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THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-62

TITLE MAINE, Appellant V. ROBERT J. TAYLOR AND UNITED STATES

PLACE Washington, D. C.

DATE March 24, 1986

PAGES 1 thru 41



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IN THE SUPREME COURT OF THE UNITED STATES

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MAINE, :
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Appellant :
:
v. : No. 85-62
:
ROBERT J. TAYLOR AND UNITED :
STATES :
:
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Washington, D.C.

Monday, March 24, 1986

The above-entitled matter came on for oral argument
before the Supreme Court of the United States at
11:05 a.m.

APPEARANCES:

CABANNE HOWARD, ESQ., Deputy Attorney General of
Maine, Augusta, Maine; on behalf of the Appellant.

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in support of Appellant.

E. PAUL EGGERT, ESQ., Portland, Maine; on behalf of
the Appellees.

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: Mr. Howard, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF CABANNE HOWARD, ESQ.

ON BEHALF OF THE APPELLANT

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

The issue in this case is whether the State of Maine, consistent with the Commerce Clause, may prohibit the importation of live baitfish for the purpose of protecting its environment.

The case is here on the State's appeal from a decision of the United States Court of Appeals for the First Circuit which declared the state statute unconstitutional for failing to survive the strict scrutiny test required by this Court in Hughes versus Oklahoma. This Court subsequently postponed jurisdiction over the appeal until this hearing.

After a brief summary of the relevant facts and a statement of why this Court has jurisdiction, I would like to explain why the Court of Appeals misapplied the proper standard for appellate review of factual findings in district court set forth in Rule 52(a) of the Federal Rules of Civil Procedure, and why the Court also subjected the Maine statute to an unnecessarily strict standard of constitutional scrutiny.

1 The State of Maine has a small and unique freshwater
2 fishery. It is available to all residents and non-residents
3 alike. To protect that fishery, in 1959 the State's
4 legislature passed a statute which is at issue in this case
5 to protect the fishery against the importation of diseased
6 fish.

7 In 1981, Congress passed the Lacey Act Amendment
8 of that year, making it a federal crime to engage in inter-
9 state commerce in violation of statutes such as Maine's.

10 In February of 1983, the Defendant in this case was
11 indicted for importing and 158,000 baitfish, some of which
12 contained various diseases about which the state was con-
13 cerned. The Defendant moved to dismiss the indictment on the
14 grounds of the unconstitutionality of the underlying state
15 statute. The state was permitted to intervene pursuant to
16 Title 28 United States Code, Section 2403(b) in order to
17 defend its statute.

18 An evidentiary hearing was held before a United
19 States magistrate and the state and federal government
20 introduced substantial expert testimony showing that its
21 statute satisfied both prongs of the Hughes versus Oklahoma
22 test, those being that the statute was needed to protect the
23 state against various parasites and exotic species which could
24 come in through a shipment of live bait, and, secondly, that
25 there was no alternative to an absolute ban on the importation.

1 The district court and -- The magistrate and subse-
2 quently the district court agreed with the state and sustained
3 the statute, but the Court of Appeals, asserting its freedom
4 to re-evaluate the evidence completely, reversed.

5 The state then appealed to this Court, although the
6 United States government did not.

7 The state believes that this case is covered by the
8 plain language 28 United State Code, Section 1254(2) which
9 gives this Court jurisdiction, and I am quoting, "by appeal
10 by a party relying on a state statute held by a court of appeals
11 to be invalid."

12 On the merits, on the question of the adequacy of
13 the evidence to support the district court's finding, the state
14 believes that with regard to the -- that the principle error
15 created by the Court of Appeals in this case was a decision
16 in effect to retry the case. The state's evidence here was
17 overwhelming that the statute met both prongs of the Hughes
18 test.

19 With regard to the legitimate purpose behind the
20 statute, the state fish pathologist and two other expert --
21 academic experts testified that the statute was needed to guard
22 against both three specific parasites which could establish
23 themselves in Maine's sport fish such as trout, bass, and salmon,
24 and also that the statute was needed to protect against the
25 introduction of exotic species such as, for example, the common

1 carp, which might successfully compete with indigenous species
2 for habitat.

3 The same witnesses, as well as the Defendant's own
4 expert, testified as to the second prong of the Hughes test;
5 that the scientific community has not established a testing
6 program of any kind for baitfish. And, since that is the case,
7 since there is no possibility of inspecting fish or testing
8 fish --

9 QUESTION: General Howard, can I interrupt you for
10 just a second?

11 MR. HOWARD: Yes.

12 QUESTION: As I understand your brief, you take the
13 position that the Court of Appeals acted as a trial de novo
14 in effect and you are giving your version of the evidence.
15 You are not giving us the findings that you think the Court
16 of Appeals ignored. Do we have to look at the original under-
17 lying evidence ourselves or can we content ourselves to look
18 at the district court's findings?

19 MR. HOWARD: What I am reciting is what the district
20 court found to be the facts in the case.

21 QUESTION: I thought you were reciting what witnesses
22 testified to. I am sorry.

23 MR. HOWARD: Well, that is contained in the district
24 court's findings if you read them, the findings of -- It refers
25 specifically to what the witnesses testified and then find

1 as a fact certain things, these things.

2 QUESTION: In your submission, do we need to go beyond
3 the district court's written opinion to find out what the facts
4 are?

