

MOTION FILED  
MAR 5 1981

No. 87 1, Original

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# In the Supreme Court

OF THE

## United States

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OCTOBER TERM, 1980

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STATE OF CALIFORNIA,  
*Plaintiff,*

vs.

STATE OF TEXAS,  
*Defendant.*

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### MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE AND BRIEF OF AMICUS CURIAE FOR A BETTER ENVIRONMENT, COUNTY OF SANTA CLARA AND TOWN OF LOS GATOS

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Santa Clara*

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*Attorney for the Town of  
Los Gatos*

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STATE OF CALIFORNIA,

Plaintiff,

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MOTION FOR LEAVE TO FILE

BRIEF OF AMICUS CURIAE

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Moving parties CITIZENS FOR A  
BETTER ENVIRONMENT, COUNTY OF SANTA CLARA,  
and TOWN OF LOS GATOS, hereby move for an  
order permitting them to file a brief of  
amicus curiae, in support of the position  
of the State of California in the within

proceedings.

Neither Rule 36 of this Court nor the Federal Rules of Civil Procedure fully states the procedures to be followed by a party seeking to participate as an amicus curiae in an original proceeding in this Court. However, some of the provisions of Rule 36 are directly applicable, and the remaining provisions "may be taken as a guide to procedure in original actions of this court." (Rule 9.2)

Original proceedings are governed by Rule 9 of this Court, which grants adverse parties sixty days to file any papers in opposition to a motion for leave to file an initial pleading. By analogy to Rule 36.1, it would therefore appear that an amicus brief in the within proceedings would be deemed timely if filed within sixty days of the motion of the State of California. Moreover, the Clerk of this

Court has indicated to counsel for amici that this interpretation of the Rules is correct. However, in excess of caution, amici are submitting this brief on the date specified by this Court for a response from the United States Solicitor.

Amici view the grant of the within motion to be a matter of right, for the reason that amici COUNTY OF SANTA CLARA and TOWN OF LOS GATOS are both political subdivisions of the State of California, which need not have prior consent for the filing of an amicus curiae brief. (Rule 36.4)

Amici have obtained the consent of the State of California to file a brief of amicus curiae. However, due to the extremely short time available, they have not been able to obtain either approval or disapproval of such filing from the State of Texas.

This original proceeding raises the question whether, either as a matter of law or as a matter of fact, the quarantine on California produce imposed by the State of Texas has created an unreasonable burden on interstate commerce. Amici have devoted substantial resources to studying the issue of whether additional steps are necessary to control the Mediterranean fruit fly (Medfly) in California, and therefore are in a unique position to address the issue of whether the Texas quarantine creates such an unreasonable burden on interstate commerce. Amici believe they are, in fact, in a better position to assess the need for additional control measures than is the State of California. The specific basis for this belief is set forth in the following paragraphs, in the accompanying amicus brief, and in supporting affidavits. The specific in-

terests of the amici in this proceeding are as follows.

Amicus CITIZENS FOR A BETTER ENVIRONMENT (CBE) is a national environmental organization with offices in Chicago, Illinois; Milwaukee, Wisconsin; and San Francisco, California. Many of CBE's approximately 6,000 San Francisco Bay Area members live in Santa Clara County, where the primary Medfly infestation and control program have occurred. CBE has devoted substantial staff resources to studying the issue and informing the public as to the pros and cons of various control measures.

Amicus COUNTY OF SANTA CLARA is a California county, and therefore a "political subdivision" of the State of California as that term is used in Rule 36 of this Court's Rules. The county includes large urban centers such as the city of San Jose, and some of California's richest agricultural land as well. Its

1979 County Agricultural Crop Report lists its total annual crop production as valued at \$123,568,160. It is among the hundred largest counties in the United States in terms of agricultural production. Because the Medfly infestation is primarily within Santa Clara County, the county's economy would be in greater danger than that of any other part of the United States were the present control program to prove unsuccessful. Thus, Santa Clara County is interested in the Medfly control program both as it may affect the health of its residents in the urban area where infestation has occurred, and as it might, if uncontrolled, affect the agricultural economy in the outlying areas, where no infestation has occurred.

