No. 87, Original

SUPREME COURT OF THE UNITED STATES

October Term, 1980

STATE OF CALIFORNIA,
Plaintiff,

vs.

STATE OF TEXAS,
Defendant.

ACTION IN ORIGINAL JURISDICTION

PLAINTIFF'S SUPPLEMENTARY BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE BRIEF, APPLICATION FOR TEMPORARY RESTRAINING ORDER AND MOTION FOR PRELIMINARY INJUNCTION

GEORGE DEUKMEJIAN
Attorney General of the
State of California

R. H. CONNETT
Assistant Attorney General
RODERICK E. WALSTON
GREGORY K. WILKINSON
CHARLES W. GETZ IV
DAVID HAMILTON
MARY HACKENBRACHT
M. ANNE JENNINGS
Deputy Attorneys General
Attorneys for Plaintiff
6000 State Building
San Francisco, CA 94102
Telephone: (415) 557-3920

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This supplementary brief addresses certain matters not fully discussed in our opening brief that support our various motions. It does not specifically respond to Texas' reply brief since, as of the date of preparation of this supplementary brief on March 2, 1981, Texas' reply brief had not been received by California.

I. THE COURT SHOULD GRANT CALIFORNIA'S MOTION FOR LEAVE TO FILE BRIEF.

A. Conflict Between California and Texas Quarantine Programs.

In our opening brief, we argued that the Texas quarantine has an adverse effect on the California agriculture industry, which is a mainstay of the California economy. Cal. Br. 70-82. Additionally, we now argue that the Texas quarantine is in conflict with the California quarantine, and also with the quarantine adopted by the U. S. Department of Agriculture (USDA). Thus, this case presents a conflict between two state regulatory schemes relating to the same subject matter, and also a conflict between a state regulatory scheme--that adopted by Texas--and a federal regulatory scheme. Because of the nature of this conflict, California has an interest in this case apart from the interest of its

agricultural industry, and thus has standing to maintain its action.

Specifically, California has adopted a quarantine and eradication program relating to the Medfly infestation in California, which program applies only to parts of two counties in California. Cal. Br. 34-36. Under the California program, no fruits or vegetables can be shipped out of the quarantine area unless they have been treated by fumigation and cold storage. Id. Therefore, California authorities have determined that no restrictions are necessary with respect to fruits and vegetables grown outside the quarantine area. Such fruits and vegetables are free to move in commerce regardless of whether they have been treated.

Conversely, the Texas quarantine prohibits the shipment of fruits and vegetables grown anywhere in California

unless they have been treated by fumigation or cold storage. Cal. Br. 27-38. Thus, the Texas quarantine is in conflict with the California quarantine. Texas has determined that all areas in California must be placed under quarantine, and California, as well as the USDA, have determined that only the actual area of infestation should be placed under quarantine. Texas thus inhibits commerce that California authorizes. Thus, a direct conflict exists between the regulatory schemes of the two states.

The conflict between the two state regulatory schemes is enhanced by the actual marketing practices of the fruits and vegetables industry. Because of these practices, many growers in California will be required to treat their products as required by the Texas quarantine, even though the products

will not be sold or consumed in Texas. Specifically, if fruits and vegetables are treated as required by the Texas quarantine, the treatment will normally occur before the products are shipped in interstate commerce. See Supplemental Affidavit of Howard R. Ingham, Exhibit M, at p. 5.[1/] A substantial portion of such products, however, is shipped in interstate commerce without the actual destination of the products being known. See Affidavit of Marvis H. Hurst, Exhibit L, at pp. 2-3. The broker often determines the ultimate point of shipment--depending on factors relating to price, space and availability in particular markets--only after the shipment is underway. Id. Moreover, even after

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1. The Supplemental Affidavit of Howard R. Ingham and Affidavit of Marvis H. Hurst are submitted under separate cover to supplement the other affidavits previously supplied to the Court.

a shipment has arrived at a particular destination-such as Texas--and been placed in a warehouse, a broker often determines that the shipment should be sent to another state because of current marketing factors. Id. at p. 3.[2/] In short, products shipped to Florida might be re-routed to Texas in transit, or vice versa; moreover, products shipped to Texas might be re-routed to other markets after they have arrived in Texas. Thus, the marketing of fruits and vegetables in national markets is highly flexible and pragmatic, owing to the perishability of such products and the volatile nature of their prices. For these reasons, the ultimate destination of such products can often not be

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2. Thus, although Texas has apparently conceded that its quarantine will not apply to shipments of products through Texas, it is often not known whether a shipment will be through Texas until after it has already arrived at a Texas warehouse.

determined until after they have been placed in interstate commerce, after the opportunity for fumigation or other treatment has ended.