5 MR. HOWARD: Well, we believe that this Court should
6 act in the same way as the Court of Appeals should have acted,
7 which is to apply the clear erroneous test to the record and
8 if you find that there is substantial evidence in the record
9 to support the findings of the district court, you should reverse
10 the Court of Appeals and --

11 QUESTION: What part of the district court's findings
12 are you now referring to just so I can follow by looking at
13 the --

14 MR. HOWARD: In the jurisdictional statement?

15 QUESTION: Well, wherever the district court's --
16 They are not numbered findings as we normally have.

17 MR. HOWARD: Oh, no. But, if you read -- It is not
18 a very long opinion. It covers nine pages.

19 QUESTION: Right.

20 MR. HOWARD: It is replete with references to the
21 transcript. I don't think you will find any difficulty in finding
22 where the findings are.

23 QUESTION: Does he find that all the testimony is
24 true that you describe? He does recite a lot of testimony.

25 MR. HOWARD: Yes. Yes, he does. With regard, for

1 example, to the question of alternatives, he finds as a
2 fact -- The quote is "the fact remains", I am quoting now.
3 It is on page D-9. "The fact remains that testing procedures
4 have not been devised."

5 QUESTION: There were differences in the opinion
6 testimony.

7 MR. HOWARD: There were -- If I can summarize --

8 QUESTION: But, nevertheless, the court believed
9 judgment of another.

10 MR. HOWARD: Yes, that is right. The thrust of the
11 Defendant's expert testimony which the Defendant's counsel
12 will summarize also was that the diseases and parasites that
13 the state was concerned about were really not that serious,
14 therefore, there was no need for --

15 QUESTION: Did the findings of the district court
16 necessarily involve passing on the credibility of these
17 experts?

18 MR. HOWARD: Yes, sir, they certainly did, and we
19 would suggest that is a very important part of this case.

20 QUESTION: That is what puzzles me because one of
21 the things he said was that the lack of agreement is not itself
22 the ground for taking one position or the other. He, in effect,
23 seemed to say that there is disagreement among experts and
24 you need more than that in order to come to the correct
25 conclusion. Doesn't he say the experts disagree on the issue?

1 MR. HOWARD: The experts were in disagreement on
2 the question of the seriousness of a threat.

3 QUESTION: Correct. And, does he resolve that
4 disagreement?

5 MR. HOWARD: He says that it is not -- The Commerce
6 Clause should not be read to require the state to take the
7 risk that something will happen to the state.

8 QUESTION: Correct. So, he is saying that no matter
9 which one is right the fact that there is disagreement is enough
10 to support the reasonableness of the state -- That is quite
11 different from saying that he picked one set of experts over
12 the other.

13 MR. HOWARD: Well, that is true. Either way it is
14 satisfactory for us.

15 QUESTION: Well, I understand, but it is a different
16 argument.

17 (Laughter)

18 QUESTION: Well, Mr. Howard, this line of questioning
19 gets to a question I have had frankly and that is what does
20 the Hughes case require, what is the test laid down in Hughes?
21 One aspect of it, as I understand here, is that the state has
22 the burden of establishing that no non-discriminatory
23 alternative is available. The district court, as I understand
24 it, said that Hughes does not preclude the state from acting
25 where the evidence on the effectiveness of such alternatives

1 is in doubt and where the potential disruptive impact is great.

2 Now, I read the First Circuit's opinion as
3 possibly disagreeing with that as a legal standard under Hughes.
4 And, if that is the case, then you have a legal issue here
5 to deal with before you have to grapple with the underlying
6 facts.

7 MR. HOWARD: Well --

8 QUESTION: In other words, maybe the district court
9 read the standard under Hughes to generously according to the
10 First Circuit. Is that a possibility?

11 MR. HOWARD: We think that we have satisfied the
12 Hughes test even giving it the strictest reading that the First
13 Circuit's opinion could be read to give it. So, we are not
14 relying on any --

15 QUESTION: Well, do you think the district court's
16 articulation of this standard, that if the evidence is in doubt,
17 then that is enough for the state? Do you think that is
18 correct?

19 MR. HOWARD: Well, I think that makes sense.

20 QUESTION: Well, it may make sense. Do you think
21 it is correct under Hughes?

22 MR. HOWARD: Well, I think Hughes could be read to
23 include such a statement, where there is such a test, where
24 there is doubt in the scientific community.

25 As I am going to say in a minute, of course, we --

1 think -- A further argument in this case can be made that the
2 standard should be not as strict as the Hughes test in the
3 first place. But, that argument aside, I think --

4 QUESTION: I think it is important to know whether there
5 is some framework here for a disagreement on the legal standard
6 between the district court and the First Circuit.

7 MR. HOWARD: I didn't get the impression from reading
8 the district court's opinion that the district court -- rather
9 reading the Court of Appeals' opinion that it was disagreeing
10 with what the district court had said. I think the Court of
11 Appeals agreed that the district court was applying the strict
12 scrutiny test and in applying the test it is fair enough to
13 say that if there is doubt among the scientific community as
14 to what the status of science is, that that ought to be enough
15 to give the state a legitimate purpose in legislating against
16 uncertainties. So, I don't see a difference between the two
17 at all.

18 As I was saying a second ago, the prohibition --
19 the needs of this prohibition in this case is required because
20 of the absolute testing procedure. The evidence that the
21 district court found was that there is no testing procedure.
22 So, in short, the state feels that it satisfied the Hughes
23 test in this case no matter how strictly one wants to state
24 it. And, in fact, the Hughes test can't be satisfied on the
25 evidence in this record. It probably is a test that nobody

1 can satisfy.

2 Now, beyond this, the state also suggests that the
3 strict scrutiny test of Hughes may not be appropriate to apply
4 in this case for the reason that the Congress enacted the Lacey
5 Act Amendments in 1981 which encouraged the states to pass
6 statutes of this kind.