Amicus TOWN OF LOS GATOS is a general law city, organized under the laws of the State of California, and is a "political subdivision of the State of Cali-



fornia as that term is used in Rule 36 of this Court's Rules. Its population is approximately 30,000. It is in the area subjected to the existing State and Federal quarantines. It has responded to the Medfly outbreak by passing ordinances requiring all residents to cooperate fully with the fruit stripping and ground spraying, and believes that these programs have been successful, making more extreme measures such as aerial spraying and the overbroad Texas quarantine unnecessary.

Amici wish to take the position in this proceeding that the Texas quarantine program creates an unreasonable burden on interstate commerce for the reason that it adds negligibly to the degree of control over the Medfly already in place, and that the present degree of control makes the possibility of a

broader infestation almost insignificant.

The brief of amici will address the  
factual and legal issues involved.

Dated: 3/5/81

SELBY BROWN, JR.

CHARLES PERROTTA

Attorneys for COUNTY OF SANTA CLARA

WALTER HAYS

Attorney for TOWN OF LOS GATOS

NICHOLAS C. ARGUIMBAU

Attorney for CITIZENS FOR A BETTER  
ENVIRONMENT

By Nicholas C. Argimbau

NICHOLAS C. ARGUIMBAU

AFFIDAVIT OF NICHOLAS C. ARGUIMBAU IN  
SUPPORT OF MOTION TO FILE BRIEF OF  
AMICUS CURIAE

State of California )  
 ) ss.  
City and County of San Francisco )

Nicholas C. Arguimbau, being first  
duly sworn, deposes and says:

I am attorney for amicus CITIZENS  
FOR A BETTER ENVIRONMENT.

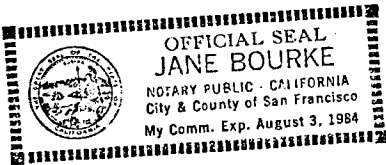
I have read the within motion for  
leave to file brief of amicus curiae.

The factual matters stated therein  
are true of my own knowledge except as to  
the following: (a) those matters stated  
on information and belief, and (b) the  
statements setting forth the interests of  
amici COUNTY OF SANTA CLARA, TOWN OF LOS  
GATOS, and CITY OF PALO ALTO. As for  
those statements, I am informed and believe  
that they are true.

Nick Carg

Nicholas C. Arguimbau

Subscribed and sworn to before  
me this 4 day of March, 1981.



Jane Bourke

Notary Public

My commission expires 8/3/84.





No. \_\_\_\_\_, Original

SUPREME COURT OF THE UNITED STATES

October Term, 1980

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STATE OF CALIFORNIA,

Plaintiff,

v.

STATE OF TEXAS,

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BRIEF OF AMICI CURIAE  
CITIZENS FOR A BETTER ENVIRONMENT,  
COUNTY OF SANTA CLARA,  
and  
TOWN OF LOS GATOS

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## INTERESTS OF THE AMICI

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well. Its 1979 County Agricultural Crop Report lists its total annual crop production as valued at \$123,568,160. It is among the hundred largest counties in the United States in terms of agricultural production. Because the Medfly infestation is primarily within Santa Clara County, the county's economy would be in greater danger than that of any other part of the United States, were the present control program to prove unsuccessful. Thus, Santa Clara County is interested in the Medfly control program both as it may affect the health of its residents in the urban area where infestation has occurred, and as it might, if uncontrolled, affect the agricultural economy in the outlying areas, where no infestation has occurred.

