NO. 87 ORIG.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

STATE OF CALIFORNIA
Plaintiff

VS.

STATE OF TEXAS
Defendant

ACTION IN ORIGINAL JURISDICTION

OPPOSITION TO MOTION FOR LEAVE TO FILE COMPLAINT, RESPONSE AND SUPPORTING BRIEF

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OPPOSITION TO MOTION FOR LEAVE TO FILE COMPLAINT, RESPONSE AND SUPPORTING BRIEF

TO THE HONORABLE JUDGES OF SAID COURT:

I.

Defendant, the State of Texas, denies that this action for injunctive and declaratory relief is filed by the State of California but affirmatively alleges that the same is, in truth and in fact, an action filed by private citizens and economic interests and that the State of California is a nominal plaintiff solely for the purpose of acquiring original jurisdiction of this Court.

II.

Defendant, the State of Texas, denies that this Court has original and exclusive jurisdiction pursuant to Article III, Section 2, Clause 2, of the United States Constitution and that jurisdiction is not conferred by 28 U.S.C. §1251(a)(1).

PARTIES

III.

Defendant admits the allegations in this paragraph.

IV.

Defendant admits the allegations of this paragraph.

NATURE OF THE CONTROVERSY

V.

Defendant admits the allegations of this paragraph.

VI.

Defendant admits the allegations of this paragraph.

CALIFORNIA PROGRAM

VII.

Defendant does not admit the allegations of this paragraph for the reason that it does not possess sufficient knowledge. Defendant, however, has no reason to deny such allegations.

VIII.

Defendant does not admit but has no basis on which to deny the allegations contained herein.

IX.

Defendant admits the first sentence of this paragraph concerning the geographic limits of the California quarantine. The remaining allegations in said paragraph concerning the purpose and motivation for the establishment of this area are denied.

X.

Defendant, the State of Texas, admits that the State

of California has taken certain actions with respect to the Medfly infestation but does not have sufficient information to admit or deny the details. The defendant would affirmatively allege that this program has been largely ineffective and denies that no flies or maggots have been found in the core area since January 22, 1980.

FEDERAL QUARANTINE PROGRAM

XI.

Defendant, the State of Texas, admits that the United States Department of Agriculture has adopted a quarantine program effective July 25, 1980, and that such was adopted pursuant to applicable federal law. Defendant further alleges by affirmative pleading that this quarantine has been expanded on two occasions to include larger areas of the State of California. *See*, 45 Fed.Reg. 54301-54302 (Aug. 15, 1980); 45 Fed.Reg. 60402-60403(Sept. 12, 1980).

XII.

Defendant, the State of Texas, admits the allegations of said paragraph.

TEXAS QUARANTINE PROGRAM

XIII.

Defendant, the State of Texas, admits the allegations of this paragraph.

XIV.

Defendant, the State of Texas, admits the allegations of said paragraph.

XV.

The Texas quarantine program is applicable to the entire State of California but in all other essential respects is identical to the federal quarantine program

now in effect in the State of California.

XVI.

Defendant, the State of Texas, denies the allegations of this paragraph. The Texas quarantine program is attached hereto as Exhibit "A" and made a part hereof for all pertinent purposes. Said quarantine program does not affect shipments through Texas destined for other states.

PREEMPTION

XVII.

The State of Texas denies the allegations of said paragraph and asserts that the pertinent statutes give Texas the authority to establish its quarantine program.

BURDEN ON INTERSTATE COMMERCE

XVIII.

Defendant, the State of Texas, denies the allegations of said paragraph. The Texas quarantine affects approximately 2 percent of the California production of agricultural products.

XIX.

Defendant, the State of Texas, denies the allegations of this paragraph.

XX.

Defendant, the State of Texas, denies the allegations of said paragraph. The only possible effect that the Texas quarantine program could have would be to increase consumer prices for fruits and vegetables solely within the State of Texas.

XXI.

Defendant, the State of Texas, denies the allegations

of this paragraph and asserts that there is no controversy between the State of California as a sovereign state acting in its capacity as a sovereign or a quasi-sovereign capacity.