7 And, if the courts were to continue to apply the
8 strict scrutiny test to statutes like this, that would frustrate
9 the will of Congress in passing the Lacey Act Amendments.
10 In short, there is a need to harmonize the policy of Congress
11 in encouraging statutes like this with, of course, the policy
12 of the Commerce Clause to prevent the economic vulcanization
13 of the United States.

14 In our brief, we have suggested that there is a way
15 in which the Court could fashion a lower degree of scrutiny.
16 We are not arguing that there should be no scrutiny at all,
17 of course, but we do argue that there should be a lesser degree
18 of scrutiny.

19 For example, on the question of legitimate purpose,
20 we think that the proper way under the Lacey Act to approach
21 a case like this would be to presume that the state statute,
22 that the state legislature has acted for the legitimate purpose
23 that it says and put the burden on the Defendant to come in
24 with some evidence that there is some illegitimate purpose
25 going on.

1 And, similarly, on the question of whether there
2 is an adequate alternative, the state should be given a little
3 bit more leeway than being required to adopt any hypothetical
4 alternative, that the Court of Appeals might be able to think
5 up.

6 In conclusion, the state believes that the Commerce
7 Clause should not require it to take the risk that the
8 indiscriminate importation of baitfish would not be harmful
9 to its environment.

10 If there are no further questions, Mr. Chief Justice,
11 I would like to reserve the remainder of my time.

12 CHIEF JUSTICE BURGER: Mr. Ganzfried?

13 ORAL ARGUMENT OF JERROLD J. GANZFRIED, ESQ.

14 IN SUPPORT OF THE APPELLANT

15 MR. GANSFRIED: Mr. Chief Justice, and may it please
16 the Court:

17 I would like to address some of the questions that
18 came up during the state's presentation and that is that there
19 is no difference of opinion in the record on the fact of whether
20 there were may tests, inspections, certification, or sampling
21 procedures presently available to test these fish for the
22 parasites and exotic diseases in any way other than a total
23 exclusion.

24 The district court found that the fact remains that
25 there is no testing technique. The Court of Appeals did not

1 find that finding to be clearly erroneous and, in fact,
2 Appellee Taylor does not contest to the contrary.

3 His brief in this Court on page 25 says simply that
4 there are procedures that could be developed.

5 So, we submit that what one might ordinarily expect
6 would be a less restrictive form of regulation in this area,
7 mainly an inspection and testing procedure is on the facts
8 that Maine has proven in this case, simply not available.

9 QUESTION: Can you buy baitfish in Maine?

10 MR. GANSFRIED: You can buy live bait in Maine.

11 QUESTION: Warm water bait?

12 MR. GANSFRIED: I may not have the technology correct,
13 but if it is from Maine, if it is not imported into Maine --

14 QUESTION: Yes. Maine people do sell bait for the
15 purpose -- for the same purpose that these baitfish were --

16 MR. GANSFRIED: Mr. Taylor, the Appellee in this
17 case, is a commercial bait salesperson in Maine. He is an
18 in-state seller of live bait.

19 QUESTION: Of live bait that is produced in Maine.

20 MR. GANSFRIED: That is correct.

21 QUESTION: These were golden shiners. Are golden
22 shiners available in Maine? Are they produced there for bait?

23 MR. GANSFRIED: I believe that there is a form of
24 golden shiner that is produced in Maine, although as I
25 recall --

1 QUESTION: How do they know that --

2 MR. GANSFRIED: -- it is indicated in the brief and
3 has a different name.

4 QUESTION: How do they know that the baitfish
5 produced in Maine are without bacterial injury? There must
6 be some testing procedures then.

7 MR. GANSFRIED: Yes, there are some procedures for
8 testing. The difficulties with them are, number one, that
9 in order to test a fish you have to kill the fish. Once you
10 kill the fish, it is not live bait.

11 QUESTION: If they can assure themselves that
12 the baitfish produced in Maine posed no danger, why can't they
13 assure themselves by visiting some out-of-state hatchery that
14 the right procedures are --

15 MR. GANSFRIED: The record indicates, and it is
16 uncontested on this point, that the parasites, diseases, and
17 predators that were discussed in this case are not native to
18 the State of Maine and have not been previously found in the
19 State of Maine.

20 QUESTION: How do they know that they haven't been
21 if they can't test?

22 MR. GANSFRIED: To the best ability that they have
23 with the tests -- They have no test that they can perform
24 without killing the fish and, therefore, rendering no longer
25 live baitfish.

1 QUESTION: That is true of all fish. I mean, if
2 you were importing trout or salmon or whatever, you just take
3 a sample and you kill the ones in the sample, isn't that right?

4 MR. GANSFRIED: Yes. The difference is, and the
5 testimony in the record reflects this, is that for trout and
6 salmon, testing, sampling, and certification procedures have
7 been developed and they are regarded as reliable. No such
8 procedures have been developed for live baitfish and to the
9 extent that there are any testing procedures at all, they are
10 not considered reliable and they often produce false negatives,
11 so even -- As Mr. Walker, the state expert, the first witness
12 in the case, testified, he examined the fish in this batch
13 of 158,000 Mr. Taylor was bringing in and based on the tests
14 available to him, he said even the fish he killed and
15 examined he could not certify that they were free of these
16 diseases and parasites.

17 QUESTION: So, you say that because these parasites
18 have never been found in Maine as far as you know, that Maine
19 is just lucky enough not to be cursed with those, but they
20 know that other states, baitfish from other states are.

21 MR. GANSFRIED: That is correct.

22 QUESTION: And, you never can tell when they are
23 or are not.

24 MR. GANSFRIED: You can sometimes tell when they
25 are, but you can never tell with any reliability that they

1 are not.

2 QUESTION: May I ask one question about the absence
3 of testing procedures which seems to suggest kind of ends the
4 case.