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of the State of California, and is a "political subdivision" of the State of California as that term is used in Rule 36 of this Court's Rules. Its population is approximately 30,000. It is in the area subjected to the existing State and Federal quarantines. It has responded to the Medfly outbreak by passing ordinances requiring all residents to cooperate fully with the fruit stripping and ground spraying, and believes that these programs have been successful, making more extreme measures such as aerial spraying and the overbroad Texas quarantine unnecessary.

## ARGUMENT

In considering whether the Texas quarantine violates the Commerce Clause of the United States Constitution, this Court should heed the words of Raymond Motor Transportation, Inc. vs. Rice 434 U.S. 429, Note 25 at 447:

"Here, as in many other fields, constitutionality is conditioned upon the facts, and to the lawyers the courts are entitled to look for garnering and presenting the facts."

It has often appeared to amici in the course of the public dispute over the Mediterranean Fruit Fly ("Medfly") infestation, that the greatest economic threat to California agriculture comes not from the little pest itself, but from potential overreaction of agricultural interests elsewhere in the nation and the world. Amicus COUNTY OF SANTA CLARA and amici municipalities are in a uniquely

favorable position to see both sides of the issue. On the one hand, amicus COUNTY OF SANTA CLARA has a major agricultural base which would probably be the first hit if the Medfly infestation were to spread. On the other hand, the problems inherent in a massive urban spray program would also hit amici harder than any other area. Thus the amici are sensitive to the dangers of overreaction inherent in this case.

A review of the facts in this case suggests a level of overreaction verging on irrationality. The Texas quarantine was imposed at a time when not a single wild Medfly had been caught in thousands of traps over a five-week period. Indeed, the facts support only one conclusion: that the infestation has at present been restricted to one small urban area in Santa Clara County and has never extended to infestation of agricultural produce. Moreover, despite widescale monitoring efforts, only 17 wild Medflies have been

caught in a four-month period, all but one in a narrow area of three urban communities (see Affidavits of Hagen and Dreistadt, attached).

Such facts give substance to the suspicion that the greatest economic threat of the Medfly lies in the human reaction to it rather than in the reality of the infestation. That fact makes this case uniquely appropriate for intervention by this Court. Once the principle is established that economic sanctions may be imposed by one State on another because the Federal government or another State is allegedly not taking adequate precautions to deal with a hazardous situation, the danger of overreaction becomes extreme. The potential chilling effect on California and Federal prerogatives of sanctions imposed by Texas in the present case is a clear example of such dangers.

The present case presents a clear application of the principles set forth in Hughes vs. Oklahoma 441 U.S. 322 (1979) and Philadelphia vs. New Jersey 437 U.S. 617 (1978). In the latter case, this Court held that quarantine laws could be justified despite their effects on commerce only because they "simply prevented traffic in noxious articles, whatever their origin" 437 U.S. et 629. In Hughes, this Court held that when facial discrimination against the produce of one state appears in the regulations of another, "(S)uch facial discrimination invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of non-discriminatory alternatives." The present case meets neither test.

It is clear that the quarantine in the present case does not "simply prevent traffic in noxious articles." There



is no evidence that California produce either is or will be in the future contaminated by the Medfly. Of necessity, then, the Texas quarantine must fail when the "strict scrutiny" test is applied.

In Philadelphia vs. New Jersey, supra, this Court saw the issue of validity of a quarantine as one of differentiating between "simple economic protectionism" and attempts of a State "to safeguard the health and safety of its people." 437 U.S. et 624. Where both factors are ostensibly involved, the strict scrutiny test of Hughes must be employed. Given the facts of the present case, the overbroad Texas quarantine, justified essentially by a finding of 17 flies in four months in a tiny urban corner of Northern California, must be interpreted as "simple economic protectionism." This Court should so find.

Where there is no evidence whatsoever of any danger that the Medfly will spread beyond California, there is no legitimate interest outside of the State in management of the control program. After all, "a State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State," Bigelow vs. Virginia 421 U.S. 809, 821 (1975). The Texas quarantine, however, may act to mold the exercise by the State of California of its police powers in a manner which the State of Texas would have no power to accomplish directly. Under such circumstances, careful scrutiny by this Court of the basis of Texas' activities is essential.