Because of this marketing practice, a grower of citrus fruits in Fresno, which is located far from the Medfly infestation, will be required under the Texas quarantine to fumigate his products before they leave California, even though the fruits may be eventually sold in Louisiana, Maryland or South Carolina. California has determined, under its quarantine program, that the Fresno grower need not fumigate his fruit under these circumstances. Texas, on the other hand, has made the opposite determination. Thus, the grower will likely be required to follow the Texas quarantine because of the possibility that this shipment may terminate in Texas, even though it is

subsequently determined that the shipment should terminate at another destination.[3/] The interests which California is seeking to protect, in

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3. This Court recognized the importance of a similar marketing situation in Jones v. Rath Packing Co., 430 U.S. 519 (1977). There, California imposed weight restrictions on the sale of flour that excluded consideration of weight reduction caused by loss of moisture. This Court concluded that the California law would require a "miller with a national marketing area" to "overpack" in order to meet the California standard. 430 U.S. at 540-541, 542-543. Accordingly, it was held that the California law posed an obstacle to the congressional objectives underlying the Fair Packaging and Labeling Act, 15 U.S.C. §§1451-1461, and hence was invalid. Id.

Similarly, as explained above, a California grower who distributes his products in national markets may be required to meet the requirements of the Texas quarantine even though his products may be sold and consumed in other states. The Texas quarantine thus imposes an unreasonable burden on interstate commerce and, more importantly here, impairs the interests which California is attempting to protect by limiting the scope of its own quarantine.

limiting the scope of its quarantine, are thus impaired by the Texas quarantine.

It is thus clear that there is an irreconcilable clash between the California and Texas quarantines, in that they impose conflicting standards and requirements on the same grower with respect to the same crop. Because of this conflict, California has its own direct interest in this case, apart from the interest of its agricultural industry. Therefore, California has standing to maintain its action against Texas.

B. Effect of Preemption Doctrine on California's Own Quarantine.

We also argued in our opening brief that the Texas quarantine is preempted by federal law. Cal. Br. 56-62. California has adopted several other

quarantines with respect to other agricultural products, unrelated to the quarantine imposed as a result of the Medfly infestation. See Supplemental Affidavit of Howard R. Ingham, Exhibit M, at pp. 2-4.[4/] Of the latter quarantines, some apply to products that are separately governed by federal quarantines, and some do not; of the quarantines separately governed by federal quarantines, we believe that the California quarantines are entirely harmonious with the federal quarantines. Id.

Therefore, California has a dual interest with respect to the preemption issue raised here. On the one hand, we believe that the Texas quarantine is

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4. These quarantines relate to such matters as the Japanese beetle, Dutch elm disease, gypsy moth, pink bollworm, and related pests. Id.

preempted by federal law. On the other hand, we believe that our own Medfly quarantine, as well as other quarantines applicable to other types of agricultural products, are not preempted by federal law. 5/ Thus, California has an interest in having the preemption doctrine applied in this case, but in not having it applied so broadly that it will invalidate California's own quarantines.

The California agricultural industry, on the other hand, does not

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5. Under our view, the preemption doctrine, as applied here, does not prohibit a state from imposing a quarantine on intrastate commerce, or from imposing a quarantine on interstate commerce to the extent that the quarantine is consistent--both in the areas quarantined and the restrictions applied--with the federal quarantine. Accordingly, under our view, California's quarantine in this case-as it applies both to intrastate and interstate commerce--is not preempted by federal law, and Texas' quarantine is so preempted.

have the same interest that California has in limiting the scope of the pre-emption doctrine in this case. The industry has an interest in having the preemption doctrine applied here, but not, at least to the same extent as California, in limiting the scope of the preemption doctrine to insure that California's own quarantines will not be jeopardized. Many of California's quarantines were adopted as an exercise of the State's police power, in order to protect the public health, welfare or safety. It is doubtful that the California agricultural industry has the same interest as California in protecting the public concerns that underlie these other quarantines. For this additional reason, California has an interest in this case apart from the interest of its agricultural industry,

and thus has standing to maintain its action.

