

# Supreme Court of the United States

ORIGINAL

JEFFERSON COUNTY PHARMACEUTICAL  
ASSOCIATION, INC.,

Petitioner

v.

ABBOTT LABORATORIES ET AL.

)  
)  
)  
)  
)  
)  
)

NO. 81-827

Washington, D. C.

November 8, 1982

Pages 1 thru 43

ALDERSON  REPORTING

440 First Street, N.W., Washington, D. C. 20001

Telephone: (202) 628-9300

1                   IN THE SUPREME COURT OF THE UNITED STATES  
2   - - - - -x  
3   JEFFERSON COUNTY PHARMACEUTICAL   :  
4       ASSOCIATION, INC.,               :  
5                                   Petitioner       :  
6                   v.                       :       No. 81-827  
7   ABBOTT LABORATORIES ET AL.       :  
8   - - - - -x  
9                                   Washington, D.C.  
10                                  Monday, November 8, 1982  
11       The above-entitled matter came on for oral argument  
12   before the Supreme Court of the United States at 2:01  
13   p.m.  
14   APPEARANCES:  
15   JOE L. TUCKER, JR., ESQ., Bessemer, Alabama;  
     on behalf of Petitioner.  
16   DAVID KLINGSBERG, ESQ., New York, New York; on behalf  
17   of Respondent.  
18                                  - - -  
19  
20  
21  
22  
23  
24  
25

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

C O N T E N T S

<u>ORAL ARGUMENT OF</u>	<u>PAGE</u>
JOE L. TUCKER, ESQ., on behalf of Petitioner.	3
DAVID KLINGSBERG, ESQ. on behalf of Respondent	21
JOE L. TUCKER, ESQ. on behalf of Petitioner - Rebuttal	44

1                                P R O C E E D I N G S

2                        CHIEF JUSTICE BURGER: We will hear arguments  
3 next in Jefferson County Pharmaceutical against Abbott.  
4 Mr. Tucker, I think you may proceed whenever you're  
5 ready.

6                        ORAL ARGUMENT OF JOE L. TUCKER, JR., ESQ.

7                                ON BEHALF OF THE PETITIONER

8                        MR. TUCKER: Mr. Chief Justice, and may it  
9 please the Court:

10                      This case involves the issue of whether or not  
11 the prohibitions of the Robinson-Patman Act apply to  
12 sales of drugs to governmental agencies where those  
13 governmental agencies act in direct competition with  
14 private enterprise. That is, are agencies of Jefferson  
15 County, Alabama and the Board of Trustees of the  
16 University of Alabama exempt per se from the application  
17 of the Robinson-Patman Act, even though they compete  
18 with privately-owned enterprises; in particular in this  
19 case, retail pharmacists.

20                      QUESTION: I suppose on the status of this  
21 case, which was decided basically on the basis of the  
22 complaint, we have no idea what percentage of the  
23 pharmaceutical products were sold to indigent sick or  
24 what part to the public in general.

25                      MR. TUCKER: Justice O'Connor, we do not have



1 any firm statistics with that regard, although a  
2 thorough investigation was made prior to filing the  
3 complaint, and that investigation did reveal plenty of  
4 facts sufficient to substantiate the complaint, with the  
5 exception, of course, the ruling of the district court.

6 QUESTION: Would you agree that many states or  
7 local governments in states do and have traditionally  
8 undertaken to provide medical care and services to the  
9 indigent sick?

10 MR. TUCKER: I would agree, Justice O'Connor,  
11 that many states have undertaken to provide care to the  
12 indigent sick. However, I will not agree that providing  
13 of health care services is a traditional government  
14 function. I would also not agree --

15 QUESTION: You would concede that it is in  
16 some states, I suppose; those who since statehood have  
17 assumed that responsibility?

18 MR. TUCKER: I agree that some states have  
19 assumed part of that responsibility, but I could not  
20 agree that it was a traditional governmental function of  
21 states or counties to provide --

22 QUESTION: Even in states which have done it  
23 since statehood?

24 MR. TUCKER: Well, Your Honor, I state this  
25 based on not only -- with regard to indigent services,

1 that may be true. But in our case, the allegations were  
2 going not just to services for the indigent, but to the  
3 general public as a whole; paying persons as well as  
4 those on Medicaid, and drugs being purchased by Medicaid.

5           This case began in 1978 when Jefferson County  
6 PHarmaceutical Association filed suit in the United  
7 States District Court of the Northern District of  
8 Alabama seeking injunctive relief and treble damages  
9 against 15 drug manufacturers, and Jefferson County and  
10 the Board of Trustees of the University of Alabama  
11 Medical School.

12           The two hospitals, Jefferson County's  
13 charitable institution, Cooper Green Hospital, and the  
14 University of Alabama Hospita were operating pharmacies  
15 in direct competition with private retail pharmacists.  
16 I think it's important to note where the pharamacy was  
17 with regard to the one operated by the University of  
18 Alabama.

19           The University of Alabama Medical Center has a  
20 hospital and that hospital has a pharmacy approximately  
21 on the 15th and 16th floors. That pharmacy was not the  
22 one selling drugs to the general public, but a separate  
23 pharmacy located away from the hospital, at street  
24 level, nice, comfortable chairs in the lobby for people  
25 to come in and wait on their prescriptions to be filled

1 off the street, the general public, to be served.

2 All of the defendants filed motions to dismiss  
3 claiming that the sales to governmental agencies were  
4 exempt from the application of the Robinson-Patman Act.  
5 The district court ruled in favor of the defendants and  
6 held that sales to the county and state agencies'  
7 pharmacies were beyond the reach of the Robinson-Patman  
8 Price Discrimination Act without regard to 15 USC 13c,  
9 which is the Non-Profit Exemption Act.

10 Petitioner appealed to the Fifth Circuit Court  
11 of Appeals, now the Eleventh Circuit, and that court  
12 affirmed the district court without opinion. Just  
13 noting the decision of the district court. However,  
14 Judge Clark wrote a dissenting opinion stating that the  
15 court had created a near-exemption to the Act. He  
16 stated that this exemption allowed governmental agencies  
17 to compete in the private, proprietary sector of  
18 commerce, and use its superior buying power against  
19 businessmen operating private retail drug stores.

20 First of all, purchases for resale -- that's  
21 the key here in this case. This case is very similar,  
22 of course, to Abbott Laboratories versus Portland Retail  
23 Druggists Association, where this Court held that the  
24 Robinson-Patman Act applied to sales to private  
25 hospitals. That case, of course, did not reach the

1 issue here where -- that case, as I understand it, there  
2 were not -- it was not before this Court the issue of  
3 governmental agencies selling to general public.

4           The antitrust laws do apply to  
5 anti-competitive conduct of state and local governments  
6 when engaged in proprietary functions. This has been  
7 cited in the City of Lafayette versus Louisiana Power  
8 where this Court held that the word "persons" as used in  
9 the antitrust laws, includes states and their political  
10 subdivisions.