PRAYER

WHEREFORE, the State of Texas prays:

1. That this cause be dismissed for want of proper jurisdiction.

2. That all injunctive and eclaratory relief be denied for want of merit.

3. Defendant recover all costs and to grant such other relief to which it may be entitled.

Respectfully submitted,

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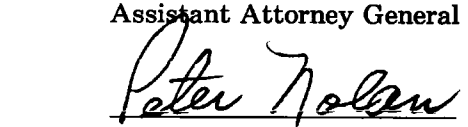

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NO. 87

IN THE
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OCTOBER TERM, 1980

STATE OF CALIFORNIA
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BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE COMPLAINT, APPLICATION FOR TEMPORARY RESTRAINING ORDER AND MOTION FOR PRELIMINARY INJUNCTION

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QUESTIONS PRESENTED

1. Should the Court grant California leave to file its complaint under the Court's original jurisdiction?

2. Should the Court grant California's application for temporary restraining order and motion for preliminary injunction?

The merits of the case raise the following aditional questions:

1. Is Texas preempted from restricting the movement in interstate commerce of fruits and vegetables grown in California by virtue of the fact that the United States Department of Agriculture has adopted a quarantine program restricting movement of such products under authority of the Federal Plant Pest Act, 7 U.S.C. §§150aa-150jj and 7 U.S.C. §161?

2. Does the quarantine established by Texas, in restricting the movement in interstate commerce of fruits and vegetables grown in California, impose an unreasonable burden on interstate commerce in violation of Article I, Section 8, Clause 3, of the United States Constitution?

PARTIES

The nominal plaintiff is the State of California. The defendant is the State of Texas.

JURISDICTION

Jurisdiction is precluded under Article III, Section 2, Clause 2, of the United States Constitution and under 28 U.S.C. §1251(a)(1) for the reason that the action is not one wherein the plaintiff is a sovereign state acting in its sovereign or quasi-sovereign capacity.

FEDERAL LAWS INVOLVED

This case involves an interpretation of the Federal Plant Pest Act, 7 U.S.C. §§150aa -150jj, and the Federal Plant Quarantine Act, 7 U.S.C. §§151-167, and particularly Section 8 of the latter Act, 7 U.S.C. §161.

STATEMENT OF THE CASE

1. Nature of the Controversy

This is an action brouught by the State of California on behalf of private economic interests within the State of California against the sovereign State of Texas arising out of a quarantine program to be established by Texas to require processing of certain fruits and vegetables grown in the State of California prior to their importation into the State of Texas.

In June of 1980, the Mediterranean fruit fly was discovered to have infested parts of certain counties in the State of California. The Medfly poses a serious threat to the agricultural economy of the State of Texas.

California has adopted a program to eradicate the Medfly, but to date this program has not been effective. As of February 17, 1981, Medflies had been discovered and captured in 12 California counties ranging from the San Francisco Bay asrea almost to Los Angeles County and over halfway across the state in an easterly direction.

The United States Department of Agriculture, on Ju-

ly 25, 1980, established its own quarantine program which has been expanded in terms of geographic area on two occasions.

The State of Texas has established a quarantine requiring certain fruits and vegetables to be treated so as to eradicate the Medfly, said treatment being a prerequisite to the importation of said fruits and vegetables into the State of Texas. That quarantine program is attached as Exhibit "A." Said quarantine is identical to the quarantine of the United States Department of Agriculture save and except that it covers a larger geographic area. Texas acts under state law and is authorized to so act by 7 U.S.C. §161.

2. NATURE OF RELIEF SOUGHT

In this action, California moves the Court to grant leave for California to file a complaint under the Court's original jurisdiction. California also moves for a preliminary injunction restricting Texas from enforcing its quarantine during the pendency of the litigation and also seeks a temporary restraining order restraining Texas from enforcing its quarantine until this Court can act on the motion for preliminary injunction.

SUMMARY OF ARGUMENT

No actual controversy exists between states but rather between private economic interests of the State of California and the State of Texas.

II.

California's application for interim relief should be denied since the likelihood that California will prevail on the merits is remote in view of 7 U.S.C. §161.

