

ORIGINAL

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 83-458

TITLE JOHN R. BLOCK, SECRETARY OF AGRICULTURE, ET AL., Petitioners,
v. COMMUNITY NUTRITION INSTITUTE, ET AL.

PLACE Washington, D. C.

DATE April 24, 1984

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IN THE SUPREME COURT OF THE UNITED STATES

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JOHN R. BLOCK, SECRETARY OF :
 AGRICULTURE, ET AL., :
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 Petitioners :
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 v. :
:
 No. 83-458
:
COMMUNITY NUTRITION INSTITUTE, :
 ET AL. :
:
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Washington, D.C.

Tuesday, April 24, 1984

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 11:07 a.m.

APPEARANCES:

MS. KATHRYN A. OBERLY, ESQ., Office of the Solicitor
General, Department of Justice, Washington, D.C.;
on behalf of the Petitioners.

RONALD L. PLESSER, ESQ, Washington, D.C.; on behalf of
of the Respondents.

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

2 CHIEF JUSTICE BURGER: Ms. Oberly, I think you
3 may proceed when you're ready.

4 ORAL ARGUMENT OF MS. KATHRYN OBERLY, ESQ.,
5 ON BEHAIF OF THE PETITIONERS

6 MS. OBERLY: Thank you, Mr. Chief Justice, and
7 may it please the Court:

8 Respondents are three individual consumers who
9 want to buy reconstituted milk, which is milk made from
10 powder and water and occasionally blended with a portion
11 of fresh milk, at a price below the price they would pay
12 for the price of regular fresh milk.

13 Their complaint is that federal milk market
14 orders issued under the Agricultural Marketing Agreement
15 Act make it uneconomical for milk handlers to
16 manufacture the product they want, and so they're
17 attacking the federal orders.

18 The issue for this Court is whether ultimate
19 consumers of milk products are proper parties to
20 challenge the minimum wholesale prices that milk
21 handlers are required to pay to farmers.

22 When this suit was first filed, the three
23 individual consumers were joined by a milk handler and a
24 nutrition organization as cc-plaintiffs. The district
25 court dismissed the entire case, holding that both the

1 organization and the consumers lacked standing, and that
2 the handler had failed to exhaust his administrative
3 remedies under the Agricultural Marketing Agreement Act.

4 The court of appeals affirmed the dismissal of
5 the handler and the nutrition organization, but it held
6 that the consumers had standing and remanded the case
7 for a trial on the merits.

8 The milk market order program, as this Court
9 has recognized in a number of prior cases, is
10 extraordinarily complex, and so I will try to limit my
11 description of it to just a layman's description of
12 those provisions of the program that affect the issues
13 in this case.

14 Probably the most important aspect of milk
15 market orders is the classified pricing system embodied
16 in those orders, and that system has always been a
17 feature of the dairy industry, even before orders came
18 into being in the early 1930s.

19 Milk -- under this system, milk that's used
20 for drinking purposes commands a higher price, known as
21 Class I. Milk that's made into manufactured products
22 such as cheese or milk powder sells at a lower Class II
23 or Class III price.

24 The statute requires handlers, who are
25 essentially middlemen, to pay farmers according to the

1 end use to which the raw milk is put. In other words,
2 if a handler buys milk and sells it for drinking
3 purposes, he pays Class I prices for it. If he buys the
4 same raw milk and makes it into cheese and sells it as
5 cheese, then he pays Class II or Class III lower prices
6 for it.

7 But to protect farmers against destructive
8 competition for sales in the desirable fluid market, the
9 handlers' payments are pooled, and farmers get paid a
10 uniform blend price regardless of the use to which the
11 milk of an individual farmer is put.

12 To maintain the integrity of this classified
13 pricing system, the Secretary of Agriculture regulates,
14 and has since 1964, reconstituted fluid milk as if it
15 were a Class I product. In other words, if a handler
16 buys powder, then turns around and reconstitutes it into
17 fluid milk, he pays for the powder or the raw milk that
18 he uses to make the powder at Class I prices. If he
19 uses the powder to make ice cream or some other
20 nondrinking purpose, then he pays for it as a Class II
21 or a Class III product.

22 Respondents' goal in this case is to let
23 handlers pay for raw milk at the class -- the lowest
24 Class III price, even if the handlers turn around and
25 make the powder into fluid milk that competes directly

1 with fresh milk for fluid sales. As I'll discuss in a
2 moment, we think that Respondents are precluded from
3 litigating what's basically a handlers' grievance about
4 the prices that handlers pay.

5 First the Court should consider that this
6 lawsuit as a factual matter really makes very little
7 sense.

8 QUESTION: Ms. Oberly, in that connection why
9 was the handler dismissed?

10 MS. OBERLY: Justice Blackmun, the statute, as
11 I'll explain, has a specific and detailed review
12 procedures -- procedure for handlers who wish to
13 challenge a milk market order. The first step in that
14 procedure is under 608c(15)(A) of the statute. 7 U.S.C.
15 608c(15)(A) requires a handler to file a petition for
16 review with the Secretary, and the Secretary then holds
17 a formal adjudicatory, on the record hearing, reaches a
18 decision on the handler's petition, and if the handler
19 is dissatisfied, the handler is then afforded a right of
20 judicial review in district court.

21 The handler in this case did not and has not
22 to this date filed such a petition.

23 Factually, we are at somewhat of a loss to
24 understand the sense of this case. As best we can tell,
25 Respondents' complaint, even though they phrased it in

1 terms of price, is simply a matter of convenience. The
2 potential savings per consumers is negligible. It's 82
3 cents a year per capita, and that's if all variables
4 operate in consumers' favor.