5 Wasn't the dispute in the testimony over the question
6 whether the problem was sufficiently serious to justify the
7 expenditure and so forth to develop testing procedures? Some
8 experts said, well, this doesn't amount to anything anyway,
9 so that is why we don't have tests. That is what the conflict
10 was.

11 MR. GANSFRIED: That is right. And, the portion
12 of the district court's opinion to which I referred to before
13 discussing the disagreement, the district court does indicate
14 that he is speaking about a disagreement only with respect to
15 the question of the legitimacy of a state interest and not as
16 to whether there is a less restrictive alternative and found
17 that the Defendant's expert agreed with prosecution that there
18 is not testing/inspection/certification procedure.

19 The district court's comment to that disagreement
20 was limited to the legitimacy of the purpose. The Court of
21 Appeals did not find to the contrary on the purpose. The
22 district court upheld the purpose, the Court of Appeals did
23 not find that the state's purpose was not a legitimate state
24 purpose.

25 QUESTION: Do you take the view that if there is

1 disagreement among experts on whether there is a serious problem
2 or not that that is a sufficient basis for sustaining the
3 statute without the judge finding that one group of experts
4 was right as opposed to the others?

5 MR. GANSFRIED: We think that the question of whether
6 the threat to the state is a sufficiently serious one is
7 essentially a legislative determination and that the --

8 QUESTION: So, your answer is if they can get one
9 expert that says it is serious, that is enough to justify the
10 statute even though the judge says I don't know whether to believe
11 him or not. That is your position?

12 MR. GANSFRIED: Our position is essentially -- The
13 orderly way to proceed is for Mr. Taylor, if he develops a test,
14 which he hasn't done yet, to present that, to present his experts,
15 to present his possibilities as to inspection and certification
16 procedures to the state legislature.

17 It basically is our feeling that under Hughes versus
18 Oklahoma, there should be sufficient elbow-room for a state
19 to implement prophylactic measures when the effect on the state's
20 ecology would be very serious and there is substantial
21 scientific basis for the state's concern.

22 On the question of the state of the record in this
23 case, I would point out that the Defendant's expert himself
24 contradicted himself on the point. He indicated he was the
25 first person to discover one of the parasites that is involved

1 here and he put a good deal of study into it because, as he
2 said, it was regarded as a major problem.

3 QUESTION: We have to look at the underlying evidence.
4 We can't just read the district court's opinion, right?

5 MR. GANSFRIED: No. I think the findings the
6 district court sustaining the legitimacy of the state purpose
7 and according proper deference to the state legislature, not
8 substituting the court's judgment for the legislative judgment,
9 and the findings of fact by the district court, which were not
10 found to be clearly erroneous by the Court of Appeals, but were
11 simply disregarded by the court which, as it said, read the
12 record and "drew its own conclusions."

13 We think that where the Court of Appeals went wrong
14 was in substituting its finding of fact for those of the
15 district court and in substituting its judgment for the state
16 legislature.

17 QUESTION: Mr. Gansfried, do you think there is
18 any tension or disagreement between the district court and the
19 Court of Appeals on the Hughes standard?

20 MR. GANSFRIED: They articulate the Hughes standard
21 the same way, but in terms of the application of that standard
22 to the particular case --

23 QUESTION: I mean, the Court of Appeals seemed to
24 apply a more strict standard under Hughes.

25 MR. GANSFRIED: The Court of Appeals seemed to

1 assume it was the arbiter of both facts and state interest.
2 And, under this Court's decision, it is neither.

3 I have addressed the difficulties with the Court
4 of Appeals' opinion.

5 Let me get back to one important point that is a
6 factual one and that is the uniqueness of Maine's situation.

7 They do prohibit the importation of live baitfish,
8 but if I could draw an analogy to this Court's decision in
9 Philadelphia versus New Jersey, the situation Maine was in here
10 is similar to what New Jersey would have been in had there been
11 no domestic solid waste in New Jersey. Here, the State of Maine
12 is attempting to keep out and protect its environment from that
13 which was not there before.

14 Thank you.

15 CHIEF JUSTICE BURGER: Mr. Eggert?

16 ORAL ARGUMENT OF E. PAUL EGGERT, ESQ.

17 ON BEHALF OF THE APPELLEE

18 MR. EGGERT: Mr. Chief Justice, and may it please
19 the Court:

20 Mr. Taylor in the court below has attacked the
21 constitutionality of the state statute which forbids the
22 importation of baitfish. He has done that in a fairly unique
23 circumstance of being in the midst of a federal criminal
24 prosecution and attacking a state statute.

25 As background for that particular challenge, Mr.

1 Taylor has been in the bait business for approximately 17 years.
2 He has raised in the State of Maine baitfish and mainly golden
3 shiners during that period of time.

4 They are, indeed, the same type of species of golden
5 shiners that he was attempting to import in this particular
6 situation.

7 The reason Mr. Taylor is importing golden shiners
8 from other states is due to the reality of aquaculture in Maine.
9 Maine has a harsh winter, a short warm season during which fish
10 may be raised and harvested and the fish selling cycle is just
11 the opposite of that. Maine fishermen can fish year around
12 with live bait, but they do not do so. Mainly, they fish in
13 winter, ice fish with live bait, and that is the peak season
14 for Mr. Taylor.

15 It is very difficult for Mr. Taylor to raise golden
16 shiners and keep them over the winter to supply the demand of
17 his customers, and, therefore, in order to remain in business
18 and to grow in his business as the demand of the marketplace
19 dictates, he has been forced to go outside the state during
20 winter months to bring back in golden shiners.

21 The initial question that is before this Court as
22 I understand it is a matter of jurisdiction which has been
23 reserved to this hearing.