## SUMMARY OF ARGUMENT

The cases of Hughes v. Oklahoma,  
supra, Philadelphia v. New Jersey, supra,  
and Bigelow v. Virginia, supra, as applied  
to the facts of this case, require in-  
validation of the Texas quarantine, be-  
cause the negligible dangers to the health  
and welfare of Texans presented by the  
Medfly do not justify the discrimination  
against California produce which Texas  
seeks to impose.

## CONCLUSIONS

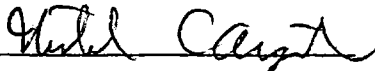
For the above reasons, the Texas  
quarantine should be held invalid.

Dated: 3/5/81

SELBY BROWN, JR.  
CHARLES PERROTTA  
Attorneys for COUNTY OF SANTA CLARA

WALTER HAYS  
Attorney for TOWN OF LOS GATOS

NICHOLAS C. ARGUIMBAU  
Attorney for CITIZENS FOR A BETTER  
ENVIRONMENT

By   
NICHOLAS C. ARGUIMBAU





State of California )  
 ) ss.  
County of Alameda )

Kenneth Hagen, Ph.D., being first  
duly sworn, deposes and says:

//

I am a Professor of Entomology and a research entomologist employed by the Division of Biological Control, Department of Entomological Sciences, University of California, Berkeley.

I have published in excess of one hundred papers in the field of entomology, including several related to the control of the Mediterranean Fruit Fly(Medfly). A copy of my biography is attached. One of my main interests in approximately thirty-five years of active research and teaching, has been Integrated Pest Management("IPM").

IPM is a pest management system which employs a combination of control strategies, rather than any single device,

using techniques such as physical control, pest-specific diseases, removal of infested host organisms, infusion of sexually sterile "decoy" populations, and selective chemical pesticides. The control program which is presently in use on the Santa Clara County Medfly infestation is an example of IPM.

Texas' imposition of a quarantine against all untreated fruits and vegetables originating from anywhere within the State of California is unwarranted and unreasonable. Federal, state and county officials have imposed an effective quarantine which includes a large buffer zone surrounding the infested area. The present quarantine prohibits the export of untreated fruits and vegetables from the 500 square mile quarantine area. The infestation has been confined to



fruit trees in residential areas.

None of the Mediterranean Fruit Flies captured since the first fly find on June 5, 1980, have been found in any commercial crops either within or outside the quarantine area.

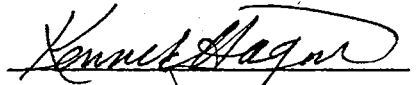
The U.S. Department of Agriculture, the California Department of Agriculture, the Santa Clara and Alameda County Departments of Agriculture and the various cities located within the quarantine area have successfully implemented a massive IPM program to eradicate the Medfly. Eradication was successfully performed in the two most recent infestations in Southern California. The present eradication efforts include an effective quarantine, removal of potential host fruits, extensive ground spraying of pesticides, and the release of tens of millions of artificially reared sterile

male flies which breed with the wild female flies and effectively prevent the production of viable offspring.

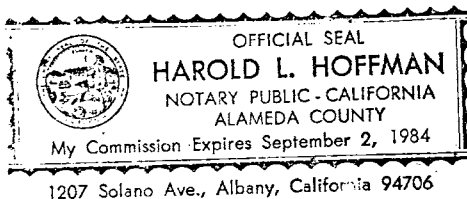
The present eradication program includes a combination of the best control measures available. The State of Texas has apparently called for immediate aerial insecticide spraying over an urban area with a population of approximately a million persons. Due to the comparatively cool weather, the fact that only 17 wild flies have been captured in the last four months using over 3,000 sensitive traps, the problems associated with urban aerial insecticide spraying, and the apparent success of our present control efforts, immediate aerial spraying is not warranted. Although we expect to capture a few wild flies during the coming warmer spring months, this would not automatically

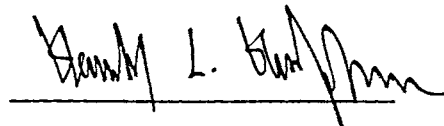
indicate that the present control program has failed or that aerial spraying is warranted. No wild Medflies have been captured since January 22 and the evidence indicates thus far that a successfully implemented appropriate Medfly control program is in operation.