5 But consumers could save more than that by
6 making reconstituted milk at home, because they would be
7 saving for themselves the manufacturer's processing and
8 marketing costs. There's no nutritional difference
9 between the product that a manufacturer would sell and
10 what a consumer would make at home; and there's no real
11 aesthetic difference either.

12 In the past and in the allegations in this
13 complaint, consumers allege that they prefer the test of
14 manufacturer-reconstituted milk because it has a
15 butterfat content; but the record in this case, the
16 Agriculture Department's impact statement of
17 Respondents' proposal, demonstrates that it's possible
18 to make a product at home that's virtually
19 indistinguishable in taste from the product that these
20 Respondents want to buy in a store by simply blending
21 powdered milk and water and some portion of fresh milk.

22 So in our view this case does come down to a
23 consumer interest in convenience. They would rather be
24 able to buy the product in the store for slightly more
25 money than they could -- than it would cost to make them

1 at home.

2 Our position as a matter of law is that
3 Congress never intended to permit consumer attacks on
4 market orders, but that it certainly didn't intend to
5 let consumers upset such a delicate regulatory scheme
6 for convenience.

7 Respondents --

8 QUESTION: I suppose your position there isn't
9 dependent on what you concede to be the small benefit
10 that consumers -- consumers might obtain.

11 MS. OBERLY: No. We would -- as a legal
12 matter we would say that all consumer suits are
13 precluded, even if they were more substantial than this
14 one. But in considering whether Congress could have
15 intended this much disruption to be visited upon its
16 program, we think it's relevant for the Court to
17 consider what's on the other side of the balance in this
18 case.

19 Respondents contend that they're entitled to
20 maintain this suit under the APA, but the APA has its
21 own preclusion provision that prohibits review whenever
22 review is precluded by the relevant statute. Here, of
23 course, the relevant statute is the Agricultural
24 Marketing Agreement Act. That statute, as I mentioned a
25 moment ago, sets up a special scheme for handlers to get

1 review of market orders; and it's clear that consumer
2 suits would be completely inconsistent with Congress'
3 plan for handler review.

4 This Court has never permitted the APA to be
5 used as a way for strangers to a regulatory program to
6 get greater rights to review than the parties that
7 Congress has specifically provided for in the statute.
8 But that would be the effect of allowing consumer suits
9 attacking market orders to be brought under the APA.

10 The basic problem with Respondents' lawsuit,
11 as we see it, is that they're attempting to litigate
12 someone else's rights -- handlers' rights. The suit
13 really isn't about the prices that consumers pay for
14 milk or milk products; it's about the order prices that
15 handlers pay to farmers. And as to those prices, the
16 Act does set up the detailed and specific scheme that I
17 mentioned for handlers to challenge the Secretary's
18 actions.

19 It requires, first, administrative exhaustion,
20 and then if the handler is dissatisfied, and only then,
21 may he go to court. So the question in this case is not
22 issue preclusion, but party preclusion. The statute
23 clearly does allow the issues that the consumers are
24 interested in to be litigated, but that litigation under
25 Congress' scheme is to be conducted by handlers.

1 And what's most striking about this case is
2 that the consumers did have a handler in the case who
3 was interested in litigating the issue that the
4 consumers want to bring before the court, but as both
5 courts below held, that handler failed to follow the
6 statutory scheme for exhaustion.

7 QUESTION: Wouldn't a handler normally be a
8 consumer, too?

9 MS. OBERLY: Yes, he would, and that, we
10 think, is a very serious problem with Respondents'
11 lawsuit. Any handler, if he is an individual,
12 presumably drinks milk and is a consumer. If he's a
13 corporation, he's ultimately owned by consumers. And
14 under the court of appeals decision, all he has to do in
15 the future is instead of coming to the Secretary first
16 and then the court through the statutory scheme as a
17 handler, is come directly into court and say I'm here as
18 a consumer of milk. And that would be the end of
19 Congress' scheme for administrative exhaustion followed
20 by judicial review at the behest of a handler. Handlers
21 would just turn into consumers or align themselves with
22 consumers. If a court might pierce through the sham of
23 a handler trying to litigate as a consumer, then
24 consumers and handlers need only join together, as they
25 did in this case and as they did in the similar Ninth

1 Circuit case of Rasmussen v. Hardin. And you then have
2 handlers litigating as consumers, but not in the way
3 that Congress has specified handlers are to bring these
4 claims to the Secretary's and the court's attention.

5 Our basic position is that when Congress has
6 said how it wants a statute to be enforced, and here
7 it's said how handlers are to enforce these provisions,
8 then there's no room for other parties who are complete
9 strangers to the regulatory scheme to come in and
10 litigate someone else's rights and liabilities.

11 We really think it's quite inconceivable that
12 Congress could have intended to let consumers litigate
13 handlers' rights. One is the reason that I just gave to
14 you, Mr. Justice Rehnquist; that that would complete
15 eviscerate Congress' scheme for handler -- excuse me --
16 handler administrative review followed by judicial
17 review.

18 Also, suits by handlers acting as consumers or
19 just plain consumers would cause chaos in the regulatory
20 program that Congress could not possibly have intended.
21 Every time this Court has considered a case under the
22 Agricultural Marketing Agreement Act, it's noted how
23 complex the statute is. In the case of milk, the market
24 order prices change monthly. The court of appeals
25 decision would appear to allow consumers to come in

1 every month and attack those price changes.

2 In the fruit and vegetable area, which is
3 regulated by the same section of the statute that
4 regulates milk, the orders are even more complex. There
5 are changes made every week during the marketing
6 season. Again, the court of appeals decision would
7 appear to allow consumers to come in every week and
8 challenge the Secretary's actions.