11           QUESTION: Mr. Tucker, if you prevail here,  
12 will there be any spill-over effect on military  
13 exchanges?

14           MR. TUCKER: No, sir, I don't think that that  
15 would apply. The case --

16           QUESTION: Why?

17           MR. TUCKER: The case of Champaign-Urbana News  
18 I believe spoke to that issue, a similar issue, except  
19 that in that case, Champaign-Urbana News sought to apply  
20 the Robinson-Patman Act to the Secretary of the Army and  
21 Secretary of the Air Force. And of course, this Court  
22 held that it could be not applied; that the Secretary of  
23 Army and the Secretary of the Air Force were immune.

24           QUESTION: Did you, by any chance, have lunch  
25 in the Court cafeteria this noon?



1 MR. TUCKER: No, sir, I didn't.

2 QUESTION: You know we have one here in the  
3 building?

4 MR. TUCKER: Yes, sir.

5 QUESTION: If you prevail here, do you think  
6 there would be a spill-over effect on the cafeteria here?

7 MR. TUCKER: No, sir. I don't. The --

8 QUESTION: Would you distinguish it on the  
9 grounds that that's maintained chiefly for the  
10 convenience of personnel working in the building?

11 MR. TUCKER: Yes, sir. I think that the  
12 cafeteria here would be very similar to the situation  
13 possibly in General Shale versus Struck Construction  
14 Company.

15 QUESTION: But it is open to the general  
16 public and is used by the general public.

17 MR. TUCKER: Yes, sir.

18 QUESTION: Did the Chief Justice say was  
19 maintained chiefly or cheaply?

20 (Laughter.)

21 QUESTION: Well, my next question was going to  
22 be what if, then, the evidence showed that 75 percent of  
23 the customers were tourists and other people not  
24 connected with this building, and only 25 percent were  
25 people in the building?

1 MR. TUCKER: If that were the case, Your  
2 Honor, and they were in direct competition, of course,  
3 the difference here is federal versus state and local.  
4 I think -- my understanding of the case is there's no  
5 question but that the Congress has the power to regulate  
6 through the commerce powers, activities of the state and  
7 local governments. Whether or not --

8 QUESTION: Well, in the Chief Justice's  
9 example, there's still the possibility that the  
10 Robinson-Patman Act might not apply where there are  
11 sales to a government entity which then itself engages  
12 in activity that is competitive with private business.  
13 But that it would cover just sales for resale by  
14 government.

15 MR. TUCKER: Yes, sir. I think there is some  
16 distinction in what is happening there in that there,  
17 the hospital pharmacies are buying the drugs for the  
18 purpose of intent of reselling --

19 QUESTION: They aren't just buying for the  
20 purpose of running a hospital.

21 MR. TUCKER: No, sir.

22 QUESTION: Which -- the hospital would be  
23 competitive, perhaps, but they nevertheless aren't --  
24 here they're reselling.

25 MR. TUCKER: The hospital may be competitive

1 with other hospitals, and I think that from Justice  
2 O'Connor's comment there has been some recognition that  
3 some hospital activities, although it's not, according  
4 to the case of Swain versus Milford City Hospital, Inc.,  
5 it's not a traditional governmental function. Those  
6 activities have been sanctioned to some extent.

7 But here you have something that is completely  
8 outside the traditional function of government, and that  
9 is the operation of retail pharmacies.

10 QUESTION: Would you concede that to the  
11 extent that the state operated its public hospital and  
12 its pharmacy within that hospital only for the benefit  
13 of the indigent sick that the state undertook to care  
14 for, that even under your test, the Robinson-Patman Act  
15 would not apply?

16 MR. TUCKER: Your Honor, I think that would  
17 depend entirely on the facts of the case. I think it  
18 would depend on whether there was a resale in  
19 competition, or whether or not, for instance, they were  
20 giving away the drugs. I think --

21 QUESTION: Or sold very cheaply to people who  
22 qualified as indigents who couldn't afford otherwise to  
23 buy them.

24 MR. TUCKER: Well, I would have to say, Your  
25 Honor, that if drugs were sold and they were sold in

1 competition with private enterprise and they were  
2 obtained through discriminatory price bidding, then they  
3 would have to fall within the proscriptions of the  
4 Robinson-Patman Act. There are --

5 QUESTION: Wouldn't that have the effect of  
6 discouraging states and local governments from providing  
7 certain forms of assistance to the indigent sick?

8 MR. TUCKER: No, Your Honor, I don't believe  
9 so. In Alabama this has not been a function of state  
10 government. In fact, it's not even authorized by the  
11 state code. The code -- nowhere have I been able to  
12 find in the Code of Alabama, 1975 edition, anything that  
13 authorizes any state agency, including hospitals, to  
14 sell drugs to the general public. This is something  
15 that has occurred and evolved through the development of  
16 the University of Alabama in Birmingham which covers a  
17 60-square block area of downtown Birmingham.

18 I would like to point to the legislative  
19 history. It appears, from the cases, that certainly, an  
20 exemption should not be carved out. An exemption should  
21 be just limited to the exemption stated. And there is  
22 an exemption for private, non-profit hospitals. That  
23 exemption, the Non-Profit Institution Act, in fact, does  
24 cover governmental agencies.

25 But the legislative history supports our



1 position that purchases by state and county agencies are  
2 covered by the Act when those agencies use those goods  
3 in competition with private retail pharmacies, rather  
4 than consuming them for their own use.

5 I'd point to Mr. Teegarden's testimony in the  
6 petitioner's brief on the merits, pages 9 and 10, page  
7 12, pages 15 and 16. There, Mr. Teegarden explained  
8 that the state or federal government, whichever, is  
9 saved by its function. That is, it was never envisioned  
10 that the state or the federal government would be in  
11 competition with private enterprise. That they would  
12 take on this anti-competitive nature and compete with  
13 private enterprise.

14 He stated that the reason they were not  
15 subject to the Robinson-Patman Act, in his testimony,  
16 was because they were not in competition. He went on to  
17 say that if a city hospital competed with a  
18 privately-owned hospital that it would be subjected to  
19 the proscriptions of the Robinson-Patman Act. So  
20 certainly, the legislative history of Mr. Teegarden when  
21 he was testifying before the Senate or House committee,  
22 covered this area. He covered this problem and stated  
23 that if they enter into competition, then they are going  
24 to be required to adhere to the proscriptions of the Act.

25 QUESTION: Your case only reaches situations

1 where the resale is available to the public generally, I  
2 take it.