24 Our position on jurisdiction is that Section 1254(2)
25 is not as clear cut as the state would have us believe, but,

1 in fact, that particular statute does not apply to criminal
2 cases, which this is. It is a criminal appeal. And, that that
3 statute applies only to civil cases. That is clear in the
4 legislative history of that statute and in the very language
5 of the statute itself. That does not mean that this Court cannot
6 hear the merits of this particular case, but that we would
7 contend that the Court must treat this as a petition for Writ
8 of Certiorari and we would further contend that this question
9 is not important enough for the Court of grant that petition.

10 All parties in this particular case, I think, agree
11 that this statute that we are talking about is discriminatory.
12 It is a flat prohibition against the importation of baitfish.
13 It stops it at the border.

14 What is being prohibited is something that the state
15 allows all the time to go on within its borders. Golden shiners
16 are a common baitfish within the State of Maine and outside
17 the State of Maine.

18 Once this discriminatory effect of the statute has
19 been admitted by all parties, the constitutional law which --
20 the body of constitutional law which has surrounded the analysis
21 of the statute indicates that the courts must look at the statute
22 and the proposed justification for the statute with strict scrutiny
23 We would contend that the district court, through the magistrate's
24 findings, and also the district court's findings, gave lip
25 service to that strict scrutiny standard and said that they

1 were applying the strict scrutiny standard and, in effect, were
2 merely adopting the opinions of the state's experts because
3 they really didn't have any basis for distinguishing between
4 or finding one expert's opinion to be more correct than the
5 others. They fell back to the position that the state has
6 proposed these problems as their legitimate purpose. The
7 Defendants contest that, but we are not really sure, therefore,
8 we will accept the state at face value and allow the statute
9 to stand.

10 We contend that the Court must do more than that,
11 that the Court must not just make findings perhaps on a pre-
12 ponderance of the evidence standard or maybe even a lesser
13 standard in this particular case, as what the court did,
14 but they must make those findings and then look and scrutinize
15 those findings in the context of everything else that was
16 presented in the hearing.

17 I think this Court does, indeed, have to go back
18 to the transcript to look at the evidence that was presented.

19 QUESTION: Well, Mr. Eggert, in the brief you
20 suggest that under a Commerce Clause analysis that clear
21 and convincing evidence is the standard to be applied. Now,
22 you are not arguing that to us, are you?

23 MR. EGGERT: No, I am not, Your Honor. I think
24 I may have been analogizing that when that is the standard
25 and the lower court -- When a clear and convincing standard

1 is evidenced as the standard, and the lower court has
2 obviously misapplied that standard, that the Appellate Court
3 then has to look at the record, the factual record, and make
4 a determination for itself from that record whether or not
5 the lower court is correct.

6 QUESTION: Well, this is just a preponderance --

7 MR. EGGERT: As it pertains, I believe, to the
8 initial findings of fact, but that is not sufficient that
9 the findings of fact agree with the state's position. The
10 Court must go further than that and apply those facts to
11 the statute and that is where the strict scrutiny comes in.
12 It is not enough that the Court say, yes, we agree, for
13 instance, that there is a parasite which could be introduced
14 into the State of Maine through importation of baitfish.
15 It goes further than that to find out if that is a sufficient
16 reason for blocking commerce at Maine's border.

17 In two of those particular instances --

18 QUESTION: I am not sure I understand your idea
19 of strict scrutiny here which is the kind of thing you might
20 apply under an equal protection analysis if there were
21 discrimination on the basis of race. We don't have that
22 there, do we? We just have the requirements set forth in
23 Hughes versus Oklahoma that we have to apply, isn't that
24 right?

25 MR. EGGERT: Well, the Hughes versus Oklahoma indicates

1 that the strict scrutiny standard is what is being applied
2 and what has to be applied. That language is identical to
3 that used in equal protection cases. I know of no other
4 place in which that standard is fully explicated.

5 I would suggest to the Court that, yes, indeed,
6 it is the same standard and that the courts have to go beyond
7 just what is presented to it by way of factual basis. This
8 particular case is justification for the statute and gives
9 serious consideration and hard consideration as to whether
10 or not that is sufficient to allow a state to block inter-
11 state commerce.

12 In this particular case factually, we have one
13 of the parasites, capillaria, being proposed and that was
14 found in this particular shipment, as I understand it. That
15 is proposed as a justification for blocking interstate
16 commerce, and yet the state's expert has agreed he has found
17 capillaria within the state.

18 QUESTION: Well, under -- in applying the Hughes
19 test, do you think the Court of Appeals is free to just
20 speculate on other possible alternatives or does the Court
21 of Appeals have to consider and rely on the evidence as
22 determined by the district court?

23 MR. EGGERT: No, I don't think it can speculate
24 and go totally outside the record, but it certainly can look
25 to other sources in the sense that the First Circuit Court

1 of Appeals did. It went to Maine's statutory and regulatory
2 structure to see whether or not Maine's avowed purpose with
3 this statute was at all consistent with what they do with
4 other fish.

5 The state's contention is that somehow baitfish
6 are entirely different from trout and salmon which they would
7 like to encourage in the State of Maine and that is true
8 because they are different species. However, there is a
9 bit of prejudice, I believe, involved in that particular
10 conception and that is that somehow the baitfish dealers
11 in Arkansas are not as careful and good as the trout raisers
12 in Maryland, let's say, without much justification for that.
13 The state's experts --

14 QUESTION: Mr. Eggert, supposing that we were dealing
15 with district court findings of just rather plain, ordinary
16 facts as to whether there were or were not an adequate test
17 for this parasite.

18 Now, if the district court finds those facts of
19 particular weight and the appeal is taken to the Court of
20 Appeals, does the Court of Appeals review those under a clearly
21 erroneous standard as it would other findings of fact?