9 I'd like to give an example in the fruit and
10 vegetable area that may sound a little silly, but to me
11 it's really no more farfetched than Respondents'
12 monetary stake in this lawsuit.

13 The market orders regulating commodities such
14 as lemons don't control prices directly like the milk
15 market orders do, but instead they do -- they do it by
16 controlling the quantity of a product like lemons that
17 can be brought to market each week.

18 At the beginning of the season a lemon
19 advisory committee makes recommendations to the
20 Secretary of Agriculture about how many lemons should be
21 marketed each week, but during the course of the season,
22 the lemon committee looks at the results of the previous
23 week's marketing efforts and decides whether to
24 recommend changes. The Secretary then enacts those
25 changes.

1 Under the court of appeals decisions,
2 consumers could bring suit every week and claim that if
3 the Secretary had simply allowed more lemons to get to
4 market, then consumers could have shaved a few pennies
5 off their grocery bills. And since consumers don't have
6 to bring their grievances to the Secretary first, we
7 would then have the courts in the business of deciding
8 how many lemons should be marketed each week.

9 We think it's inconceivable that Congress
10 intended this complex statutory scheme to operate in
11 that manner. Besides the fact that the Secretary's
12 expertise would be lost to the courts, it's obvious that
13 suits like this would cause chaos in a program that has
14 market stability as one of its primary purposes. When
15 Congress gave handlers a right of review, it was careful
16 to balance that right against the needs of the industry
17 for stability. It provided that a handler review
18 petition, whether pending before the Secretary or in
19 court, can't be used to impede, hinder or delay the
20 Secretary's ability to obtain handler compliance with
21 existing market orders. But a consumer suit under the
22 APA would not be subject to any such limitations.

23 QUESTION: What about producers?

24 MS. OBERLY: Producers, Your Honor, we think
25 are clearly different than consumers. Respondents --

1 QUESTION: Well, there's no doubt about this.

2 MS. OBERLY: Pardon?

3 QUESTION: For this purpose?

4 MS. OBERLY: Respondents rely heavily on the
5 Court's decision in Stark v. Wickard which allows
6 producers to sue even though they're not expressly
7 mentioned in the statute. But there are several
8 different features about producers. One of the most
9 important is this statute was passed expressly for the
10 benefit of producers.

11 QUESTION: Well, that may be true, but in
12 terms of -- in terms of the -- of the chaos you say
13 would result from letting consumers sue every week,
14 producers are the ones who -- for whose benefit the
15 statute was really passed, and if they don't think
16 they're getting a good enough deal, I suppose every week
17 they could come in and -- under Stark v. Wickard and
18 upset the Secretary's applecart.

19 MS. OBERLY: They haven't --

20 QUESTION: Or milkcart.

21 MS. OBERLY: It seems much less likely that
22 they would do that, Your Honor, because the statute
23 gives them a different form of protection in that market
24 orders can't be adopted unless two-thirds of the
25 producers vote for them. If the -- if the producers are

1 unhappy with the orders, a majority of them can require
2 the Secretary to terminate the order. And so they're
3 included and given great protection in the
4 administrative level of the statutory scheme.

5 QUESTION: Well, then why -- why - why Stark
6 v. Wickard?

7 MS. OBERLY: Not every producer is always
8 going to be happy, and there are some producer suits.
9 But --

10 QUESTION: Yeah. Any one of the third who
11 didn't vote for it.

12 MS. OBERLY: That's correct. But not any one
13 of the nation's entire stock of consumers, which is
14 basically every household in the nation. And as the
15 Ninth Circuit noted in the Rasmussen case, the statute
16 is a cooperative venture between producers, handlers and
17 the Secretary, and consumers are outside of that
18 venture. And the statute goes to great lengths to
19 protect the interests of consumers, and this Court has
20 added an additional level of protection in its decision
21 in Stark. Consumers just aren't in this scheme, and
22 there's no rationale for extending Stark to the
23 situation of consumers.

24 I might also -- in the same point --

25 QUESTION: Well, here in this case, though,

1 the consumers weren't really asserting a separate
2 interest as consumers. Weren't they basically asserting
3 the same interest as the handlers?

4 MS. OBERLY: That's -- yes, and that's another
5 problem with their lawsuit. They're litigating somebody
6 else's rights. They don't -- they can't legitimately
7 care about what handlers pay to farmers at the wholesale
8 level. They only care about the trickledown effect, if
9 they can even show that there is such an effect --

10 QUESTION: Yeah, but they --

11 MS. OBERLY: -- At retail prices.

12 QUESTION: They said in this case that they
13 could; that if handlers got a bigger break, the
14 consumers -- that would trickle down.

15 MS. OBERLY: Well, we dispute that, Your
16 Honor, in our argument on standing; that we think
17 they're unable to show redressability. But even if -- I
18 mean in this suit they're litigating handlers' rights to
19 lower payments. They have a handler who says that he's
20 ready to litigate the same issue, only he hasn't
21 followed the proper procedure.

22 When Mr. Oberweiss, the handler who was
23 dismissed from the case, is out there and able to do
24 exactly -- to litigate this issue in exactly the manner
25 that Congress intended, it doesn't make any sense to

1 assume that Congress would have allowed strangers to
2 come in and litigate the same issue but not go through
3 the procedures specified in the statute.