3 MR. TUCKER: That's correct.

4 QUESTION: So you don't think it would reach  
5 post exchanges, which are just restricted to the  
6 military.

7 MR. TUCKER: That's correct.

8 QUESTION: Or whoever they're restricted to.

9 MR. TUCKER: That's correct. So long as it is  
10 restricted to that agency's own use, whether it was its  
11 dependents -- I mean, employees or dependents of the  
12 employees --

13 QUESTION: Well, what if the University of  
14 Alabama said we'll only let students patronize the drug  
15 store?

16 MR. TUCKER: They would only let students  
17 patronize the drug store?

18 QUESTION: Yes.

19 MR. TUCKER: I don't think the students would  
20 be covered.

21 QUESTION: Well, the students aren't covered,  
22 but are the drug stores covered? You say it would not  
23 apply if the federal government, or the government  
24 agency restricted the resale to people within -- for  
25 whom it had some responsibility.

1 MR. TUCKER: Yes, sir.

2 QUESTION: So I take it you've just excluded  
3 the University of Alabama drug store if they say nobody  
4 but students can buy here. Students or faculty.

5 QUESTION: Or faculty, yes. So you would  
6 exclude them?

7 MR. TUCKER: Faculty and staff members could  
8 purchase.

9 QUESTION: Yes. And the Robinson-Patman Act  
10 wouldn't reach that situation.

11 MR. TUCKER: That's right.

12 QUESTION: And how about students?

13 QUESTION: In my understanding of students, it  
14 would not apply, according to my reading of Abbott  
15 Laboratories versus Portlant Retail Druggists.

16 QUESTION: So then, the only competition  
17 you're talking about is the extent to which the  
18 university drug store sells to members of the general  
19 public who are not either students or faculty.

20 MR. TUCKER: That's correct.

21 QUESTION: What about families of the faculty  
22 or families of the students?

23 MR. TUCKER: They could purchase, also. My  
24 reading of Abbot Laboratories versus Portland Retail  
25 Druggists allows faculty members, staff and --

1 QUESTION: If that's the case, it's construing  
2 an exemption from the Act. We don't have an exemption  
3 here, do we?

4 MR. TUCKER: No, sir. There is no exemption  
5 other than the Non-Profit Institutions Act. There is no  
6 exemption spoken to in the entire Act.

7 QUESTION: Well, this is a very different  
8 theory from Mr. Teegarden's theory that you quote I  
9 think three times in your briefs. His theory was  
10 there's an absence of injury to competition. Now you're  
11 relying -- you say that isn't the test at all; the test  
12 is 13c, which is a very different theory.

13 MR. TUCKER: Well, Your Honor, I would say  
14 that Mr. Teegarden's theory is what I'm saying --

15 QUESTION: You see, his theory came before  
16 there was any 13c.

17 MR. TUCKER: Right. There would be an  
18 exemption; even though the Act applies there would be an  
19 exemption to take it out from under the proscriptions of  
20 the Act if it meets the test of Abbott Laboratories,  
21 which considered 13c.

22 QUESTION: What is the legal basis for your  
23 saying this? Just that it makes good sense? Because  
24 you certainly can't base that on what Teegarden said;  
25 you can't base it on 13c. It may make a lot of sense,



1 but is there any legal foundation?

2 MR. TUCKER: Yes, sir. As stated. The  
3 Portlant Retail Druggist in my reading of it is the same  
4 as what we have here except that we have governmental  
5 institutions competing with private enterprise as  
6 opposed to private persons.

7 If I may comment with regard to the Non-Profit  
8 Institutions Act, that Act exempts purchases for  
9 consumption by both non-profit and charitable  
10 governmental institutions. My question would be why  
11 would Congress, two years after the Robinson-Patman Act,  
12 enact the Non-Profit Institutions Act if there was a per  
13 se exemption already? It is only logical that the  
14 Non-Profit Institutions Act was enacted to create this  
15 exemption for non-profit charitable institutions and  
16 governmental institutions.

17 And I would point to --

18 QUESTION: Is it possible that it was enacted  
19 only to aid the charitable institutions? Wasn't that  
20 where the problem was?

21 MR. TUCKER: Well, if I may point to the  
22 legislative history of that, Justice O'Connor,  
23 Representative Walter's testimony -- and that's found on  
24 pages 8 and 9 of our Reply Brief, and on pages 11 and 12  
25 of the Amicus Brief of the National Association of Retail

1 Druggists. Representative Walter's testimony there  
2 specifically stated that the Non-Profit Institutions Act  
3 applied both to charitable institutions and to  
4 governmental agencies such as governmental hospitals.

5 Further, the case of Logan Lanes versus  
6 Brunswick held that the sales of bowling equipment to  
7 the Utah State University were exempt because that  
8 bowling equipment and those bowling lanes were being  
9 used for the university's own use, and it went into  
10 detail to discuss how it was used in the PD program in  
11 the teaching of classes, used by faculty members, used  
12 in physical education by the students, et cetera.

13 Further, in the City of Lafayette case, as  
14 found at 425 US, at page 397, footnote 14, this Court  
15 exempted -- stated in that footnote that libraries were  
16 exempt because they made purchases for their own use.  
17 Further, I would point to the motions to dismiss by nine  
18 of the defendants in this case. Those motions are found  
19 in the Joint Appendix Pages 19A to 48A. Nine of the  
20 defendants in this case concede that the Non-Profit  
21 Institutions Act applies to governmental purchasers.

22 Now, I would suggest that if the Non-Profit  
23 Institutions Act applies to governmental purchases then,  
24 of course, the Robinson-Patman Act would have to apply  
25 to those purchases.

1           Further, the attorneys general of the states  
2 of California and Georgia --

3           QUESTION: Let me interrupt a minute. They  
4 filed a motion to dismiss and one of the grounds of the  
5 motion was that the sales allegedly made are lawful  
6 under 13c. Is that a concession, you think, that --

7           MR. TUCKER: I think so, Your Honor. Nine of  
8 the defendants -- and in fact, one of those defendants  
9 is Cooper Green Hospital. Cooper Green Hospital, in my  
10 opinion, by filing this amendment, concedes that the Act  
11 applies by claiming the exemption under 13c.

12           The attorneys general of California and  
13 Georgia have held that the Robinson-Patman Act applies  
14 to governmental bodies when they act in competition with  
15 private enterprise. These opinions of the attorneys  
16 general are referred to in our brief at page 13 and  
17 pages 14 and 15 of the Amicus Brief of the National  
18 Association of Retail Druggists.

19           In the case referred to by the Georgia  
20 attorney general, the state was running a factory for  
21 the blind, and in that opinion, the attorney general  
22 found that the Robinson-Patman Act did not apply to  
23 sales by that factory for the blind because they were --  
24 the sales were made to state agencies. But he went on  
25 to say that the factory for the blind would divest

1 itself of its sovereignty if it acted in a proprietary  
2 interest. That is, if it sold goods out of that factory  
3 to the general public, if it got outside of sales to  
4 state agencies and to the state itself. Once it got  
5 outside that sphere, then its sales would be subject to  
6 the Robinson-Patman Act.