22 MR. EGGERT: No, I don't believe they do.

23 QUESTION: Why not?

24 MR. EGGERT: Because it is a mixed question of
25 law and fact.

1 QUESTION: The hypothesis I gave you was the kind
2 of factual questions that are classical, factual questions
3 under any application of Rule 52. You are always going to
4 be applying law to facts. That doesn't set you free from
5 the clearly erroneous test.

6 MR. EGGERT: I agree.

7 QUESTION: Why isn't the Court of Appeals bound
8 by the clearly erroneous test here?

9 MR. EGGERT: They are bound by the clearly erroneous
10 test when they look at the facts, but they are not bound
11 when they then apply the legal standard to that.

12 QUESTION: Well, no, I don't think anyone would
13 think they were.

14 MR. EGGERT: Okay. But, then, when they go and
15 look at the legal standard that the district court applied
16 and determines, which I believe they did determine, that
17 the district court was wrong with that legal standard, then
18 I think that opens to question whether or not the district
19 court was adequately and properly looking at the factual
20 record in making its findings.

21 QUESTION: Is that the clearly erroneous test or
22 is it something different? You know, it is a rather vague
23 statement.

24 MR. EGGERT: I guess it is more of a hybrid. I
25 think the courts have said that when there are factual findings
that don't fit into the legal structure or the proper legal

1 standard, that the courts then are not bound by those factual
2 findings. That they then have to somehow get back into the
3 record and review the facts.

4 So, if as far as we had to go was to say could
5 the district court, based on the record, determine that there
6 were no alternative means or that there were no other alternative
7 means of testing or that there are no adequate methods of
8 testing and that was the end of the question, then I think,
9 yes, the district court would be correct. The Court of Appeals
10 would apply the clearly erroneous standard. But, that does
11 not end, in my view, the inquiry that the Court of Appeals
12 has to undertake when it reviews the district court findings.

13 I would like to perhaps clear up a problem in the
14 record and that is I do not believe any of the experts said
15 there were no procedures except procedures for testing various
16 fish for these parasite problems.

17 The state's expert himself testified that he tested
18 the fish in his samples for the three parasite problems and
19 was satisfied that he found two of the three within the
20 shipment. I think that is pretty clear evidence that, in
21 fact, there is a testing procedure.

22 What is really at issue and what the experts disagree
23 upon is the sampling procedure which is undertaken. Now,
24 with trout and salmon, everybody has agreed that some "X"
25 number of a thousand fish, five out of a thousand fish can

1 be sampled and if those are disease free, then we can pretty
2 safely say that the entire shipment is disease free. Experts
3 have not yet agreed we can do that and say we have sampled
4 five of the thousand baitfish and, therefore, the entire
5 shipment is disease free and the reason that hasn't been
6 done is because these particular problems that the state
7 is talking about do not pose a threat to the total ecological
8 system of the warm-water fish in Maine. There is no evidence
9 in the record that that kind of problem is posed by importing
10 baitfish.

11 QUESTION: Even diseased baitfish?

12 MR. EGGERT: That is correct.

13 QUESTION: Well, what is the state's position of
14 what would happen if a large number of diseased baitfish
15 were imported?

16 MR. EGGERT: The state's position is that that
17 is going to pose a problem.

18 QUESTION: What sort of a problem?

19 MR. EGGERT: I don't know.

20 QUESTION: And, your position is it doesn't pose
21 any problem?

22 MR. EGGERT: Our position is that it does not pose
23 a problem in the sense that it will not infect the wild fish
24 population; that there is no evidence in the record, even
25 though these parasites have existed in other states all

1 over the country, there is nothing in the record from the
2 state that shows that these have ever -- that these problems
3 have ever been transmitted to wild fish and there certainly
4 should be if the state is correct.

5 QUESTION: Was this a subject of the expert testimony,
6 one of the subjects of the expert testimony?

7 MR. EGGERT: Yes.

8 QUESTION: Did the experts disagree?

9 MR. EGGERT: Yes. The state's expert testified
10 that these problems do exist in fish, in baitfish, golden
11 shiners; that they have been found in illegally imported
12 baitfish, but that is as far as they go. They say that one
13 of the parasites does cause mortality in individual fish,
14 but a scarcity in the record of whether or not that translates
15 into any harm for the environment.

16 What is not in the record perhaps is that this
17 is a changing field. The experts are disagreeing and they
18 perhaps are going to be developing, and as I understand it,
19 have developed tests for --

20 QUESTION: Meanwhile, who is supposed to bear the
21 risk?

22 MR. EGGERT: When it comes to --

23 QUESTION: You don't suggest that these parasites
24 don't exist?

25 MR. EGGERT: No.

1 QUESTION: In these shiners.

2 MR. EGGERT: No, they do, and they exist in probably
3 all the other -- in many of the other states and have not
4 caught the problem.

5 QUESTION: Maybe so. That may be so, but it is
6 an undesirable thing to have them spread around, isn't it?

7 MR. EGGERT: I am not sure I would concede that,
8 no. It is something that --

9 QUESTION: You are saying that it would not be
10 a sufficient threat to permit Maine to keep them out of the
11 state?

12 MR. EGGERT: No.

13 QUESTION: With or without tests?

14 MR. EGGERT: No. I would submit that, yes, that
15 they are not a sufficient problem.

16 QUESTION: So, your submission is even if there
17 is no test Maine has to let them in.

18 MR. EGGERT: Yes.

19 QUESTION: May I ask this question? I am confused
20 at the moment. There is a section in your brief on page
21 25, the caption of which says, "The Court of Appeals Did
22 Not Sufficiently Consider the Serious Consequences to Maine's
23 Ecology of Invalidating the Challenged Statute."