4 One other difference, Justice White, between
5 consumers and producers is that basically the market
6 orders are government-ordered contracts between handlers
7 and producers; and it would be quite unfair and perhaps
8 even unconstitutional to say that one party to the
9 contract, the handler, can sue, but the other party to
10 the contract, whose personal proprietary rights are
11 affected, can't sue because Congress didn't mention them.

12 The same thing is not true of consumers. The
13 consumers are not parties to these minimum wholesale
14 price contracts between producers and consumers.
15 They're suing on somebody else's rights, and we think
16 that's a substantial difference.

17 QUESTION: What -- what particular aspect of
18 standing do you rely on mostly?

19 MS. OBERLY: We think --

20 QUESTION: Zone of interest, is that it?

21 MS. OBERLY: We think they've failed at least
22 three standing tests. Zone of interest is one;
23 generalized grievance is another; and redressability is
24 the third. I was planning in my argument to focus on
25 redressability, just due to time limitations and because

1 we had briefed zone of interest more thoroughly in the
2 brief.

3 And as for the zone of interest problem with
4 this case, there basically are three or four or even
5 more different factors that would all have to coalesce
6 in Respondents' favor before there could be any
7 substantial probability that Respondents' injury would
8 be redressed by a favorable judicial decision.

9 The first is that Respondents live in Florida,
10 Texas and Arkansas, but they haven't alleged that there
11 are any handlers who are interested in making the
12 product they want and marketing it in the areas where
13 they live. The one handler, Oberweiss, who was
14 dismissed from this case, operates in the Chicago area;
15 but he's never alleged that he would market
16 reconstituted milk where the Respondents live.

17 The examples in the record indicate that it's
18 actually quite unlikely that milk handlers would go into
19 the business of marketing reconstituted milk. As an
20 example, the impact statement in this case notes that
21 the entire State of California is unregulated by federal
22 market orders, and yet there's still no reconstituted
23 milk made in that state.

24 Another example is the one relied on
25 Respondents in North Carolina, which is also an

1 unregulated market. Reconstituted milk was sold there
2 for a while, but then the manufacturer on his own simply
3 decided to stop making it. His action obviously had
4 nothing to do with the federal milk market orders
5 because the area is still unregulated, and yet the
6 product isn't available in that area.

7 Even if Respondents could find a handler who
8 wanted to market reconstituted milk in their area, they
9 are unable to show that the handlers' cost savings would
10 be passed on to consumers. The legislative history
11 indicates that when farm prices increase, consumers do
12 see that at the retail level; but when farm prices
13 decrease, as would be the case here, handlers frequently
14 keep a substantial portion of the savings for themselves
15 rather than passing it on to the consumers.

16 Another point is the Department of
17 Agriculture's impact statements show that this plan of
18 Respondents would cost farmers far more than it would
19 save consumers -- a difference of several hundred
20 million dollars of savings to consumers, on the one
21 hand, and a loss in farmers' income on the other.

22 It's not very likely that farmers or their
23 representatives in Congress would allow that to happen.
24 It's almost certain that farmers would press for an
25 increase in the price support program that would wipe

1 out any savings to consumers by raising the prices that
2 they have to pay for manufactured dairy products.

3 Respondents also ignore the fact that even now
4 with these supposedly prohibitive federal regulations in
5 place, seven states completely ban the sale of
6 reconstituted milk, and another eight or nine place
7 various restrictions on it. If the federal regulations
8 were changed, it's a likely assumption that more states
9 would pass similar legislation to protect their local
10 dairy industries.

11 So, in sum, on the redressability issue, we
12 think this case is virtually indistinguishable from
13 Warth v. Seldin and Simon v. Eastern Kentucky Welfare
14 Rights Organization. In both cases it was entirely
15 speculative whether there was any substantial
16 probability that granting -- that having a court hear
17 the complaint Respondents had brought to court would
18 actually result in the relief that they want, which is
19 lower retail prices at the consumer level.

20 I'll save the remainder of my time.

21 CHIEF JUSTICE BURGER: Mr. Plessner.

22 ORAL ARGUMENT OF RONALD L. PLESSER, ESQ.,

23 ON BEHALF OF THE RESPONDENTS

24 MR. PLESSER: Thank you, Mr. Chief Justice,
25 and may it please the Court:

1 In this case three cost-conscious consumers of
2 milk from Tampa Bay, central Arkansas and Texas are
3 seeking to challenge regulations of the Secretary of
4 Agriculture which effectively prohibit the sale to them
5 of reconstituted milk -- a lower cost alternative to
6 fresh fluid milk.

7 The Government in their argument continued to
8 misstate, I think, the interest of consumers in this
9 case. I believe counsel said that we are challenging
10 the minimal -- minimum price level that handlers must
11 pay to producers for fresh fluid milk. That is not at
12 all the claim of consumers in this case.

13 The claim of consumers in this case is that
14 the Secretary of Agriculture has issued a set of
15 regulations which prohibit the marketing of an
16 alternative product in contravention of the regulation,
17 of the statute which is the Agriculture Marketing
18 Agreement Act. We are not challenging price levels; we
19 are challenging whether or not a competitive product
20 should be able to be marketed.

21 There is only one issue in this case at this
22 point. The Government is arguing a good deal of the
23 merits, but the real issue at this point is whether or
24 not these three consumers have access to the courts to
25 challenge certain milk market regulations by the

1 Secretary.

2 The consumers' claims are asserted under
3 Section 10 of the Administrative Procedure Act as
4 persons aggrieved by regulations under the Agriculture
5 Marketing Agreement Act.

6 The Government contends that they are
7 precluded by inference and that they lack the required
8 elements of standing.

9 As a preliminary matter, I won't go into the
10 detail that Ms. Oberly did, but I think a little
11 discussion of the regulatory scheme is necessary. The
12 milk market system is a regulatory program that is
13 essentially a price-fixing scheme to set minimum prices
14 that producers receive from handlers for milk.