7           Further, I would point to the opinion of the  
8 district court which is relied upon by the court of  
9 appeals, and would say that the cases and other  
10 authorities cited by the district court do not support  
11 its ruling. Each and every of the cases cited as  
12 authority by the district court did not consider the  
13 issue of whether or not sales by governmental agencies  
14 were being made to the general public in direct  
15 competition. None of those cases and none of those  
16 citations considered that point.

17           The case of General Shale versus Struck which  
18 I've already mentioned was one of the cases relied upon  
19 by Judge Pointer of the Northern District of Alabama, in  
20 that case there was no sale of brick. Further, the  
21 brick was used by the City of Louisville, Kentucky for  
22 its own use in building a housing project. And thus,  
23 since there was no sale and it was for their own use,  
24 there was no competition.

25           Further, another case cited by the district



1 court, Gulf Oil versus Copp, turned on the fact that  
2 there was no interstate commerce. So that case is  
3 inapplicable. The case of Logan Lanes versus  
4 Brunswick. That's a Ninth Circuit case that affirmed  
5 the district court's dismissal of a plaintiff's case  
6 against Brunswick on the basis that the Non-Profit  
7 Institutions Act applied. Because the Non-Profit  
8 Institutions Act applied and the state university was  
9 using the bowling lanes were for their own use, again,  
10 they were exempt because of that.

11 Further, the attorneys general's opinions  
12 cited by the district court did not consider purchases  
13 that were being made for the purpose of resale by state  
14 and local agencies. They did not consider the factor of  
15 competition with private enterprise. The opinions of  
16 the -- I might add, too, that the opinion of the  
17 Attorney General of the United States speaks to  
18 purchases by federal government and not to state and  
19 local agencies. And I think that's the key difference  
20 there.

21 The opinions of the attorneys general of  
22 Minnesota, Wisconsin and North Carolina were cited by  
23 the district court, but again, in each of these  
24 opinions, it was not considered -- there was no  
25 consideration as to whether or not there was competition

1 with private enterprise.

2 I'd like to save a few minutes. Thank you.

3 QUESTION: May I ask you a question before you  
4 sit down? Did I understand you to say at the outset  
5 that the record does not show what percentage of the  
6 sales by these pharmacies went to the public generally?

7 MR. TUCKER: No, sir, we did not get that far.

8 QUESTION: You don't have any record other  
9 than the pleadings, do you?

10 MR. TUCKER: No record other than the  
11 pleadings.

12 QUESTION: Decided on the motion to dismiss.

13 MR. TUCKER: That's correct, Your Honor.

14 CHIEF JUSTICE BURGER: Mr. Klingsberg.

15 ORAL ARGUMENT OF DAVID KLINGSBERG, ESQ.

16 ON BEHALF OF THE RESPONDENT

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

19 This case presents the question of whether  
20 sales to state and local government agencies are within  
21 the coverage of the Robinson-Patman Act. I respectfully  
22 suggest that the petitioner has drawn the issue too  
23 narrowly, and that in interpreting congressional intent  
24 as to whether the Robinson-Patman Act covered state and  
25 local government agency purchases and looking at the

1 language of the Act, it can't simply be limited to  
2 drugs, it can't simply be limited to hospitals and it  
3 can't simply be limited to the state of Alabama.

4           But rather, it deals with the entire spectrum  
5 of government agencies, a great many of which purchase  
6 commodities and purchase commodities which are covered  
7 by the Robinson-Patman Act if indeed the Act was  
8 applicable, whether they're sold for use or for  
9 consumption or resale under the terms of the Act.  
10 herefore, a very far-reaching assertion is being made  
11 here by the petitioner.

12           Our position, based on legislative history,  
13 judicial decisions and the unanimous view of the  
14 commentators, including Representative Patman, is that  
15 Congress did not intend to apply the Robinson-Patman Act  
16 to purchases by state and governmental agencies.

17           I would like, if I may, to concentrate on two  
18 main points; one, the statutory scheme as reflected in  
19 the Robinson-Patman Act of 1936 and the Non-Profit  
20 Institutions Act of 1938, which we say is logical and  
21 consistent only if the earlier statute, the original  
22 Robinson-Patman Act, is read as the legislative history  
23 indicates; not to reach purchases of governmental  
24 agencies.

25           And this conclusion is buttressed by

1 Congress's rejection in 1951 and 1953 of specific  
2 proposed amendments which were not enacted to extend the  
3 statute's reach to purchases by states and their  
4 political subdivisions. And thereafter, Congress failed  
5 to act despite more than 40 years of uniform enforcement  
6 agency recognition --

7 QUESTION: Do you have any instances in that  
8 legislative history of where the committee reports or  
9 individual congressmen or senators addressed expressly  
10 the sales for resale matter? I know --

11 MR. KLINGSBERG: There was discussion --

12 QUESTION: I've read your briefs, but I didn't  
13 notice you ever picked out a particular instance like  
14 that.

15 MR. KLINGSBERG: Right. There was discussion  
16 in the oral hearings with Mr. Teegarden, who is counsel  
17 to the wholesalers and one of the draftsman --

18 QUESTION: That may have been in a hearing,  
19 but nothing on the floor or in any committee reports.

20 MR. KLINGSBERG: Well, in the committee -- in  
21 a written brief which Mr. Teegarden submitted, he was  
22 asked the question: would the bill prevent competitive  
23 bidding on government purchases below trade price  
24 levels. And he answered that question first by saying  
25 that as a matter of statutory construction he would



1 think that it would not be covered, and he assured  
2 Congress that it wouldn't be covered. And then he said  
3 a further reason was the effect on competition because  
4 of the requirements relating to secondary line  
5 competition.

6 I should point out, Your Honor, that the  
7 Robinson-Patman Act as ultimately passed also has a  
8 primary line provision in which there would be liability  
9 where there is a sale to a state, for example, if indeed  
10 the states were covered, and there is no effect on  
11 competition by the state or the city or the municipality  
12 with some drug store or retailer, but there was an  
13 effect on competition at the primary line level between  
14 the sellers.

15 And so on that basis, it would seem that the  
16 resale or the competition are not, by the state, would  
17 not, under the terms of the statute, have anything to do  
18 with whether the Act applies or not. And Mr.  
19 Teegarden's written report indicates the categorical  
20 elimination of applicability and assurance to the  
21 congressmen who were concerned as to whether or not the  
22 states and municipalities could continue their practice  
23 of competitive bidding and buy, in the words of  
24 Congressman Hancock who asked one of the questions, at  
25 the cheapest prices.

1 Congress was concerned that the states and  
2 cities be able to purchase at the cheapest prices and  
3 continue the practice, which they have today, of buying  
4 at prices as the question asked in the written report  
5 says, below trade price levels.

6 Now, --

7 QUESTION: Mr. Klingsberg, with respect to the  
8 instances in 1951 and 1953 where you say that Congress  
9 rejected efforts to amend the Act, were there bills that  
10 actually were -- hearings were held on in committee?  
11 Did they get out of committee?