C. Economic Impact on State.

Further, the State of California has a sovereign interest, apart from the interest of its agricultural industry, in the economic health and vitality of its agricultural industry. It is generally estimated that one out of three jobs in California is related, directly or indirectly, to the agricultural industry. See Affidavit of Marvis H. Hurst, Exhibit L, at p. 3. Therefore, any condition that adversely affects California's agricultural industry also has an adverse effect on employment in California, which in turn has an effect on the collection and distribution of the State's tax revenues. Additionally, the diminution of income received by the California agricultural

industry will, in itself, directly result in reduced tax revenues that are available for collection by the State, which in turn will result in higher tax burdens for the State's taxpayers. Therefore, California has an interest in maintaining this action, apart from the interest of its agricultural industry.

D. Pendency of Private Action.

It has been brought to our attention that, after the filing of this action, a segment of the California agricultural industry--consisting of a group of avocado growers--has filed a separate action in the Texas district court to restrain enforcement of the Texas quarantine. Since we have not yet obtained a copy of the pleadings, we are unfamiliar with the specific issues raised therein. Assuming, however,

that the Texas lawsuit raises both the preemption issue and the interstate commerce issue raised herein, the Texas lawsuit still does not provide a proper basis for denying our motion for leave to file brief.

This Court's jurisdiction of our action is both "original" and "exclusive." 28 U.S.C. 1251(a)(1). Therefore, it is doubtful if the Court should decline to hear our lawsuit because of the pendency of another lawsuit brought by an aggrieved private party. As noted in our opening brief, the Court has some latitude in determining whether California is acting in a proper parens patriae capacity in this case, and thus whether the Court should entertain our action on this ground. Cal. Br. 43-50. Assuming, however, that California is acting in such a capacity, it would not

seem proper to deny California the opportunity to present its case because the same issues are raised in a private lawsuit. Otherwise, California would be unable to have its case heard in any forum, since this Court's jurisdiction is "exclusive."

In any event, the private group which initiated the Texas lawsuit cannot adequately represent the interests of the State of California herein, for several reasons.

First, as noted above, California has an interest, apart from the interest of the California agricultural industry, in preserving the integrity of its own quarantine program.

Second, as noted above, California has an interest, apart from the interest of the California agricultural industry, in limiting the scope of the preemption

doctrine, because California has several other quarantines that may be jeopardized by an unduly generous interpretation of the preemption doctrine in this case.

Third, the avocado growers who initiated the Texas action represent only a small part of the California agricultural industry affected by the Texas quarantine. The Texas quarantine applies to more than 31 specified varieties of fruits and vegetables. See Affidavit of Richard E. Rominger, Exhibit A-5. Avocadoes thus comprise only a small part of the products affected by the Texas quarantine. It is questionable whether the avocado growers will be able to sufficiently establish the widespread burden on interstate commerce that underlies our case. It is even more doubtful that they will be able to

establish the widespread irreparable harm that underlies our motion for preliminary injunction. A court might well conclude that Texas' interests outweigh the limited harm sustained by the avocado growers, but that Texas' interests do not similarly outweigh the broad interests California is seeking to protect in this case.

It is thus respectfully submitted that a small, maverick branch of the California agricultural industry should not be able, by filing its own lawsuit, to defeat California's right to protect the broad interests involved here. Indeed, every action involving two states under this Court's original and exclusive jurisdiction affects private interests in some way, and the Court should not decline to exercise its original jurisdiction because of the

happenstance that one of the aggrieved private parties initiates his own lawsuit.

II. THE COURT SHOULD GRANT CALIFORNIA'S APPLICATION AND MOTION FOR INTERIM RELIEF.

Finally, it is submitted that the Court should grant interim relief here, because the balance of relative harm weighs in favor of California rather than Texas. As noted in our opening brief, the fruits and vegetables industry in California generated total cash receipts in 1979 of $5.0 billion. Cal. Br. 17 18. Approximately 75-80% of such products are shipped in interstate commerce. Id. at 18. Although we had not received Texas' reply brief at the time that this supplemental brief was prepared, we have been informally advised that Texas represented in its brief that approximately 2% of such

fruits and vegetables are shipped to Texas. Assuming the accuracy of this representation, it appears that the total annual value of California-grown fruits and vegetables consumed in Texas in 1979 is approximately $80 million. Thus, the Texas quarantine will have a substantial burden on the California agricultural industry. Moreover, this burden will be substantially enhanced for the reason that, as noted above, the California agricultural industry, in order to comply with the Texas quarantine, will have to fumigate or otherwise treat substantially more products than are actually sold and consumed in Texas.

