever with the banning of out-
3 of-state interests. But the local interests such as the can
4 manufacturers and others who would be affected by an effective
5 litter or container deposit bill were not affected by this
6 legislation, because politically, they could not have been.

7 QUESTION: What out-of-state industry as of the pre-
8 sent time, or at the time of beginning of the litigation, was
9 being banned?

10 MR. KEYES: The plastic industry.

11 QUESTION: Generally?

12 MR. KEYES: No, no, only in regard to the making of
13 milk bottles, plastic containers.

14 QUESTION: Well, I understood the State to say that
15 they were going to set up a plant in Minnesota, and that this
16 was what brought up, one of the things that brought up the
17 legislation.

18 MR. KEYES: I was very unaware of that, and
19 and it has never happened. There is no -- in
20 there are fabricating plants in Minnesota which
21 utilize out-of-state machinery and utilize out-of-
22 state polyethylene, but there are no plants in
23 Minnesota, no plastic plants in Minnesota. There
24 are none. There is, however, a very strong
25 lobby in the State. The discrimination in this matter, we

1 submit, for interstate commerce purposes, is between producers
2 of milk containers. We further submit that the movement of
3 plastic containers, raw material, equipment, is halted at the
4 border of Minnesota. It can't get into the State for the pur-
5 pose of retail.

6 QUESTION: Now, this is your interstate commerce
7 argument?

8 MR. KEYES: This is our interstate commerce, sir.

9 QUESTION: That you're making as an alternative
10 ground to support the judgment in your favor in the Minnesota
11 Supreme Court?

12 MR. KEYES: That is correct, Mr. Justice Stewart.
13 The evidence was clear that Phillips Petroleum would lose about a
14 half a million dollars annually as a result of this statute.
15 The Hoover Company has already lost a million and a half dol-
16 lars and it would be absolutely foreclosed from the Minnesota
17 market. The Wells Dairy in Le Mars, Iowa, would not be able to
18 ship about a million gallons of plastic-contained milk into
19 Minnesota if this statute were permitted.

20 QUESTION: Well, if they had banned both plastic
21 and paper, I suppose you'd be making the same argument?

22 MR. KEYES: Yes -- I don't know that I would.

23 QUESTION: Well, why not, if --

24 MR. KEYES: On Commerce --

25 QUESTION: -- it would still keep these, the very

1 people out that you just mentioned?

2 MR. KEYES: On Commerce; yes. That's correct.

3 The legislative history in this case indicates that
4 the timber interests were to be protected. It's the third
5 largest employer in our State -- that was in the legislative
6 history. The plastic industry was referred to by the author of
7 the bill as the boys in the alligator shoes from New York and
8 Chicago who were going to come in our State and tell us how to
9 run it; no importation of competing petrochemicals or plastics
10 from out-of-state. Further, this Court has stated that protec-
11 tionism can arise from the effect of a statute as well as from
12 a protectionist legislative motion. Very few legislatures
13 state exactly that they are going to cast an undue burden on
14 commerce.

15 But the practical effect of the statute -- and which
16 it is here -- no chemical industry in Minnesota, no plastic
17 industry; there is an extensive timber industry. This Court
18 is aware of a number of recent cases by hit, just in regard to
19 this point. The evidence convinced the Minnesota court that
20 the purported State goal was environmental protection, was
21 illusory. At least the trial court found that. And that's the
22 same result as this Court determined in regard to Raymond Motor
23 Transport. Then the State of Wisconsin said, we're going to pro-
24 mote highway safety. This Court said, the evidence did not
25 permit that.

1 Hunt and Lewis: we're going to protect the consumer.
2 This Court after an examination of the evidence found in the
3 contrary. Philadelphia v. New Jersey, environment and public
4 health were going to be supported by this statute. This Court
5 after review of the evidence found that it was illusory.

6 A slight or non-existent legitimate state purpose
7 cannot justify a burden on commerce, even though the burden is
8 slight. That is what I believe this Court has said in these
9 matters, and that is the basis of our Commerce Clause argument.

10 The Minnesota court also found that Equal Protection
11 was violated on the basis of no rational nexus. I am aware
12 of the three-tiered approach used by this Court in that matter
13 and of course if the approach should be abandoned, we sub-
14 mit that Minnesota's justification of the statute is insuffi-
15 cient to support the discrimination between milk containers.
16 There's just no -- whether it's rational basis or whether it's
17 substantial state purpose.

18 Even if the Minnesota end be legitimate, the Court
19 held that the means selected did not effect an appropriate
20 governmental interest, and whereas here we contend that the
21 end is not legitimate, the discriminatory classification cannot
22 be related to a proper State interest.

23 Now, we're aware, and our court was aware of Railway
24 Express, of Dukes, and Williamson. Those cases held that
25 legislatures are free to at least perceive evils on a step

1 by step basis.