12 MR. KLINGSBERG: Not in the 1951 and 53, but  
13 in 1968 and 69, there were extensive hearings before a  
14 subcommittee of Congress on small business which dealt  
15 with this very problem. The whole controversy was  
16 raised. And as a matter of fact, Mr. Kintner, who is  
17 counsel to National Association of Retail Druggists who  
18 is one of the principal amici here, told the congressman  
19 on that occasion that there were three categories.

20 One category was government, and that was not  
21 covered by the Robinson-Patman Act. The second category  
22 was charitable eleemosynary institutions, and that  
23 category was covered by the Robinson-Patman Act but  
24 given a partial exemption under the Non-Profit  
25 Institution Act. The Non-Profit Institution Act did not

1 apply to government.

2           And the congressional subcommittee adopted  
3 that, quoted it in its report and -- to find the  
4 Non-Profit Institution Act as only applying to private  
5 charitable institutions, and concluded after extensive  
6 hearings at which it was brought out that there's  
7 competition between drug stores and hospital pharmacies  
8 and so forth, there was testimony by pharmaceutical  
9 manufacturers that went on for weeks -- concluded that  
10 what should be done is the administrative agencies  
11 should enforce the Robinson-Patman Act as against the  
12 non-profit, non-governmental private charitable  
13 hospitals where they don't meet the requirements of the  
14 1938 Act.

15           But never concluded and was never even asked  
16 by the National Association of Retail Druggists to  
17 extend the basic Robinson-Patman Act to cover  
18 governmental purchases. So Congress --

19           QUESTION: What was the purpose of that  
20 committee report? Was it to say do not pass or do pass  
21 with respect to a particular piece of legislation?

22           MR. KLINGSBERG: I think the purpose was to  
23 consider the problem which was set before it at great  
24 length and to make recommendations which was a  
25 recommendation to the administrative agencies that they

1 should enforce the Act as against the private,  
2 charitable hospitals.

3           Now, inherent in what I've been saying, if  
4 Your Honors please, is that to appreciate the logic of  
5 the statutory scheme, you have to look both at the 1936  
6 Act and the 1938 amendment. My proposition is that the  
7 1938 amendment did not exempt governmental bodies  
8 because they were not covered by the Robinson-Patman Act  
9 to begin with, and any other construction would be  
10 illogical.

11           By its terms, the 1938 amendment provided for  
12 exemption of non-profit institutions. Now, that's not a  
13 term which is ordinarily applied to government. It's  
14 not the term which Congress used in 1951 and 1953 when  
15 they proposed amendments. The called the state the  
16 states and political subdivision states political  
17 subdivisions.

18           The Non-Profit Institutions Act applies to  
19 purchases for own use by schools, colleges,  
20 universities, public libraries, churches, hospitals and  
21 charitable institutions, not operating for profit. Now,  
22 charitable institutions and churches are plainly not  
23 government.

24           Others, schools, libraries and hospitals  
25 theoretically encompass both governmental and



1 non-government owned bodies. Schools can be private.  
2 So can hospitals, and as to libraries, despite the  
3 footnote in the Lafayette case which respectfully, we  
4 say is wrong, libraries can, I was very interested to  
5 find out, be privately run, privately endowed, open to  
6 the public libraries. And there are thousands of  
7 libraries like that in the United States.

8           Now, if governmental purchases were intended  
9 to be covered by the 1938 exemption, a logical  
10 legislature surely would have included other types of  
11 governmental buyers. Why would you have just three  
12 exemptions for libraries, schools and hospitals and  
13 apply the Robinson-Patman Act without any exemption,  
14 without any own-use exception to police, fire,  
15 sanitation, transit, parks, the cafeteria downstairs,  
16 museums, prisons and so on.

17           An irrational statutory scheme would result if  
18 the Robinson-Patman Act of 1936 were interpreted to  
19 reach purchases of all governmental entities and the 38  
20 Act were interpreted just to exempt partially three  
21 governmental entities. The only logical conclusion is  
22 that Congress believed, as the legislative history  
23 supports, that government purchases were not covered by  
24 the original '36 Act, and the 1938 Act only applies to  
25 non-governmental eleemosynary, not-for-profit schools,

1 hospitals, libraries, churches, --

2 QUESTION: Mr. Klingsberg, isn't it possible  
3 that in 1938, Congress didn't particularly consider the  
4 primary line competition problem because your principal  
5 focus was on the secondary line I think, in the  
6 Teegarden testimony at least, and that the assumption  
7 that it didn't apply was simply based on the assumption  
8 that you wouldn't have competitive injury in the normal  
9 case where there are sales to the government.

10 MR. KLINGSBERG: Your Honor, I think there are  
11 government agencies, in addition to the three that might  
12 be governmental in that Act, which compete, would sell  
13 for resale --

14 QUESTION: I understand it's conceivable, as  
15 this case demonstrates. But what the -- the agencies  
16 they talked about, the large purchase contracts and so  
17 forth, in the attorney general's opinion, were those  
18 where there wouldn't be any realistic likelihood of  
19 competitive injury at the secondary line.

20 MR. KLINGSBERG: Well, public transit competes  
21 with private buses. Public sanitation competes with  
22 private. Cafeterias compete with restaurants. Gift  
23 shops and souvenir shops in museums compete. I think  
24 there are many areas where there might be competition  
25 which aren't mentioned in this 1938 Act.

1           QUESTION: That's my very point. The areas of  
2 government purchases that are mentioned in the attorney  
3 general's opinion and in the relevant discussion by  
4 Teegarden and others are areas in which there would be  
5 no competition with the private sector.

6           MR. KLINGSBERG: Why would they pick, for  
7 example, libraries? Libraries are not a particularly --

8           QUESTION: That was in 38.

9           MR. KLINGSBERG: In the 38 Act. Why would  
10 they pick libraries, which ordinarily would not be  
11 viewed as competing or selling for resale? Why would  
12 they pick schools or hospitals out of the myriad of  
13 agencies? It seems to me the only logical conclusion is  
14 that as Congress indicated in the Senate and the House  
15 reports on the 1938 Act, that was dealing with  
16 eleemosynary institutions. That's what Congress said in  
17 both the Senate and the House reports. And eleemosynary  
18 institutions are private, charitable institutions.  
19 That's what Congress said again in 1968 when it  
20 considered the matter.

21           And therefore, it would be very unreasonable  
22 and unfair and illogical to have the basic  
23 Robinson-Patman Act of 1936 applying to every government  
24 agency and the 1938 Act exempting only three. And  
25 that's the reason why the logical statutory scheme,

1 rational statutory scheme would be if the original  
2 Robinson-Patman Act did not cover any governmental  
3 agencies in the 38 Act; only exempted non-profit,  
4 private, charitable, eleemosynary institutions.