Thus, a substantial burden will be imposed on the California agricultural industry regardless of whether it chooses to retain the Texas market or not. If it chooses to retain the

market, it will have to meet the Texas quarantine requirements which, as noted in our opening brief, will entail a cost of $535 million in the first year, and $38 million in succeeding years. Cal. Br. 75. If, on the other hand, it chooses not to retain the Texas market, it will lose a market that in 1979 was valued at approximately $80 million, as noted above.

Because of the burden that will be imposed on the California agricultural industry regardless of whether it attempts to retain the Texas market, a substantial burden will also be imposed on the people of California. As noted above, the California agricultural industry is responsible for substantial employment in California, and is also a major source of the State's tax revenues. Thus, any adverse effects

imposed on the agricultural industry will be felt by the people of the State in reduced employment and lost tax revenues. Although it is impossible to quantify these adverse effects at this time, the effects will doubtlessly be substantial because of the large volume of the Texas market.

With respect to the interests which Texas is seeking to protect, two additional factors should be noted that were not made in our opening brief. First, although quarantines are often associated with dangers to the public health, such is not the case here. The Medfly poses no threat to the public health whatsoever, nor can Texas reasonably argue otherwise. The only danger is that the Medfly will infest crops and thus cause economic damage to farmers. Thus, Texas is not attempting to protect

the health of its citizens in this case. Instead, it is, at most, attempting to protect its agricultural industry. In balancing the relative harm in this case, the Court should weigh the potential harm to California's agricultural industry--and to its people as the result of reduced employment and diminished tax revenues--against the potential harm to the Texas agricultural industry. Since, as noted in our opening brief, both California and Florida have determined that their respective agricultural economies are adequately protected by the existing quarantines, and since the United States has made a similar determination with respect to the agricultural economy of the entire country, it would seem that Texas' quarantine is unnecessary to protect its own agricultural industry.

Second, since the United States, Florida and California have determined that the quarantine should be linked to the biological area of infestation, a legitimate question arises as to Texas' motive in linking its quarantine to the political boundaries of the entire State of California. Perhaps the answer lies in the fact that the USDA has imposed a quarantine upon grapefruit originating in the Rio Grande Valley in Texas as a result of infestation of the Mexican fruit fly, a quarantine that many in Texas apparently believe was imposed at the instigation of California. See Affidavit of Howard R. Ingham, Exhibit I, at pp. 4-5. It is thus possible that the Texas quarantine was imposed as a retaliatory act, not as a legitimate attempt to protect the Texas

agricultural industry.[6/]

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6. This suspicion is supported by the fact that a recent UPI dispatch quoted a prominent Texas citrus fruit grower as stating that, "We have to quarantine our citrus that goes to California," and that, "If the shoe fits us, it ought to fit them." See Oakland Tribune, at p. B-8, Feb. 26, 1981. The dispatch further stated that the Texas grower, "who said most of the Texas citrus growers to whom he has talked agree on the California produce ban, said the western state [California] has forced fumigation of Texas produce because of the Mexican fruit fly." Id.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the Court grant our motion for leave to file brief, application for temporary restraining order and motion for preliminary injunction.

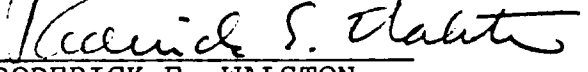
Dated: March 2, 1981

Respectfully submitted,

GEORGE DEUKMEJIAN, Attorney General of the State of California

R. H. CONNETT
Assistant Attorney General

RODERICK E. WALSTON
GREGORY K. WILKINSON
CHARLES W. GETZ IV
DAVID HAMILTON
M. ANNE JENNINGS
MARY HACKENBRACHT
Deputy Attorneys General

By 
RODERICK E. WALSTON
Deputy Attorney General