15 Producers are the primary beneficiaries of
16 this legislation. And we readily agree to that. They
17 are not, however, regulated. They are the beneficiaries
18 of the regulation, but are not certainly principally
19 regulated.

20 The handlers are the regulated parties. They
21 are the parties to whom it is determined how much they
22 will pay for a product that they then have to sell. The
23 consumers --

24 QUESTION: Well, aren't -- aren't the
25 producers subject to that same regulation? Just as the

1 handlers can't enter into a contract to buy milk on
2 conditions that are inconsistent with the marketing
3 order, aren't producers likewise forbidden to enter into
4 a contract inconsistent with the marketing order?

5 MR. PLESSER: Well, there are some -- there
6 are some restrictions, I think. There are some
7 restrictions on producers. But, for example, if a
8 producer is also a handler, that producer is outside of
9 the regulations and can really -- and can market milk
10 outside of the marketing order. And there is far less
11 control on the producers than there is on the -- on the
12 handlers.

13 And finally, the consumers are the beneficiary
14 of a fair and balanced system. I think it is just
15 common sense that consumers were the -- are the ultimate
16 beneficiary of a system that requires milk supply to --
17 to this country. I think more importantly, consumers
18 are the people who pay the price. And it is -- it is in
19 that interest that these consumers come forward.

20 Consumers first sought relief by going to the
21 Secretary of Agriculture in this case by filing a
22 petition for rulemaking. This petition was supported by
23 consumers but was also supported by the Council on Wage
24 and Price Stability, was also supported by the
25 Department of Justice Antitrust Division, and indeed, in

1 the U.S. -- the U.S.D.A. itself filed an impact
2 statement, which we will discuss and is discussed in our
3 brief, which goes against consumers on the merits, but
4 very clearly indicates that consumers will be -- would
5 be favorably affected if their relief was sought.

6 There is -- I say it at this point in the
7 record -- there is simply every piece of evidence in
8 this rulemaking record that was initiated just prior to
9 this case, and every statement of the Government and
10 every report cited indicates and assumes that consumers
11 will be benefited if these regulations are eliminated.

12 The Government has argued here even more
13 strongly than they've argued in their brief that we
14 haven't shown any evidence that relief will be -- will
15 be realized by our plaintiffs. But I think the plain
16 truth is there is not one study, not one statement that
17 the Government can present other than in argument to
18 indicate that consumers will not have the benefit. In
19 fact, the United States Department --

20 QUESTION: Do you know of any -- any study at
21 any time that showed that any regulation cut prices,
22 resulted in the consumer getting a lower price?

23 MR. PLESSER: No, Your Honor.

24 QUESTION: Well, what do you hope to get?

25 MR. PLESSER: Well, Your Honor, I think what

1 -- on the merits of this case what we hope is that
2 essentially the -- the reconstituted milk process will
3 be taken out of part of the regulation and will be
4 treated as a milk product rather than milk so that its
5 price will be able to float in the marketplace and not
6 necessarily be regulated.

7 QUESTION: Mr. Plessner, you're talking now, I
8 guess, about kind of questions of fact involving
9 standing. You say one thing; the Government says
10 another thing. And I notice that Judge Wilkie's opinion
11 in the court of appeals, the majority opinion there,
12 devotes some attention.

13 How are these kind of factual questions
14 resolved at the pleading stage? Is the Court required
15 simply to take your allegations? Can it make some sort
16 of factual inquiry? What is the test?

17 MR. PLESSNER: Well, I think the test was
18 enunciated in the *Warth v. Seldin* which indicated that
19 you could -- that the Court could take the allegations,
20 but if those allegations were challenged by the
21 Government, that it then -- then the plaintiffs had a
22 requirement to substantiate those -- those allegations.

23 So I don't think I can just sit here and say
24 allegations are enough to get us past the barrier of --
25 of injury in fact and redressability. But I think the

1 -- what we've produced in the record, which by the way
2 is primarily material developed by governmental agencies
3 in this case, indicate that we have -- we have met the
4 threshold requirement for injury in fact, redressability.

5 QUESTION: You -- you would stop short of a
6 full dress trial on that issue, I take it, before you --

7 MR. PLESSER: Oh, I would certainly stop
8 short. And I think the court of appeals in this case
9 indicated that if you have a full dress trial on the
10 issues of standing, essentially you're litigating the
11 issues of merits at the standing level. And at least
12 Judge Wilkie in the court of appeals thought that that
13 was inappropriate, but did feel that there was a need
14 for this threshold of some facts. And we're certainly
15 not just standing on the bare allegations in our
16 complaint.

17 We were turned down -- consumers were turned
18 down in their petition to the Secretary of Agriculture,
19 and I think it's important to, as I go into the injury
20 and preclusion issues, to -- to just review the three
21 basic requirements for this kind of case were set down
22 in Associated Data Processing and Barlow v. Collins.
23 And those three requirements are that injury in fact by
24 the government agency, that the interests asserted are
25 within the zone of interest of a substantive statute,

1 and that the statute cannot explicitly or implicitly
2 preclude judicial review.

3 As I've already stated, of course, we don't
4 have to demonstrate merits. We just have to demonstrate
5 sufficient facts to get past the threshold of standing.

6 The injury being suffered by these consumers
7 is distinct, palpable and is personal to them. The
8 Government has argued as though we are representing
9 consumers from all over the country and that it is 89
10 cents per capita per year, or what we are arguing is for
11 three particular consumers in regions of the country,
12 where the Secretary's own impact statement indicated
13 that they would be benefited if reconstituted milk was
14 made available.