5 QUESTION: What do you think is the strongest  
6 case or opinion supporting your position?

7 MR. KLINGSBERG: If Your Honor please, I think  
8 that there has to be a conglomeration of all of the  
9 factors we have here. Mr. Teegarden's written  
10 statement, Representative Patman in --

11 QUESTION: I understand the accumulation of  
12 arguments. You don't think there's one case that you  
13 can point to that really is quite persuasive, or one  
14 opinion?

15 MR. KLINGSBERG: One --

16

17

18

19

20

21

22

23

24

25



1 QUESTION: If you had to pick out the one  
2 authority that you wanted to really rest on, would you  
3 pick one?

4 MR. KLINGSBERG: I don't think I could pick  
5 one more than the other, except perhaps Mr. Teagarden's  
6 written statement.

7 QUESTION: But he emphasizes competition, is  
8 the problem with that. He emphasizes the absence of  
9 injury to competition.

10 MR. KLINGSBERG: He says that's a further  
11 reason.

12 QUESTION: Yes.

13 MR. KLINGSBERG: But I think that really --

14 QUESTION: He doesn't categorically say that  
15 no sale to government could ever be covered.

16 MR. KLINGSBERG: Well, he says that eliminates  
17 the possibility, meaning there is no possibility, but I  
18 prefer to take the conglomeration of facts.

19 Representative Patman in 1938, the same year that the  
20 1938 Act was passed, said in his treatise that the  
21 Robinson-Patman Act did not cover governmental  
22 purchases.

23 And then, 15 years later, there was the  
24 submission of the two bills which Congress failed to  
25 enact which would have expressly extended.

1 QUESTION: Could I ask you --

2 MR. KLINGSBERG: Yes, Your Honor.

3 QUESTION: -- what you think the limits of the

4 exemption for sales to chuches and eleemosynary

5 institutions, do you think -- an exemption for purchases

6 that have -- and use that have some relation to their

7 function?

8 MR. KLINGSBERG: I think Your Honors defined

9 that in the Abbott case, in a very complicated way for

10 hospitals, and I suppose if that were, contrary to the

11 plain wording of the statute, extended to every single

12 governmental agency --

13 QUESTION: Well, I just want to talk about the

14 eleemosynary institution. Take a private -- take a

15 church. Take a church. It decides that to make a

16 little money we'll go into the book business. They

17 start buying books very cheaply and selling them very

18 cheaply.

19 MR. KLINGSBERG: They wouldn't be exempt.

20 QUESTION: Why not?

21 MR. KLINGSBERG: Because it wouldn't be for

22 own use.

23 QUESTION: Well, they are certainly using them

24 to make some money.

25 MR. KLINGSBERG: I think own use means --

1           QUESTION: So you think that that exemption  
2 then is limited to own use, the '38 Act.

3           MR. KLINGSBERG: That's what the statute  
4 says.

5           QUESTION: Yes, and you wouldn't include  
6 within own use resales.

7           MR. KLINGSBERG: Not for profit.

8           QUESTION: But you think the exemption for  
9 governmental institutions, which you say was  
10 pre-existent --

11          MR. KLINGSBERG: Yes, Your Honor.

12          QUESTION: -- covers resales as well as  
13 anything else.

14          MR. KLINGSBERG: I'd say it covers everything,  
15 that it was never intended to be covered in the first  
16 place. I said government was not intended to be --  
17 purchases by government --

18          QUESTION: Yes, yes, but why do you -- but you  
19 yet have to come up with some support in the legislative  
20 history to indicate that the government exemption which  
21 you say existed from the very start covers purchases for  
22 resale as well as just purchases.

23          MR. KLINGSBERG: Yes. I say that because Mr.  
24 Teagarden in his written brief gave two grounds, and the  
25 first ground was a matter of statutory construction,

1 which has nothing to do with resale --

2 QUESTION: I know, but I still want you to  
3 find me some express mention of purchases for resale  
4 anywhere in the legislative history, where somebody  
5 gives the opinion that the government may decide to go  
6 into competition with private industry and purchase  
7 goods for resale and direct competition, and that that  
8 was exempt.

9 MR. KLINGSBERG: I can only --

10 QUESTION: Well, there isn't any, is there?

11 MR. KLINGSBERG: There is not any explicitly.  
12 No, Your Honor. I can only infer --

13 QUESTION: Any more than there is for private  
14 institutions.

15 MR. KLINGSBERG: In the original statute?

16 QUESTION: No, under the '38 Act.

17 MR. KLINGSBERG: That's explicit in the Act.

18 QUESTION: Are you speaking, strictly speaking  
19 of an exemption in the same sense that the '38 Act  
20 conferred an exemption on eleemosynary institutions, or  
21 are you speaking simply of a failure to include within  
22 the Act in the first place?

23 MR. KLINGSBERG: The latter, Your Honor.

24 QUESTION: Although it is pretty hard to say  
25 that the literal words of the statute doesn't cover



1 sales to government. You have to imply some -- you have  
2 to do -- you have to construe the Act not to include  
3 government.

4 MR. KLINGSBERG: Yes, Your Honor. The Court  
5 in the past --

6 QUESTION: But the words in plain black and  
7 white --

8 MR. KLINGSBERG: The Court in the past has  
9 said, for example, in regard to the Sherman Act where  
10 there is no expression of intent one way or the other,  
11 that that would apply to cities, for example, in the  
12 Lafayette and Boulder case, but here we have a whole  
13 host of indicia which the Court has traditionally  
14 applied in terms of analyzing the purpose, context,  
15 legislative history, post-enactment history, et cetera,  
16 and --

17 QUESTION: Mr. Klingsberg, may I ask you a  
18 question --

19 MR. KLINGSBERG: Yes.

20 QUESTION: -- just give you a chance to  
21 comment on it? I don't know if it's totally relevant or  
22 not, but among the amicus briefs, I don't find a brief  
23 from the Solicitor General, and they have expressed  
24 their views on the Robinson-Patman Act in several cases  
25 recently, and generally have not been sympathetic to the

1 statute, and their client surely has a great interest in  
2 the outcome of this case. How do you explain that?

3 MR. KLINGSBERG: I don't know if this is  
4 proper argument, but I spoke to them -- I spoke to the  
5 proper person in the Justice Department, and they said,  
6 this is a question of pure statutory intent. We are  
7 sure you can argue it as well as we can. There is no  
8 economic issues.

9 QUESTION: Within context, when --

10 QUESTION: Not interested in the law?

11 QUESTION: If it was Mr. Patman who said it,  
12 the statement that was mentioned that this was for  
13 government purchases, is it not implicit in that kind of  
14 a statement, fairly implicit government purchases for  
15 its own use?

16 MR. KLINGSBERG: Your Honor, Representative  
17 Patman stated in his book that the Attorney General of  
18 the United States has ruled that the Act does not apply  
19 to government, meaning federal government, and it may be  
20 presumed that his reasoning may also be applied to  
21 municipal and public institutions, so Representative  
22 Patman said in 1938 that he, the sponsor of this bill,  
23 the man whose name appears, did not think that it  
24 applied at all to governmental purchases.