ARGUMENT

I.
The Court Should Deny Leave to File Complaint

Jurisdiction of this Court is original and exclusive only if the action is between states. Article III, Section 2, Clause 2, United States Constitution; 28 U.S.C.§1251(a)(1). California places heavy emphasis on *Georgia v. Pennsylvania*, 324 U.S. 429 (1945), a case by a state against a citizen of another state (not a state vs. a state as the California brief would indicate). In that case, the State of Georgia was appearing in a proprietary *capacity* as well as sovereign. This Court there found that rail rates in the State of Georgia were of such importance that the state could bring suit, *parens patriae,* for the citizens of the state. At issue in that case were antitrust law violations and a conspiracy to fix rail rates, imposing far-reaching damages to the state. Public transportation affects the population as a whole and all types of industries and segments of the economy. The present case is not that far-reaching; the fumigation of fruits and vegetables is limited in its economic impact.

In the present case, California concedes the reluctance of this Court to grant jurisdiction on economic grounds. *Pennsylvania v. New Jersey,* 426 U.S. 660 (1976); *Alabama v. Arizona,* 291 U.S. 286 (1934). The essential question is whether there is a sovereign or quasi-sovereign interest to be protected. The only damage alleged by California is that there may be imposed on a collection of private parties some economic damage. No sovereign or quasi-sovereign interest of the State of California is mentioned. California merely says that the economic impact on certain fruit and vegetable growers will be such of such magnitude as to give California standing to represent these parties in an original proceeding which is granted to a sovereign state. This position is precluded by *Pennsylvania v. New Jersey,*426 U.S. 660 (1976).

This case is obviously brought for the benefit of private citizens for which purpose the original jurisdiction of the Supreme Court cannot be invoked. *Oklahoma ex rel. Johnson v. Cook,* 304 U.S. 387 (1938). The intervention by California Avocado Commission, Calavo Growers of California, Inc., Western Growers Association, Sunkist Growers, Inc., California-Arizona Citrus League and California Citrus Mutual shows the true parties in interest and also the limited economic impact. The very fact of intervention shows the facade posed by the State of California purporting to act as a sovereign, so as to get before this Court the private economic interests involved.

The only vehicle by which jurisdiction might be extended is the magnitude of the economic impact. A discussion of that is important to the question of jurisdiction as well as the impact on interstate commerce. California's petition and brief will lead one to believe that the quarantine imposed by Texas is going to obliterate the agricultural economy of California. The Texas quarantine applies only to fruits and vegetables which account for only 41 percent (using California figures) of the agricultural output of the State of California. From that figure, 75 percent is exported (California brief p. 49). The Texas quarantine would apply to only five percent of that figure. *See* affidavit of Exhibit "B." This is approximately 2 percent of agricultural output of the State of California. Even this small percentage would not be destroyed or lost to the private producer. Texas only requires that if the producer intends to ship the produce into Texas (as opposed to through Texas; that the same be fumigated so as to kill the maggots and larvae of the Medfly. If the producer chooses not to do so, he still has 48 other states in which to sell in spite of the Texas quarantine. Nowhere is it alleged that these private citizens lack facilities to treat the ° percent of the produce exported to Texas. The only economic impact would be the cost of fumigation to kill the larvae and maggots so vividly described in California's statement of the case. Surely, the original

jurisdiction of this Court can't be invoked simply because Texas, in exercise of its legitimate powers, seeks to have private interests in California export for sale in Texas fruits and vegetables free of contamination-or market this small percentage of agricultural products in some other state where there is less danger of infesting noncontaminated agricultural lands.

This is simply not a controversy between two states envisioned by 28 U.S.C. §1251 (a) (1). The controversy is between the fruit and vegetable growers of California who have intervened in this cause and who choose to market approximately 2 percent of agricultural products of the State of California in Texas markets.

II.

A. The Court Should Deny California's Application for Temporary Restraining Order and Motion for Preliminary Injunction

Even if this Court has jurisdiction, the injunctive relief should be denied because the restraint on commerce is not sufficient to override the legitimate interests of the State of Texas in insuring its residents of noncontaminated foodstuffs and its farmers from insect infestations.