24 Are you representing the Solicitor General?

25 MR. EGGERT: No.

1 QUESTION: I beg your pardon.

2 MR. EGGERT: The other --

3 QUESTION: You are saying there is no risk to Maine's
4 ecology?

5 MR. EGGERT: That is what I am saying.

6 QUESTION: Right.

7 MR. EGGERT: The other reason that the state's
8 attempt to -- or the state's scheme to protect its ecology,
9 if I may phrase it that way, cannot be effective is that
10 Maine's water environment is not unique. In fact, it shares
11 a substantial watershed with the State of New Hampshire which
12 the state's own expert conceded. His testimony was sufficient
13 that the state could not possibly block these problems from
14 coming to the State of Maine as long as the State of New
15 Hampshire allowed importation of baitfish into that particular
16 state.

17 And, he further conceded that as far as he knew,
18 and it is as far as I know true, the State of New Hampshire
19 does allow importation of these golden shiners. In fact,
20 they come probably from the same place, through the Massachusetts
21 wholesale dealers, into the State of New Hampshire. And,
22 any release of those baitfish in the State of New Hampshire,
23 at least in the common, shared watershed between New Hampshire
24 and Maine is going to mean that these problems are going
25 to exist in Maine, if, in fact, they don't already exist,

1 and they probably do, and the state --

2 QUESTION: So, you are just submitting the state
3 isn't -- they may have a little problem and they aren't
4 entitled to try to keep it little.

5 MR. EGGERT: Well, Your Honor, they certainly don't
6 take any steps with their regulatory and statutory scheme
7 to try to deal with that problem as exists within the state.

8 Mr. Howard mentioned the possibility of carp coming
9 into the state. Well, carp does exist in the State of Maine
10 and it exists in the lower Kennebec River. And, I don't
11 know of anything that would prevent people from taking that
12 carp and spreading it to the rest of the state.

13 If the state is really serious about dealing with
14 what they perceive to be problems, it would seem to me it
15 would be within a framework, consistent framework, that would
16 deal with all these problems, both in state and out of state
17 and they just don't do that. They take it one little perceived
18 problem and have dealt with it in a most severe fashion and
19 that is to stop all commerce in that particular area.

20 Finally, and perhaps by no means least, the district
21 court found that there was no economic protectionism involved
22 in this particular statute despite some direct evidence in
23 a publication by the Department of Inland Fisheries that
24 it was better to raised baitfish in Maine and keep Maine's
25 baitfish economic alive and healthy rather than spending

1 our money in Arkansas.

2 The Circuit Court of Appeals, I think, more correctly
3 looked at that and at least indicated that that was a reflection,
4 that there was, indeed, some economic protectionism involved
5 in this particular case and that is the very problem that
6 the Commerce Clause is designed to prevent.

7 QUESTION: Do you think Maine could just prevent
8 bait fishing entirely?

9 MR. EGGERT: Yes, indeed, they could.

10 QUESTION: And, keep out baitfish from any other
11 states?

12 MR. EGGERT: Yes.

13 QUESTION: I know they could prevent bait fishing,
14 but do you think could keep -- They could enforce that rule
15 by preventing importation of baitfish?

16 MR. EGGERT: I would think the state could regulate
17 in such a fashion that they say people in Maine, we will
18 not allow fishing with live bait in the State of Maine.
19 If that is a serious problem, if the state thinks there are
20 serious problems with live bait, then that is an even-handed
21 regulation that they certainly could adopt. Politically
22 I am not sure the could, but --

23 QUESTION: You don't think the state is required
24 to go to that length to meet its reasonable alternatives?

25 MR. EGGERT: No. I am suggesting that the state

1 is required to perhaps expend a little bit of effort to
2 regulate and allow baitfish to be imported into the State
3 of Maine under strick controls perhaps, but not be allowed
4 to just flatly prohibit the importation of baitfish.

5 I believe that the State of Maine can, if it wants
6 to, devise a system, a permanent system, a licensed system,
7 an inspection system which would satisfy them and which would
8 satisfy Mr. Taylor and other bait dealers in the State of
9 Maine, indeed, as many other states in the northeast.

10 QUESTION: Is your client prepared to share its
11 costs -- share the cost of sending inspectors all around
12 the country?

13 MR. EGGERT: If that is what it takes for him to
14 be able to import baitfish, to have them inspected somewhere
15 else, he certainly would.

16 The place where most of these baitfish come from
17 in Arkansas, there is, in fact -- I am not sure, the Department
18 of Inland Fisheries research station there that does, in
19 fact, test sample certified fish to be disease free and they
20 certainly could do that right there at the source in Arkansas
21 and the fish could be brought into Maine quickly.

22 Thank you.

23 CHIEF JUSTICE BURGER: Do you have anything further?

24 MR. HOWARD: Yes, Mr. Chief Justice, just three
25 points in response to the prior questions.

1 ORAL ARGUMENT OF CABANNE HOWARD, ESQ.

2 ON BEHALF OF THE APPELLANT -- REBUTTAL

3 MR. HOWARD: Justice White, with regard to the
4 question you were just asking, the problem of sending inspectors
5 to other states is the same problem that applies to inspecting
6 in Maine. There is no test that anybody can apply anywhere.

7 QUESTION: If two out of every hundred thousand
8 baitfish are diseased, you may find those two but you would
9 never know whether you found them all.

10 MR. HOWARD: That is the point. The point is there
11 is no test that can be done to find the parasites and the
12 diseases. There is such a test for salmonis. The scientific
13 community has not developed one. That is uncontradicted
14 on this record which leads me to respond to an earlier question
15 from Justice O'Connor.