25 QUESTION: That is somewhat post-legislative

1 history, isn't it?

2 MR. KLINGSBERG: But it's the same time, Your  
3 Honor, as the 1938 Act was proposed, and it doesn't seem  
4 to make any sense to say that Congress in 1938 would  
5 have had a partial exemption for just three kinds of  
6 governmental entities and left the dozens of other  
7 governmental entities subject to the Act without any  
8 even own use exception, which would be a very  
9 far-reaching kind of holding, and very unfair and  
10 illogical to have in the one sense transit, parks,  
11 recreation, et cetera, et cetera, all apply without any  
12 exception at all, and to just pick these three, schools,  
13 hospitals, and libraries, and say, well, those are the  
14 only three to which we will give a partial exception.

15 It seems to me much more logical to say, as  
16 Mr. Teagarden indicated in his written report, that the  
17 Act didn't apply to -- the original Act didn't apply to  
18 government at all, and the Court has said on many  
19 occasions that post-enactment history can be persuasive  
20 evidence, not conclusive, but persuasive.

21 Recently mentioned in the Northhaven case,  
22 statutory construction has been fully brought to the  
23 attention of Congress. I have showed how that  
24 occurred. In the Gulf case, Gulf against Kopp, dealing  
25 with the Robinson-Patman Act, how the failure of

1 Congress to act is significant. Here we not only have  
2 the failure of Congress to Act, we have specific  
3 legislation to extend coverage being proposed and that  
4 not being accepted by the Congress.

5           The Court has said that the positions of  
6 administrative agencies and enforcement agencies has  
7 great weight. There has never been a case on record  
8 where the Department of Justice or the FTC, charged with  
9 the administration of this Act, have ever applied it or  
10 filed a claim against anyone selling to or any state or  
11 governmental agency purchasing.

12           There have been 46 years of uniform thought  
13 among commentators, all the leading commentators, Roven,  
14 Kolinowsky, Mr. Kintner, the counsel to the National  
15 Association of Retail Druggists, all believing and  
16 operating on the premise that the Robinson-Patman Act  
17 does not apply to governmental purchases, and we think  
18 under these circumstances, where the Act has been  
19 universally and long recognized as not applying, that  
20 any change --

21           QUESTION: May I ask you one other question  
22 that I have thought of and that is not discussed in the  
23 brief? What about the Idaho -- North Dakota, I guess it  
24 is, has the cement plant, Reeves against State. When  
25 the government operates as a market participant and



1 therefore avoids some of the constitutional problems  
2 that it might otherwise have, would it still not be  
3 subject to the Robinson-Patman Act in your view?

4 MR. KLINGSBERG: Yes, Your Honor, and as a  
5 matter of fact, this very point was brought to the  
6 attention of Congress at great length in the 1968  
7 hearings. There was testimony by numerous  
8 representatives of the drug industry. A year later  
9 there was testimony by wholesalers, but automotive  
10 industry people, all saying that the Robinson-Patman Act  
11 does not apply to governmental purchases, and that there  
12 are a lot of instances in a variety of industries where  
13 government competes, and Congress's only reaction to  
14 that was to -- the Subcommittee's reaction was to render  
15 a report saying, well, it can be enforced against  
16 private charitable, eleemosynary institutions if they  
17 don't comply with the '38 exemption, but didn't say  
18 anything about applying the Act to governmental  
19 purchases where they compete.

20 It's a situation where, to take the words of  
21 prior Court opinions, there has been public  
22 controversy. The controversy has been brought to the  
23 attention of the Congress, and Congress has not acted,  
24 and that is persuasive evidence, in light of all the  
25 facts that we have, under traditional criteria applied

1 by the Court, that the Act was not intended to apply in  
2 the first place.

3           And taking all that into account, and  
4 combining it with the statement by Mr. Teagarden that as  
5 a matter of statutory construction Congress can be  
6 assured that the Act will not apply to governmental  
7 purchases, and that these government bodies can  
8 continue, as the Congressman expressed concern about, to  
9 have competitive bidding and to purchase at cheapest  
10 prices. That's what Congress was concerned about. Mr.  
11 Teagarden said, don't worry about it. If you leave out  
12 the government, then they are not covered, and the issue  
13 is not whether this was correct statutory interpretation  
14 or not, as the Court recently pointed out in the Merrill  
15 Lynch and the Brown case. The question is, how did  
16 Congress perceive this, not whether or not the statutory  
17 construction was correct, although I think that there is  
18 support which we cite and discuss in our brief for the  
19 point that this statutory construction is correct.

20           I should point out also that in -- there have  
21 been -- in two of the cases, one the Saks case, that  
22 dealt with sales to government liquor stores, and the  
23 General Shale case dealt with construction, these are  
24 both situations where the government did not compete,  
25 and this was an alternative ground of holding, but one

1 ground of holding was that the Robinson-Patman Act did  
2 not mean to cover government sales in the first place.

3 I would like to also point out in answer to  
4 the question which was asked earlier of the Petitioner  
5 that hospitals doing the dispensing of pharmaceuticals  
6 and the giving of public health care is a traditional  
7 governmental function. The district court here so  
8 found, and the Court in National League of Cities so  
9 held.

10 There are just two brief points that I want to  
11 make quickly that are discussed in the brief. One is  
12 that the state has argued in its brief, and I am going  
13 to mention the point, that in order to avoid significant  
14 questions under the Tenth Amendment, that the Court  
15 should construe the statute so as not to apply to  
16 governmental purchases.

17 The other is that in view of the almost  
18 universally recognized inapplicability of the statute to  
19 governmental purchases for 46 years, if the Court  
20 should, and I don't think there is basis, but if the  
21 Court should decide this issue of first impression, then  
22 there should not be a retroactive application which  
23 would upset not only the states' allocations, cost  
24 computations, how they determine what programs to have,  
25 what prices are going to be charged, but also have a lot

1 of treble damage liability in cases both against states  
2 and against the -- sorry, strike states, buffer against  
3 the manufacturers of drugs in this particular case, but  
4 the manufacturers of every single product, every single  
5 commodity which are sold to state and governmental  
6 agencies.

7           And I emphasize again in conclusion that this  
8 is not a case which is limited to drugs or hospitals.  
9 This is a very, very far-reaching case which would go to  
10 the very heart of everything that states buy, and all  
11 the cost allocations which states have made, all the  
12 programs which they have in place which are based upon  
13 the prices which they have been able to get at lower  
14 than trade levels because of the inapplicability of the  
15 Robinson-Patman Act.

16           QUESTION: May I just put one extreme example?

17           MR. KLINGSBERG: Yes.

18           QUESTION: Assume that the post exchanges that  
19 are now all over the world where there are government  
20 forces stationed were proving to be modestly profitable,  
21 and the government decided to go into the supermarket  
22 business, calling them post exchanges, and opened them  
23 in competition with the chains of food supermarket  
24 stores around the United States, so that you had a  
25 Safeway and a Giant and a government PX, all open to the



1 public. That still, under your analysis, I suppose,  
2 would be exempt?

