such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.' *Lindsley* v. *Natural Carbonie Gas Co.*, 220 U.S. 61, 78 (31 Sup. Ct. 337, Ann. Cas. 1912C, 160)."

So viewed, the classification in question can be sustained only if it bears a reasonable relationship to the purpose of the liquor act. The purpose of the act is to control the liquor traffic in the state. No plausible reason can be advanced why an alien who is otherwise eligible to sell alcoholic liquor under the provisions of the Act is disqualified by reason of alienage alone to carry out the responsibilities imposed upon licensees by the Act. In brief, the requisite of citizenship of a licensee does not relate to the control of the liquor traffic.

I am aware that there are authorities which conclude contrary to the foregoing. See, for example, cases discussed in 145 ALR 509 at 515. In my view the opinion expressed herein is consonant with current judicial expression as illustrated by *In re Houlahan,* 389 Mich 665; 209 NW2d 250 (1973), where, on the authority of *In re Griffiths,* 413 US 717, 93 S Ct 2851; 37 L Ed 2d 910 (1973), the statutory requirement of United States citizenship for licensure as an attorney was ruled unconstitutional as offensive to the equal protection clause of the Fourteenth Amendment.

FRANK J. KELLEY,
Attorney General.

751013.1

AGRICULTURE: Constitutionality of Filled Milk Act.

CONSTITUTIONAL LAW: Filled Milk Act is unconstitutional as to "Milnot."

MILK: Constitutionality of Filled Milk Act.

The prohibitions against filled milk products contained in the Filled Milk Act, deny the Milnot Company due process of law and equal protection of the laws. This Act, as applied to "Milnot," exceeds the boundaries of the valid exercise of the state's police power to protect the public health, safety and welfare.

Opinion No. 4902 October 13, 1975.

B. Dale Ball, Director
Department of Agriculture
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You have requested an answer to the following question:

"In light of the Federal court decision declaring the Federal Filled Milk act unconstitutional, can we enforce the Michigan Filled Milk

Law and disallow the sale of the Milnot filled milk product in Michigan?"

The Michigan Filled Milk Act, 1945 PA 330; MCLA 288.171 *et seq;* MSA 12.618(21) *et seq,* is very similar in terms, objects, and effects to the federal filled milk act, 42 Stat 1486 (1923), 21 USCA 61 *et seq.* The term "filled milk" is defined nearly identically in the two acts. The Michigan act definition states in part:

> "The term 'filled milk' means any milk, cream, or skimmed milk, or combination thereof, whether or not condensed, evaporated, concentrated, powdered, dried, or dessicated, to which has been added, or which has been compounded with any fat or oil other than milk fat so that the resulting product is in semblance of milk, cream, or skimmed milk, whether or not condensed, evaporated, concentrated, powdered, dried or dessicated, . . ." 1945 PA 330, § 2; MCLA 288.172; MSA 12.618(22)

The federal act definition states in part:

> "The term 'filled milk' means any milk, cream, or skimmed milk, whether or not condensed, evaporated, concentrated, powdered, dried, or dessicated, to which has been added, or which has been blended or compounded with, any fat or oil other than milk fat, so that the resulting product is in imitation or semblance of milk, cream, or skimmed milk, whether or not condensed, evaporated, concentrated, powdered, dried, or dessicated. . . ." 42 Stat 1486, 21 USCA 61

Having defined "filled milk" in substantially identical terms, both acts then declare the sale of filled milk to be a fraud upon the public:

> "It is hereby declared that filled milk as defined herein lends itself readily to substitution for or confusion with genuine milk products and that the sale of such filled milk constitutes a fraud upon the public." 1945 PA 330, § 3; MCLA 288.173; MSA 12.618(23)
>
> "It is hereby declared that filled milk, as defined in section 61 of this title, is an adulterated article of food, injurious to the public health, and its sale constitutes a fraud upon the public. . . ." 42 Stat 1487, 21 USCA 62

By way of proscription, the Michigan act then states:

> "It shall be unlawful for any person, by himself, his servants or agent, or as the servant or agent of another, to manufacture for sale within this state, or sell or exchange, or have in his possession with intent to sell or exchange, or offer for sale or exchange, any 'filled milk' as defined in this act." 1945 PA 330, § 4; MCLA 288.174; MSA 12.618(24)

The proscription provision of the federal act states:

> "It shall be unlawful for any person to manufacture . . ., or to ship or deliver for shipment in interstate or foreign commerce, any filled milk." 42 Stat 1487, 21 USCA 62

The remaining provisions of both acts establish penalties and enforcement methods and are not germane to the question of the constitutionality of the respective acts.

The federal court decision to which you refer is *Milnot Co* v *Richardson,* 350 F Supp 221 (SD Ill, 1972). There the Court entered a declaratory judgment that plaintiff has the right to market its "Milnot" product in interstate and foreign commerce free from any prosecution for violation of the federal act. In reaching its decision in that case, the Court was faced with two United States Supreme Court decisions upholding the constitutionality of the federal act. In *United States* v *Carolene Products Co,* 304 US 144, 58 S Ct 778, 82 L Ed 1234 (1938), the Supreme Court concluded, based upon the legislative history of the act and scientific evidence accumulated after its enactment, that the use of filled milk as a substitute for pure milk was generally injurious to health and facilitated fraud on the public. As a result, the act was held to be constitutional. In *Carolene Products Co* v *United States,* 323 US 18, 65 S Ct 1, 89 L Ed 15 (1944), the Court noted that, even though there was convincing evidence to suggest that the product was no longer injurious to health due to improved nutritional-fortification techniques, the product could still confuse and deceive the public, and, therefore, the prohibition imposed by the act against manufacture and sale of the product was still valid.

In reaching a contrary conclusion regarding the constitutionality of the federal act, as applied to "Milnot", the Court in the *Milnot* case, *supra,* proceeded from the following finding of fact:

> "The substance involved in this case, Milnot, is a food product which basically is a blend of fat free milk and vegetable soya oil, to which are added vitamins A and D. In the production of this product cream is skimmed from whole fresh milk. The cream contains the butterfat content of the milk including the fat-soluble vitamins A, D and E. To the portion of the milk which remains after the skimming process, plaintiff adds, *inter alia,* soybean oil as well as vitamins A and D. This restores the liquid to a milk-like consistency and composition. The mixture is then evaporated so as to remove a portion of the water content. That Milnot is wholesome, nutritious, and useful as a food source is clear from the record." *Milnot Co* v *Richardson, supra,* 222

Taking its cue from *Chastleton Corp* v *Sinclair,* 264 US 543, 44 S Ct 405, 68 L Ed 841 (1924), where the Supreme Court held that the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist, the Court considered the current safe status of the "Milnot" product and concluded that one justification for the federal act—protection of the public health—no longer exists as to that product. The Court then turned to the other justification—public fraud—and noted the widespread availability of imitation dairy products very similar to "Milnot" in composition, appearance and use, concluding that different treatment caused by application of the act to "Milnot" was arbitrary and capricious and hence violated due process of law. To quote:

> "The possibility of confusion, or passing off, in the marketplace, which justified the statute in 1944, can no longer be used rationally as a constitutional prop to prevent interstate shipment of Milnot. There is at least as much danger in this regard with imitation milk as with filled milk, and actually no longer any such real danger with either." *Milnot Co* v *Richardson, supra,* 225

Persuaded that neither public health nor public fraud considerations can justify prohibition of the "Milnot" product in present form, the Court declared the federal act unconstitutional as to that product. This decision was not appealed by the U. S. Food and Drug Administration. I conclude that the Michigan act is unconstitutional as to "Milnot" for the same reasons that the federal act was declared unconstitutional. As was shown above, the Michigan and federal acts are virtually identical in terms, objects, and effects. If the need for the federal act no longer exists, it follows that the need for the Michigan act has ceased to exist as well. This conclusion comports with the relevant Michigan case law.