16 You were concerned, as I recall, about whether
17 there is a difference in the test that the district court
18 and the Court of Appeals applied here. I had a chance to
19 reread the Court of Appeals' opinion during the other arguments
20 and I can't see anything in there that indicates that the
21 Court of Appeals criticized the district court on its applica-
22 tion of the test.

23 And, furthermore, the point on which the Court
24 of Appeals reversed; that is that there was other means that
25 the state hadn't sought and found to protect itself, that

1 point is one in which there is no disagreement in the record.
2 There is no evidence at all that there is no test. The record
3 is unequivocal.

4 . The disagreement occurs on the point as to whether
5 there is a risk, whether there is a real risk or not. The
6 Defendant's experts on that issue tried to make the point
7 that there was a difficulty on the risk.

8 But, that wasn't the point on which the Court of
9 Appeals reversed the lower court. So, it doesn't seem that
10 there is a problem with regard to the application of the
11 test in either case.

12 And, as to the question about the risk, Justice
13 Stevens, I think you were concerned that the district court
14 didn't make findings about that and if I could just direct
15 your attention to a paragraph on page D-7 of the jurisdictional
16 statement. It is in the middle of the page, the first full
17 paragraph. I think that is the paragraph where the court
18 is finding that -- having cited the testimony above it --
19 the court is coming to the conclusion that given the somewhat
20 unique characteristics associated with the Maine fish population,
21 the substantial uncertainties surrounding the effects and
22 so on shows that there is a risk.

23 QUESTION: What sentence do you refer? I just
24 read that paragraph as a recitation of what the testimony
25 was.

1 MR. HOWARD: Well, I realize the court didn't use
2 the words "I hereby find" --

3 QUESTION: He didn't say I believe this one and
4 I don't believe that one. He didn't do that.

5 MR. HOWARD: Yes. Well, I think that is his
6 conclusion.

7 QUESTION: What makes you think that?

8 MR. HOWARD: Well, because --

9 QUESTION: It is a summary.

10 MR. HOWARD: That is right. It is a summary of
11 the preceding testimony and then in the next paragraph he
12 goes on to the next standard.

13 QUESTION: Without ever saying I agree with that
14 expert.

15 MR. HOWARD: Excuse me?

16 QUESTION: Without ever saying he agreed with the
17 testimony.

18 MR. GANSFRIED: He didn't actually say I hereby
19 find so and so, but I think --

20 QUESTION: What he said was there is a disagreement
21 and in view of the fact there is a disagreement the state
22 is entitled to rely on the uncertainty.

23 MR. HOWARD: Right. But, I think he is finding
24 that there is a substantial uncertainty. That is to say
25 that he is not finding that -- He is finding that there is

1 a legitimate uncertainty here.

2 Presumably there could be a situation where a state
3 could come in --

4 QUESTION: And, in case it does, the state can
5 go ahead and protect its environment.

6 MR. HOWARD: Yes.

7 QUESTION: That is what it says.

8 MR. HOWARD: Anyway, I think that finding is there,
9 at least I would characterize --

10 QUESTION: The finding that there is uncertainty
11 is there, yes.

12 MR. HOWARD: Yes, that is right, and that is what
13 we need. All we need to show is there is a finding as to
14 uncertainty and there is substantial evidence to support
15 that finding. And, if that is the case, we think we should
16 win the case.

17 QUESTION: Do you know of any other states that
18 have a similar rule?

19 MR. HOWARD: No. And, I think one of the reasons
20 why there isn't is because the State of Maine -- and it is
21 in the record and the courts found this below -- a unique
22 and fragile fishery here which requires a prohibition of
23 this kind. Many other states have regimes where the state
24 administrative officer, the Fish & Game Commissioner, let's
25 say, has the power to regulate the importation of fish

1 and presumably under those --

2 QUESTION: Why are these shiners any more dangerous
3 to Maine than they are to New Hampshire?

4 MR. HOWARD: Well, they would be equally dangerous
5 to New Hampshire.

6 QUESTION: New Hampshire lets them in, don't they?

7 MR. HOWARD: I think they do. At least --

8 QUESTION: You don't know that?

9 MR. HOWARD: I don't know the answer to that, as
10 to what the New Hampshire law is.

11 QUESTION: What about Vermont?

12 MR. HOWARD: I don't know, but the situation --

13 QUESTION: Do you know of any other state that
14 keeps them out.

15 MR. HOWARD: I know of no other state that has
16 a statutory prohibition.

17 QUESTION: Well, do you know of any other state
18 that lets them in on the assumption that the threat is not
19 very great?

20 MR. HOWARD: It is a question of what the state
21 administrative officers do with their administration discretion
22 that legislatures may have given to them.

23 QUESTION: So, I ask you again, do you know of
24 any --

25 MR. HOWARD: No, I do not know, but that doesn't

1 mean it isn't being done.

2 In short, it is the fragility of the Maine ecology
3 that requires a prohibition of this kind.

4 QUESTION: You mean some diseased fish would cause
5 more havoc there than they would in the non-fragile New
6 Hampshire fishery?

7 MR. HOWARD: Yes. We have a very unique fresh-water,
8 pure-water fishery with a lot of -- a small number of fish,
9 trout, bass, salmon that are very vital to our state and
10 because of that unique fact the state has a special interest
11 in keeping that pure.

12 Thank you.

13 CHIEF JUSTICE BURGER: Thank you, gentlemen.

14 The case is submitted.

15 (Whereupon, at 11:57 a.m., the case in the
16 above-entitled matter was submitted.)
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CERTIFICATION

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#85-62 - MAINE, Appellant V. ROBERT J. TAYLOR AND UNITED STATES

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BY Paul A. Richardson

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