3 MR. KLINGSBERG: Yes, Your Honor. As a matter  
4 of fact, that's a very hot issue. It has been in the  
5 press. It is the basis on which bills were offered to  
6 Congress to have the Robinson-Patman Act coverage extend  
7 to the federal government. These post exchanges do not  
8 merely sell to military, they sell to diplomats and a  
9 whole host of other people. That is a matter for  
10 Congress.

11 QUESTION: They do not sell to retired reserve  
12 officers. I know that.

13 (General laughter.)

14 MR. KLINGSBERG: But that's the kind of issue  
15 which, like the sales to the states and political  
16 subdivisions, we suggest, involves so many far-reaching  
17 political and economic issues that that should be  
18 considered by Congress and has been considered by  
19 Congress, and not after 46 years of inapplicability be  
20 taken up and altered by the Court at the present time.

21 Thank you.

22 CHIEF JUSTICE BURGER: Do you have anything  
23 further, Mr. Tucker?

24 ORAL ARGUMENT OF JOE L. TUCKER, JR., ESQ.,  
25 ON BEHALF OF THE PETITIONER - REBUTTAL

1 MR. TUCKER: Yes, Your Honor.

2 Mr. Klingsberg states categorically that the

3 Non-Profit Institutions Act does not apply to government

4 institutions. I would point the Court to Page 34-A and

5 Page 35-A of the Joint Appendix in this case, in which

6 Mr. Klingsberg's name appears of counsel. His law

7 firm's name appears of counsel on behalf of Charles

8 Pfizer and Company, and in his motion to dismiss before

9 the district court, Paragraph Number 5 states, sales of

10 goods -- states as a ground for dismissing the case,

11 sales of goods alleged to have been made at

12 discriminatory prices that were lawful under 15 UCS

13 Section 13(c).

14 Why, then, if it does not apply, did they

15 plead it in this case?

16 QUESTION: Do you think we are bound by that?

17 MR. TUCKER: Sir?

18 QUESTION: Are we bound by that?

19 MR. TUCKER: No, sir, but I think that --

20 QUESTION: Do you think he is bound by it?

21 MR. TUCKER: I think --

22 QUESTION: Could he withdraw that motion if he

23 wanted to?

24 MR. TUCKER: I think at this point that it at

25 least serves as an admission that --

1 QUESTION: Well, it is not a binding admission.

2 MR. TUCKER: -- they thought it applied at  
3 that time.

4 QUESTION: Whoever drafted that motion thought  
5 it applied when he filed that motion.

6 MR. TUCKER: Yes, sir. I would also point to  
7 the -- to Page 8 and 9 of our reply brief, that tracks  
8 the legislative history, the testimony by Mr. Walter,  
9 who was the sponsor of the Non-Profit Institutions Act,  
10 and Mr. Saddle asked him, "Does the gentleman think a  
11 county hospital or a city sanitarium wholly financed by  
12 a city, county, or state would come within the  
13 provisions of this Act," meaning the Non-Profit  
14 Institutions Act. Mr. Walter responded, "Yes, I do."  
15 Mr. Walter was a sponsor of that Act.

16 Further, Mr. -- as Justice Powell -- Justice  
17 Stevens mentioned, Mr. Teagarden did not categorically  
18 state that the government was exempt from the  
19 Robinson-Patman Act. He qualified it. The question  
20 was, the federal government is not in -- The statement  
21 was by Mr. Teagarden, the federal government is not in  
22 competition with other buyers from these concerns. The  
23 federal government is saved by the same distinction, not  
24 of location, but of function. They are not in  
25 competition with anyone else who would buy. That is

1 what Mr. Teagarden says with regard to that provision.

2           Also, I would like to mention very briefly Mr.  
3 Klingsberg's reference to the failure of Congress to act  
4 on six subsequent proposed amendments. Those first two  
5 proposed amendments in 1951 and '53 were proposed for  
6 the purpose of restricting federal, state, and local  
7 governmental purchases generally and arguably would have  
8 extended to purchases by the government for their own  
9 use.

10           The last four bills which were proposed by Mr.  
11 Keogh did not even speak to state and local  
12 governments. It went directly to federal agencies  
13 alone, and certainly that can't be given any credence  
14 toward this case when those last four bills did not  
15 speak to state and local governments whatsoever, but  
16 were limited to federal concerns.

17           QUESTION: Well, your argument would require  
18 us to say that the states and federal government were  
19 subject to the Act even on purchases for their own use,  
20 wouldn't it?

21           MR. TUCKER: No, sir. No, sir.

22           QUESTION: Well, because the '38 Act just  
23 doesn't cover the government, that one that exempted the  
24 eleemosynary institutions.

25           MR. TUCKER: Well, the legislative history



1 seems to believe that it -- seems to say that it does  
2 cover governmental agencies. Mr. Walter stated in his  
3 testimony before the Committee hearing that, yes, it  
4 does cover governmental hospitals.

5 QUESTION: Do you think the language of the  
6 '38 Act lends itself to that construction?

7 MR. TUCKER: Sir?

8 QUESTION: Do you think the language of the  
9 '38 Act lends itself to that construction, that it  
10 includes the government as an eleemosynary institution?

11 MR. TUCKER: In those areas, yes, sir,  
12 government hospitals, in the instances referred to by  
13 Justice O'Connor for health care, for the indigent, it  
14 would be covered and they would be exempt under the  
15 Non-Profit Institutions Act for that purpose, but I am  
16 not by any means trying to say that it should be applied  
17 to government institutions where they are purchasing for  
18 their own use. That is certainly exempt.

19 CHIEF JUSTICE BURGER: Thank you, gentlemen.

20 MR. TUCKER: Thank you.

21 CHIEF JUSTICE BURGER: The case is submitted.

22 (Whereupon, at 3:00 o'clock p.m., the case in  
23 the above-entitled matter was submitted.)

24

25

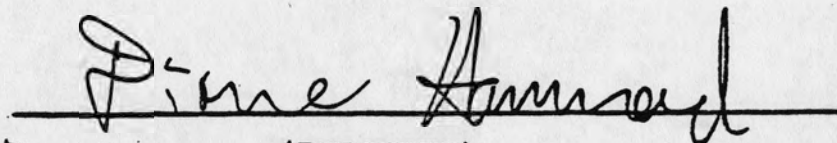
# CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:

JEFFERSON COUNTY PHARMACEUTICAL ASSOCIATION, INC., v. ABBOTT LABORATORIES ET AL  
# 81-827

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

BY

A handwritten signature in cursive script, appearing to read "Pine Hunsay", written over a horizontal line.

(REPORTER)

1982 NOV 15 PM 4 15