In *Carolene Products Co* v *Thomson,* 276 Mich 172; 267 NW 608 (1936), the Court declared unconstitutional a prior version of Michigan's filled milk act, which version also prohibited the sale of such products. In so doing, the Court addressed itself to the public health and public fraud questions, both of which concerns can result in regulation under the police power and both of which were central to the United States Supreme Court's two subsequent *Carolene* decisions discussed above and to the *Milnot* decision, *supra,* as well. The Michigan Court had the following to say about the public health question:

> "Prohibition of manufacture and sale of a nutritious food product which is harmless to public health cannot be justified under the police power to preserve public health, because the remedy has no reasonable relation to the purpose unless, at least, it appears that other similar products, dangerous to health, are on the market and that prohibition of all is reasonably necessary to protect the public health because of the impracticability of separating the good from the bad. There is no such claim here." *Carolene Products Co* v *Thomson, supra,* 180

As to the public fraud question, the Court concluded that prohibition was an improper infringement upon constitutional rights and that promulgation of regulations regarding branding, disclosure of ingredients, and kinds and markings of containers was an adequate and appropriate alternative to prohibition of the product.

It is significant to note that the Carolene Products Company changed its name in 1950 to Milnot Company. In each of the cases cited in this opinion, then, the courts are considering the same party in interest as we consider here and the same product but for a name change and evolutionary improvements.

The result required by the above discussion is that I am constrained to conclude that Michigan's Filled Milk Act is unconstitutional as to "Milnot". The opinion in *Milnot Co* v *Richardson, supra,* is persuasive, and, when read in conjunction with the holding of the Michigan Supreme Court in

Carolene Products Co v *Thomson, supra,* it is controlling. Therefore, when there is no rational basis for discrimination between the types of products in order to protect the public health, it is a denial of due process of law to prohibit filled milk products from appearing in the marketplace while allowing imitation milk products to proliferate. In addition, prohibition of "Milnot" under these circumstances is arbitrary and capricious and, hence, denies to Milnot Company equal protection of the laws. Milnot is, as found by the Federal Court in *Milnot Co* v *Richardson, supra,* a wholesome, nutritious, and useful food source. Its acceptance and use is spreading. If there exists some possibility of confusion in the mind of the consuming public as a result of the availability of Milnot, the Michigan *Carolene* case, *supra,* holds that due process of law requires that the sale of Milnot be regulated rather than prohibited. Prohibition exceeds the boundaries of the valid exercise of the state's police power where regulation will sufficiently protect the public health, safety and welfare. I conclude that the Michigan Filled Milk Act, 1945 PA 330, *supra,* is unconstitutional as applied to "Milnot" for the reasons set forth above.

FRANK J. KELLEY,
Attorney General.

751015.2

RETIREMENT SYSTEMS: Public School Employees.

1974 PA 244 does not retrospectively grant deferred retirement allowances to persons who, prior to the effective date of 1974 PA 244, left public school employment after 10 years of service without claiming a refund of their accumulated retirement contributions.

The new retirement allowance formulas in §§ 15a and 15b of 1945 PA 136, as amended by 1974 PA 244, are to be used in computing the retirement allowance of members who, when they left public school employment prior to July 1, 1974, were entitled to a deferred retirement allowance.

Opinion No. 4903 October 15, 1975.

Mr. Norvel A. Hansen
Executive Director
Public School Employees Retirement System
Lansing, Michigan

You have requested my opinion concerning a number of questions on behalf of the Michigan Public School Employees' Retirement Board. Further, you have indicated that the first two questions are particularly pressing since they affect a significant number of people. Thus, those two questions, set forth below, will be answered in this opinion with the remaining questions to be answered at a later date.

"1. Is an inactive member, who prior to enactment of Act No. 244, P.A. 1974 acquired ten years of service credit under Chapter 1, left his accumulated contributions on deposit and had not acquired vesting or entitlement to a deferred retirement allowance under the retirement