15 These are in regions which are typically
16 referred to as inefficient milk market regions. It may
17 be that in the more efficient regions consumers would
18 not be able to demonstrate the injury that our clients
19 can demonstrate in this case.

20 We are not representing all consumers in the
21 United States. We are representing three consumers who
22 are located in three specific market areas, and we've
23 demonstrated facts in our case -- in our papers
24 sufficient to indicate an injury to them if -- an injury
25 to them by the failure of the Secretary to allow the

1 marketing of reconstituted milk.

2 It is -- it has not been contested that the
3 effect of the regulation is to prohibit reconstituted
4 milk. As we've demonstrated on page 5 of our brief, in
5 the regions in which our -- our clients are situate, the
6 cost of reconstituted milk at the wholesale level
7 exceeds that of regular fresh milk. And I think it is
8 -- it's not contested also that the same price -- and we
9 don't contest it -- at the same price or higher price
10 that consumers would buy reconstituted milk. They would
11 only buy it if it was at a cost savings.

12 And in those three areas not only does the
13 regulations of the Secretary make them equal price, but
14 in fact, reconstituted milk is more expensive. And
15 that's not been contested at any point by the Government.

16 And I think it is also important to focus both
17 on the Secretary of Agriculture's impact statement that
18 indicated that consumers would be damaged to the extent
19 of \$186 million a year, or in other words, they would
20 receive a benefit of \$186 million a year. And we
21 contend that for purposes of standing that that is a
22 salient factor.

23 The fact that, as Judge Gash at the district
24 level thought there was some countervailing concerns
25 that farmers would be injured and then resultingly

1 affect consumers, I think the court of appeals handled
2 that appropriately and said that that was -- that was
3 essentially conjecture that could be resolved on the
4 merits, but that there was no substantiation of that at
5 this point. But for merits discussion there was \$184
6 million.

7 QUESTION: Mr. Plessner, even assuming that
8 your clients have standing, isn't the more difficult
9 question whether the whole statutory scheme just
10 precludes giving relief to consumers? It seems to have
11 been designed to keep prices up for producers, not to
12 get them down for consumers. How do you fit into the
13 scheme of the statute? •

14 MR. PLESSNER: Well, as we -- we state on page
15 32 of our brief, we believe the interest of consumers is
16 in a fair and balanced price. As I stated at the outset
17 of my argument, we are not contending that we want
18 cheaper prices. We simply want a fair and balanced
19 approach. And we think we will be able to demonstrate --

20 QUESTION: Well, but to get -- to get
21 standing, you have to allege that you're going to have
22 lower prices, and that certainly seems to be outside the
23 scope of the concept of the statute.

24 MR. PLESSNER: Justice O'Connor, I think what
25 we have to argue or we have to contend is that if we

1 prevail on the merits and we -- it's determined that the
2 Secretary's regulations create an illegal trade barrier
3 to reconstitute milk and that reconstituted milk is
4 effectively classified as fluid milk in contravention of
5 the statute, then reconstituted milk will have to be
6 made available, and we will benefit.

7 It's not necessarily that we're asking for a
8 lower price. We're simply asking for a product
9 essentially to be released from what we think is an
10 illegal regulatory scheme. We're asking for this
11 product to be broken out. If that product is broken
12 out, we will benefit by more -- more -- by cheaper
13 prices. But we don't think Congress intended in that
14 statute to allow the Secretary to create trade barriers
15 or to classify products as milk to the detriment of --
16 of consumers.

17 So while I understand your question, I think
18 that our -- that our concerns are -- it's very confusing
19 and it's very close, but I think we're -- we're more
20 interested in getting that product available rather than
21 arguing the price. And I think the legislative history
22 indicates that there's an interest in -- in this fair
23 and balanced price, and there's no interest in illegally
24 -- in illegal price structures.

25 Getting to the second part of the Associated

1 Data Processing test I think is responsive to Justice
2 O'Connor's question, which is essentially the -- the
3 arguably within the zone of interest test that's been
4 asserted by this Court. We turn to two sections of the
5 Agriculture Marketing Agreement Act, Section 22 and
6 Section 24, both of which on the face of those sections
7 indicate an interest to protect consumers, and that the
8 consumer has an interest, on the face of the statute, in
9 fair prices and in an appropriate administration of the
10 Act to comply with the requirements of the Act. Again,
11 the interest is not just in lower prices, but in a fair
12 and balanced program.

13 Clearly, the rights of consumers are intended
14 to be protected from the face of the statute. To
15 require more, we believe at this -- at this juncture
16 would return to the legal interest tests that were
17 turned over in Associated Data Processing. Clearly, as
18 the -- as Judge Wilkie recognized in this case,
19 consumers have a stake in the outcome of -- of orders
20 under the Milk Market Agreement Act, and that they have
21 an interest to assure compliance with the Secretary with
22 the challenge of the Act.

23 The Government has said in their briefs that
24 we are challenging the basis of the Act. We are not.
25 We are simply challenging the legality of whether -- of

1 certain regulatory schemes under the Act as adopted by
2 the Secretary.

3 QUESTION: Do you think that the so-called
4 zone of interest test still has relevance in determining
5 standing?

6 MR. PLESSER: The court of appeals did in this
7 case, Your Honor, and discussed it in great detail. And
8 I think that following the cases that I reviewed from
9 this Court, it appears that -- that administrative --
10 that the zone of interest test is still a -- is still a
11 strong holding, although there are some commentators
12 that disagree.