The State of Texas may enlarge the scope of the quarantine already effected by the United States Department of Agriculture for three reasons. First, the statute under which the United States Department of Agriculture acted in declaring a limited quarantine allows for state action, both on its face and in the purpose described in its legislative history. Second, traditional commerce clause analysis shows that the State's interest is a legitimate one and meets the standards the Supreme Court has prescribed for state action in the interstate commerce area. Finally, if the United States

Department of Agriculture and the State of California are allowed to argue that in deciding NOT to quarantine an area of California, the United States Department of Agriculture has preempted state action, then the implied grant of power to the states under the commerce clause and the explicit grant of power in the Tenth Amendment are rendered completely without substantive content.

B.The Statute Allows for State Action

1. The statute allows for state action on its face.

Congress enacted the Interstate Quarantine statute, 7 U.S.C. §161, to address the problem of spreading dangerous plant diseases and insect infestations. The Act authorizes the Secretary of Agriculture and the United States Department of Agriculture to quarantine any portion of the country (state, district, or portion thereof) in which a dangerous disease or infestation is found. The statute provides for enforcement of this authority to prevent the spread of these dangers by quarantine and by the provision of penalties.7 U.S.C. §§150aa-150jj doesn't offset §161 in any manner (see 150jj).

Although the Act addresses itself to the issue of federal authority to act, it does not preclude the state from acting. In an amendment added in 1926, the Congress "provided...that until the Secretary of Agriculture shall have made a determination that such a quarantine is necessary...nothing in this Act shall be construed to prevent any State, Territory, District, or portion thereof." Thus, even where the United States Department of Agriculture has acted in a limited extent, a state may increase the scope of that limited action.

Clearly, then, the statute sets up a framework in which the United States Department of Agriculture sets a kind of minimum standard of protection, which the state may exceed. The commerce clause itself (as will be

shown below) sets the maximum standard, which the state may not exceed.

2. Case law indicates that a state may act to protect its legitimate interests where the federal government has not acted.

Plaintiff relies heavily on *Oregon-Washington Railroad and Navigation v. State of Washington,* 270 U.S. 87 (1926). Five weeks after that decision the last three provisos of 7 U.S.C. §161 were added, and since that time, no court has directly interpreted the 1926 amendments. The legislative history of those amendments with unusual clarity demonstrate what Congress intended when it added the last three provisos to Section 161 (in response to *Oregon-Washington Railroad and Navigation v. State of Washington,* 270 U.S. 87 (1926).

> "A few weeks ago the Supreme Court of the United States held that these quarantine regulations of the different states were invalid, valid, because the federal government had taken possession of the field under its power to regulate interstate commerce. The purpose of this measure is simply to permit the State to continue such regulations where they are not in conflict with the regulation of the United States Government or where the regualtions of the United States Government do not cover the particular plant or thing which the State laws undertake to cover."

68 Cong.Rec. 7053-7054 (1926)(remarks of Mr. Jones). Other proponents of the amendments echoed this purpose:

> "The effect of the decision was to place the entire burden on the Federal Government as to the regulation of these matters. In a case arising in my own State...State authorities did not have the power to exercise any con-

trol whateaver over the importation of infested sweet-potato seeds....This bill will correct the situation speedily."

68 Cong.Rec. 7054 (remarks of Mr. Bankhead). According to the concensus of speakers,

> "(t)he pending resolutions (which were to become the amendments to 7 U.S.C. §161) will give back to the States the power taken from them by the Federal act (as interpreted in *Oregon-Washington)* and will enable them to help and cooperate with the United States Department of Agriculture..."

68 Cong.Rec. (7056) (remarks of Mr. Hill).

Thus, the only Supreme Court decision which holds that the State may not act in the area addressed by 7 U.S.C. §161 has been rendered moot by the deliberations and the actions of Congress. Even though the statute is clear on its face--allowing the state to act where the United States Department of Agriculture has not--the legislative history underscores Congress' intent to allow the states to protect their interests where United States Department of Agriculture has not yet acted.