2 QUESTION: As long as it's a step.

3 MR. KEYES: As long as it's a step. And our
4 Supreme Court --

5 QUESTION: But this is a non-step, you say?

6 MR. KEYES: That's what our Supreme Court said.

7 QUESTION: And the District Court?

8 MR. KEYES: And the District Court. And again, on
9 the basis that a journey of a thousand miles begins with one
10 foot forward, is valid only if that foot is forward, we submit,
11 and sideways or backwards doesn't -- the aphorism is untrue.
12 We submit that that is what our court held on the basis of
13 voluminous findings of fact, that the step is not a forward
14 step, and because of that the statute cannot be justified under
15 the Commerce Clause, we submit, and also as the Minnesota
16 Supreme Court determined, under the Equal Protection Clause.

17 QUESTION: Did the State ever argue that as a matter
18 of state law the Supreme Court of Minnesota was disentitled to
19 second guess the findings of the Legislature?

20 MR. KEYES: Over and over. Yes, they argued that --

21 QUESTION: And the Minnesota -- so the Minnesota
22 court in effect says, as a matter of state law, the state
23 Supreme Court and courts are perfectly allowed and it's
24 permissible to look into legislative findings.

25 MR. KEYES: Your Honor, they made a motion to dismiss

1 at the beginning of the case on the basis that legislative
2 enactments cannot be examined by the courts. They lost that
3 in the District Court. They argued it again in the District
4 Court and in the Supreme Court. The Minnesota court held that
5 the courts could not and should not abandon their role to de-
6 termine the constitutionality of statutes. That is simply
7 what they held.

8 QUESTION: Well, mightn't you get a different answer
9 to that question in terms of whether you're relying on the
10 Federal Constitution or the State?

11 MR. KEYES: I don't know that we did. I don't know
12 that we would. I do know that our Minnesota court was cer-
13 tainly aware of the fact that the courts are not super-legisla-
14 tures and that they have a distinctive role in the constitu-
15 tionality of statutes. And they exercised it.

16 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Keyes.
17 Mr. Raschke, do you have anything further? You have a couple
18 of minutes left.

19 MR. RASCHKE: Just a couple of further comments,
20 Your Honor.

21 ORAL ARGUMENT OF KENNETH E. RASCHKE, JR., ESQ.,

22 ON BEHALF OF THE PETITIONER -- REBUTTAL

23 MR. RASCHKE: I am not aware that the Minnesota
24 Constitution contains anything directly parallel to the U.S.
25 Equal Protection Clause. I was just paging through to find

1 in the plaintiffs' complaint at A-8, they do not cite any
2 State constitutional provision to base their equal protection
3 argument in the complaint.

4 Secondly, Mr. Keyes mentioned that plastic burns at
5 a higher BTU value. There's a very good reason for that. It
6 has a whole lot more energy locked up in it. The trial court
7 found that it has three times, roughly, the energy that the
8 paperboard container has in it.

9 With respect to the question of protecting the
10 pulpwood industry, there's no evidence on record that demon-
11 strates that these paperboard containers actually come from any
12 Minnesota paper products as opposed to products of any one of a
13 large number of other states which are engaged in the paper
14 industry.

15 QUESTION: Would that be a matter outside judicial
16 notice? I suppose you would suggest it is.

17 MR. RASCHKE: Pardon me, your Honor?

18 QUESTION: Is that a matter outside of judicial
19 notice or -- I suppose you'd say it is.

20 MR. RASCHKE: Well, I don't -- if you're asking me
21 whether you can take judicial notice of the fact that there are
22 numerous cases involving paper --

23 QUESTION: Does the fact that trees grow in
24 Minnesota --

25 MR. RASCHKE: -- I think that's judicially noticeable.

1 QUESTION: Well, did the Supreme Court of Minnesota
2 say they were judicially noticing this production and resource
3 factor? Did its opinion mention that?

4 MR. RASCHKE: With respect to discrimination -- paper?

5 QUESTION: No, did they refer to the fact that -- the
6 source of these containers, whether they were made inside or
7 outside the State?

8 MR. RASCHKE: The Act makes no distinction whatsoever
9 with respect to where the containers, raw materials, or any-
10 thing else came --

11 QUESTION: What did the District Court find?

12 MR. RASCHKE: The State Supreme Court found --

13 QUESTION: What did the District Court find?

14 MR. RASCHKE: -- with respect to --

15 QUESTION: What did the District Court find?

16 MR. RASCHKE: I don't think there was any finding
17 with respect to where the paper for the paperboard container
18 comes from, whether within or without the State. Certainly
19 the statute doesn't make that distinction. Certainly the
20 statute in its effects in its entirety placed a primary impact
21 on local interests, the local dairies and the retailers that
22 would like to be able to sell this milk. It's only after you
23 get two or three steps removed in terms of regulation that we
24 even get the plastic industry, who makes something that happens
25 to go into one use, one container. I thank you.

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MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 2:00 o'clock p.m., the case in the above-entitled matter was submitted.)

MILLERS FALLS
ERASE
COTTON CONTENT

CERTIFICATE

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North American Reporting hereby certifies that the attached pages represent an accurate transcript of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

No. 79-1171

Minnesota,

v.

Clover Leaf Creamery Company,
et al.

and that these pages constitute the original transcript of the proceedings for the records of the Court.

BY: W. J. Wilson

William J. Wilson

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