13 QUESTION: Why do -- why do the consumers --
14 why do the consumers satisfy that test?

15 MR. PLESSER: As I said, Your Honor, I think
16 -- and as Judge Wilkie has indicated in his court of
17 appeals decision -- there are two sections, sections in
18 the Act which talk about the interests of consumers.
19 The legislative history that we cited talks about the
20 interests of consumers in a fair and balanced -- in a
21 fair and balanced system. And I think there is a
22 threshold of interest of consumers in how that
23 regulatory structure is created. So that I think the
24 zone of interest being an expansive test is satisfied in
25 this case.

1 QUESTION: Does that apply to all consumers?

2 MR. PLESSER: I think --

3 QUESTION: Don't go too far, because I'm going
4 to get a consumer over in West Africa in a minute.

5 t MR. PLESSER: I think on zone of interest,
6 Your Honor, that it would go to consumers who were
7 asserting the type of injury that we are asserting in
8 terms of the access to reconstituted milk. Conceivably
9 there could be consumers or other people who would be
10 injured but not within the zone of interest. For
11 example, a manufacturer or reconstituted milk equipment
12 or a trucker of milk powder is injured by these
13 regulations.

14 ely It is not entirely clear to me that such a --
15 such a person would be within the zone of interest. But
16 these consumers are.

17 ad QUESTION: I said a consumer, somebody that
18 consumes this milk, somebody that consumes milk.

19 es. MR. PLESSER: Yes. If they assert the type of
20 claims we do.

21 vha QUESTION: He'd have all of them.

22 Mr. MR. PLESSER: Your Honor, I can really only
23 speak --

24 QUESTION: Well, am I not disqualified, and
25 all nine of us? Don't we have an interest?

1 MR. PLESSER: Your Honor, as I -- as I stated,
2 I think you are -- I assume -- I will take judicial
3 notice that you're all consumers of milk, but I think
4 that -- I think that what we're arguing here is what
5 area of the country, what would the impact on those milk
6 market orders are.

7 We've done the analysis of the Washington
8 metropolitan area. I do not know if there would be the
9 kind of impact in this area that -- that would -- that
10 we've done for our consumers in the Tampa Bay, Arkansas
11 and Texas area, that would -- would justify consumers.

12 I think -- but I think what you're getting at
13 is the generalized grievance argument, Justice
14 Marshall. And I think that -- I think that Judge --
15 Judge Wilkie had a good response to that, which is if we
16 can demonstrate that our -- that there is a distinct and
17 palpable injury, my clients cannot go to a supermarket
18 and find reconstituted milk on the shelf, and studies
19 indicate that but for these regulations there's a
20 substantial probability that that product would be there.

21 We can't find it on the shelf. That's a real
22 injury. That's a real loss. We then have -- I think we
23 then can demonstrate that we are within the zone of
24 interest of the statute for a fair and balanced program,
25 and that is, I think, the basis of our claim.

1 The fact that many other consumers are like
2 situate I don't think lessens the impact or the rights
3 of our clients to seek redress.

4 Finally is the preclusion argument that we
5 have recognized and which the Government relies on quite
6 strongly, and I think the preclusion argument of the
7 Government is really very simple. It says that anybody
8 -- since handlers were given specific remedial rights
9 under the statute, that no one else should be able to
10 challenge the statute. Nonhandlers are excluded. Of
11 course, that argument was rejected by this Court in 1944
12 in *Stark v. Wickard*, where it was determined that
13 producers, although not given specific administrative
14 and judicial rights, were allowed standing.

15 The Government has argued well, producers
16 really is a different situation because they are more
17 affected by the statute, they're more recognized as the
18 principal beneficiary, none of which we -- we contest or
19 argue with.

20 Our claim simply -- and our position is very
21 straightforward. For the position -- for an argument of
22 preclusion, if nonhandlers are to be precluded and if it
23 was the intent of Congress to preclude nonhandlers, then
24 producers and consumers are indistinguishable for that
25 purpose. They may be on much different grounds for

1 standing arguments, for injury in fact and
2 redressability, but on a straight preclusion concept
3 addressed by the Government in this case, we believe
4 that it's inconsistent. And the -- the harms that they
5 asserted were the same harms that they -- exactly the
6 same harms that they asserted in 1944 when they argued
7 Stark v. Wickard.

8 We've looked at the briefs in that case, and
9 the Supreme Court, this Court in Stark v. Wickard
10 responded to that argument, as we quote in our material,
11 and suggested that -- that those types of arguments of
12 the delicate balance and the excessive litigation would
13 be solved by motions to dismiss and other activities
14 that limit frivolous actions, as well as the cost of
15 bringing the action.

16 And I -- I think that -- that this Court in
17 responding in 1944 to those exact same concerns can
18 raise the same -- the same responses are valid today;
19 that -- that there is no great fear that -- that
20 consumers are going to overburden the courts. I think
21 if consumers can come forward and show the kind of
22 injury we've showed in this case and show -- demonstrate
23 the type of violation that they -- that we are
24 attempting to demonstrate in this case, that they should
25 be able to -- to respond -- to have standing.

1 There is just two points I'd like to say
2 before I conclude. One, counsel for the Government has
3 indicated -- used two examples, the State of California
4 and the State -- and North Carolina to indicate why
5 there really isn't any interest in marketing
6 reconstituted milk.