In 1933, a similar situation arose. In *Mintz v. Baldwin,* 289 U.S. 346 (1933), the Supreme Court was called on to address a situation in which a state agricultural commissioner enforced a state quarantine on a certain state's cattle to prevent the spread of a dangerous infectious disease. In that case, as in the one before us, the federal statute granted the Secretary of Agriculture the authority to impose a quarantine. He had not done so, however, in the *Mintz* situation, and the state agricultural commissioner acted to fill this vacuum. In that case, the court held that the state could indeed so act:

> "The express (statutory) exclusion of state inspection extends only to cases where

> federal inspection has been made and certificate (of health) issued. The clause cannot be read to extend to other cases. The expression of purpose to so limit the exertion of state power strongly suggests that Congress intended not otherwise to trammel the enforcement of state quarantine measures..."

289 U.S. at 351. In the process of holding that the state did not violate the statute, the court also held that the state did not violate the restrictions of the commerce clause. "It cannot be maintained," said the court, "that the order so unneccessarily burdens interstate transportation as to contravene the commerce clause,"for the state regulation was "promulgated in good faith and is appropriate for the prevention of further spread of the disease." 289 U.S. at 349-350.

III. STATE ACTION DOES NOT VIOLATE THE COMMERCE CLAUSE

A. Commerce Clause allows the state to legislate to effect legitimate state interests within the police powers of the state.

The commerce clause of the United States Constitution states that "Congress shall have Power. . .To regulate commerce. . .among the several States..." U.S.CONST. art. I, §8, cl. 3. Thus, the primary grant of power in the regulation of interstate commerce is to Congress. Where Congress has not acted, however, the states may. U.S.CONST. amend. X; *Hall v. DeCuir*, 95 U.S. 490 (1978); *Aldens v. LaFollette,* 552 F.2d 745 (7th Cir. 1977), *cert. den.,* 434 U.S. 880.

Moreover, to preempt the states' authority, the Congress must clearly indicate that such is their intention. *Rice v. Sante Fe Elevator Corp.*, 331 U.S. 218 (1947); *Rogers v. Ray Gardner Flying Service,* 435 F.2d 1380 (5th Cir. 1970); *Great Western United Corp. v. Kidwell,* 577 F.2d 1256 (5th Cir. 1978).

The commerce clause has been held to impose restrictions on state action; however, legislation must further a legitimate state interest. Thus, the state may regulate health and safety. In *A&P Co. v. Cottrell*, 424 U.S. 366 (1976), the Supreme Court held that "under our constitutional scheme the states retain 'broad power' to legislate protection for their citizens in matters of local concern such as public health. . .and that not every exercise of local power is invalid merely because it affects in some way the flow of commerce between the states." 424 U.S. at 371. *See also, Great Western Corp. v. Kidwell*, 577 F.2d 1256 (5th Cir. 1978); *Canton Poultry Inc. v. Conner*, 278 F.Supp. 822 (N.D.Fla. 1968); *Consolidated Freightways v. Dassel*, 475 F.Supp. 544 (S.D.Iowa 1979); *Park 'N Fly of Texas v. City of Houston*, 327 F.Supp 910 (S.D. Tex. 1971).

The most authoritative and recent clear statements of the standard for state action which does not violate the commerce clause is that formulated by the Supreme Court in *Pike v. Bruce Church Inc.* 397 U.S. 137 (1969). There the court states the general rule which emerges from the court's decisions:

> Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. *Huron Cement Co. v. Detroit*, 362 U.S. 440, 443. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities. Occasionally the Court has candidly undertaken a balancing approach. . .

397 U.S. at 142. Since, here, the State's interest is the protection of its citizens' health and safety, the quarantine it seeks to impose is a legitimate interest within the police powers of the state.

B. The State's action does not unduly burden interstate commerce.

In a recent case, the Supreme Court noted that "burdens on interstate commerce may be unavoidable when a state legislates to safeguard the health and safety of its people." Thus, the Supreme Court said in *Philadelphia v. New Jersey* 437 U.S. 617 (1978), an incidental burden on interstate is permissible. When it reaches the point of an economically protectionist measure--designed to protect the state's economic interests--then state action violates the commerce clause. "The crucial inquiry, therefore, must be directed to determining whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental." 437 U.S. at 624. *See also, Great Western United Corp. v. Kidwell,* 577 F.2d 1256 (5th Cir. 1978); *Transcontinental Gas Pipeline v. City of Hackensack,* 464 F.2d 1358, *aff'd,* 409 U.S. 1118 (3rd Cir. 1972), to the same effect.

In the instant case, the burden on interstate commerce which will result from the State's action will be incidental in several respects. First, the burden will be literally incidental to the important state interest of protecting its citizens' health and safety. Second, the burden is incidental in the sense that it does not approach an economic protectionism by discriminating against out-of-state commerce. The only economic effects the state's action imposes are those necessary to bring California's produce up to the level of safety of other produce brought into and produced in the state.

C. The state's interest in protecting health and safety outweighs any incidental burden on interstate commerce.

As noted in passing above, in *Pike v. Bruce Church Inc.,* 397 U.S. 137 (1970), the Supreme Court often applies a balancing test in cases where a noneconomic burden on interstate commerce results from legislation intended to further a legitimate state interest. In *Raymond Motor Transportation v. Rice,* 434 U.S. 429, 441, the court stated that "the inquiry necessarily involves a sensitive consideration of the weight and nature of the state regulatory concern in light of the extent of the burden imposed on the course of interstate commerce." The court goes on to cite the above-mentioned *Pike* test.

The specific factors to be balanced depend on the fact situation involved. At least two factors are prominently mentioned, however. First, if other, less burdensome or less expensive methods are not available, this will weigh in favor of the state's regulation. *Proctor and Gamble v. Chicago,*509 F.2d 69, *cert. den.* 421 U.S. 978 (2nd Cir. 1975). Second, often it is said that in any balancing of rights, the State's sovereignty should prevail. *Employees, etc. v. Department of Public Health, etc.,* 452 F2d 820, *aff'd,* 411 U.S. 279 (2d Cir. 1971).

While the precise factors to be taken into account in the balancing are not clearly established, it is clear that in light of the vitally important interest of the State in preventing the spread of the California infestation to its own territory as well as the lack of any cheaper and less burdensome means of effecting this protection, as well as the merely incidental burden on interstate commerce, that this measure does not violate the limitations of the commerce clause.

IV

Public Policy Proscribes Interpretations Such as That Petitioner Presents

The United States Department of Agriculture has quarantined only a limited section of California. Peti-

tioner seeks to show that United States Department of Agriculture preempted the State of Texas from acting to expand the area of the quarantined produce for the purposes of Texas production, by arguing that in deciding *NOT* to quarantine the remainder of the State of California, the United States Department of Agriculture "acted" within the meaning of 7 U.S.C. §161 and interpretations of the commerce clause.

To accept this argument is to accept the proposition that the United States Department of Agriculture and other governmental agencies act both positively and negatively. Thus, if the United States Department of Agriculture takes *any* action, they preclude state action (if California's argument is accepted), for their decision not to impose a quarantine is an action precluding the states. Moreover, if the United States Department of Agriculture took no action whatsoever, it could well be argued under this line of argument that the refusal to act was action precluding the states.

This argument is unacceptable for a number of reasons. First, the Tenth Amendment guarantees the states all the powers not delegated to Congress. Petitioner's argument would render this amendment a vacuous phrase, for all action or lack thereof by Congress would preempt state action. Second, the amendments of 1926 to 7U.S.C. §161 are clearly intended--both on their face and in the language with which they were proposed--to prevent the federal government from taking over the entire area.

There is no attempt by Texas to interfere with the free flow of commerce to other states. (See affadavit of David A. Ivie.) The Texas quarantine will have no effect on goods whose destination is a state other than Texas. As to those items intended for Texas markets, the borders are open to non-contaminated food stuffs. The requirement of the Texas quarantine is that certain fruits and vegetables be treated to kill maggots

and larvae. This was instituted only after the outbreak of Med fruit-fly in California had been confirmed and was determined to have the potential to spread.

Medflies have been captured in 10 countries outside the United States Department of Agriculture quarantine area, including Ventura County California, the adjoining county to Los Angeles County. The flies are now being detected from the San Francisco Bay area almost to Los Angeles and one-half the way across the state in an easterly direction (Tulare County Calif.) (See affadavit of David A. Ivie)

The relief sought should be denied.

Respectfully submitted,

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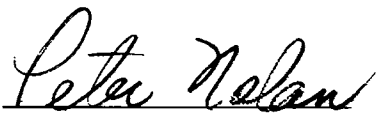

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