7 My response to North Carolina is the reason --
8 and it's in the record, I think in the impact statement
9 of the Secretary -- the reason that the -- that the --
10 the handler in North Carolina stopped making
11 reconstituted milk, which was relatively successful --
12 it wasn't overwhelming, but they were selling a fair
13 amount of it -- was because the handler was bought by a
14 co-op. The co-op is a milk producer, and I suggest that
15 it was not in the interest of the co-op after they
16 purchased this handler to continue the reconstituted
17 milk product, and that's why the North Carolina
18 experience, which was a truly deregulated situation, did
19 not -- did not result in -- why that ended.

20 In California it is true that California is
21 not regulated under the federal milk market order, but
22 California is regulated by a State of California milk
23 market system very similar to that of the federal
24 program. And while I can't say with absolute certainty
25 because it wasn't discussed in the brief, I am

1 comfortable in asserting that the same type of
2 restrictions that were existent in this case were
3 existent in the California system. So while federal law
4 didn't stop them, state law did.

5 And finally, in terms of the restrictions on
6 reconstituted milk, reconstituted milk is not milk. It
7 is another product. It has to be labeled separately, as
8 most states have required, and in some states, I suspect
9 in -- in response to dairy interests, it is even -- it
10 is even prohibited from being marketed, I assume
11 primarily for economic reasons.

12 It is a product that will benefit consumers,
13 and we believe -- we contend that the Government -- that
14 consumers have asserted sufficient interest for standing.

15 If you have no further questions, I'm complete.

16 Thank you.

17 CHIEF JUSTICE BURGER: Do you have anything
18 further, Ms. Oberly?

19 ORAL ARGUMENT OF MS. KATHRYN OBERLY, ESQ.,

20 ON BEHALF OF THE PETITIONERS -- REBUTTAL

21 MS. OBERLY: Your Honor, as I understand
22 Respondents' argument, their injury is that the product
23 they want to buy is not available; and I would simply
24 like to repeat that it is available. They can make it
25 at home, and they've been able to make it at home for at

1 least the past 20 years.

2 Second, Respondents repeatedly say that in
3 order to bring themselves within the statute zone of
4 interest that the statute has a purpose --

5 QUESTION: Well, Ms. Oberly, what if I as a
6 consumer said I wanted to have a particular kind of
7 cheese available, and that I couldn't find it on the
8 market? Would it be an adequate answer to my lawsuit on
9 my standing to say well, you can make that kind of
10 cheese at home; just go out and buy some milk and churn
11 it and so forth?

12 (Laughter.)

13 MS. OBERLY: No, not probably to your
14 problem. But since their interest is lower prices and
15 they could save more money by making it at home, I think
16 it is an adequate answer to say that if they're really
17 serious about saving money, the way to do it is to make
18 this product at home.

19 QUESTION: How do you make it?

20 MS. OBERLY: You can do it any number of
21 ways. I've experimented the last several days at home.
22 You can take milk powder and water and just mix them
23 together in equal proportions, and you wind up with a
24 product that resembles skim milk. Or if you like some
25 butterfat in your milk, you can take milk powder and

1 water and add in some fresh milk, which is something
2 that a manufacturer also does, and you wind up with a
3 product that resembles 2 percent milk. And much to my
4 surprise, the Federal Register is correct. This product
5 is basically indistinguishable from fresh fluid milk
6 that you would buy in a store.

7 QUESTION: How's it taste?

8 MS. OBERLY: That's what I meant. It was
9 indistinguishable.

10 QUESTION: It depends on how much you like
11 milk.

12 (Laughter.)

13 MS. OBERLY: I come from Wisconsin, so I'm a
14 big milk drinker.

15 QUESTION: Is it different from the dry milk
16 they had in the war?

17 MS. OBERLY: Well, since I wasn't in the war,
18 I can't answer that question.

19 (Laughter.)

20 MS. OBERLY: I would say that the technology
21 for making powdered milk has substantially improved over
22 about the last 10 to 15 years, and it probably is
23 different than the milk that they had in the war.

24 QUESTION: I can only say I hope.

25 (Laughter.)

1 MS. OBERLY: There was one serious point that
2 I wanted to make, and that was that Respondents
3 repeatedly assert that the statute has as an interest
4 setting up a fair and balanced relationship that
5 benefits them. We don't find that interest in the
6 statute anywhere.

7 As Justice O'Connor pointed out, the purpose
8 of the statute is to raise producer prices. Congress
9 has told the Secretary exactly the level to which he is
10 to raise producer prices. That's the parity level.
11 Respondents don't contend that the Secretary has
12 exceeded that level. We think it's quite clear that
13 Respondents are asking the courts to define this fair
14 and balanced relationship between producers and
15 consumers when Congress itself has already said that the
16 relationship it wants to promote is increased farm
17 prices, and it had not the slightest interest in
18 lowering consumer prices. The only protection for
19 consumers was to make sure that they were not subject to
20 excessive price increases, which are not at issue in
21 this case, or to prices above the parity level, which
22 also are not at interest in this case.

23 Thank you.

24 CHIEF JUSTICE BURGER: Thank you, counsel.
25 The case is submitted.

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We will resume at 1:00.

(Whereupon, at 11:56 a.m., the case in the
above-entitled matter was submitted.)

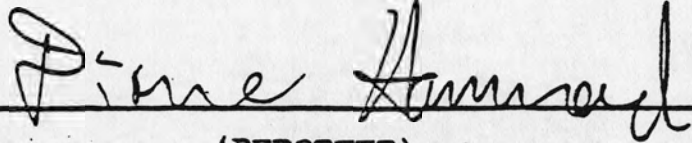
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#83-458 - JOHN R. BLOCK, SECRETARY OF AGRICULTURE, ET AL., Petitioners v
COMMUNITY NUTRITION INSTITUTE, ET AL.

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 "F. J. Anderson", written over a horizontal line.

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