For the previously stated reasons, the imposition of a quarantine such as that proposed by the State of Texas is not warranted.

  
Kenneth Hagen, Ph.D.

Subscribed and sworn to before me  
this 3 day of March, 1981.





Notary Public

My commission expires Sept. 2., 1984.

## Biography

Kenneth Sverre Hagen. Professor of Entomology and Entomologist, Division of Biological Control, Department of Entomological Sciences, University of California, Berkeley. Mailing Address: 1050 San Pablo Avenue, Albany, California 94706.

//

Born in 1919, citizen of U.S.A. B.S., University of California, Berkeley, 1943; M.S., University of California, Berkeley, 1948; Ph.D., University of California, Berkeley, 1952. Lab Assistant, University of California, Division of Entomology, 1943; Ensign-Lt. (j.g.) U.S. Naval Reserve 1943-1946. Teaching Assistant, Department of Zoology, University of California, 1946; Supervisory Entomologist, West Side Insect Control Assoc., 1946; Senior Lab. Tech., Princ. Lab. Tech., Jr. Entomologist, Asst. Entomologist, Assoc. Entomologist, Department of Biological Control, University of California 1949-1965. Lecturer and Entomologist 1965-1969, Professor of Entomology and Entomologist 1969-present. International Atomic

Energy Agency Tech. Assistance Expert to the Government of Greece on olive fly project 1961-1962. Member UC/AID study team to evaluate Mediterranean Fruit Fly and its economic impact on Central American Countries and Panama, March-April 1977. Short-term consultant for evaluation of teaching and research biological control in Brazil via Michigan State University, July-Sept. 1977. FOA consultant to Greece on integrated pest management of olive pests, Aug. 1978. Research interests: (1) Nutrition of predaceous and parasitic insects and tephritidae, (2) Use of supplemental, artificial diets and behavioral chemicals in the field to increase effectiveness of natural enemies of agricultural pests, (3) biological control of aphids, psyllids and fruit flies. Ecophysiology of Coccinellidae, Chrysopidae, systematics of Coccinellidae, Anthicidae and Encyrtidae. Honors: AAAS Fellow, past president of the Pacific Coast Entomological Society. President of the Pacific Branch of the

Entomological Society of America 1978-79.

Member, U.S. Scientific Study Team on Biological Control in China, August 1979. President of the International Organization of Biological Control, 1980-84.







State of California )  
 ) ss.  
City and County of San Francisco )

Steve Dreistadt, being first duly sworn, deposes and says:

I am a Research Associate employed on a full-time basis by Citizens for a Better Environment, San Francisco, where I have been employed for two years. I received my Bachelor of Science (B.S.) in Environmental Technology from the University of Wisconsin, and have subsequently done substantial professional work in assessing pest control programs.

I have devoted a large portion of my time over the last six months to serving as an information clearinghouse on the Medfly program, to keeping abreast of the program's progress on a daily basis, and to informing the public as to the status of the program.

I have reviewed the records of

the United States Department of Agriculture, the California Department of Food and Agriculture, and the Santa Clara and Alameda County Departments of Agriculture on the Mediterranean Fruit Fly eradication program, and those files reveal the following statistics:

1. In the last four months, a total of seventeen wild flies have been trapped, although there are in excess of 3,000 traps.

2. Not a single wild fly has been trapped since January 22, 1981.

3. The total of wild flies captured since November 20, 1980 have all been within a fifty-square-mile area in the cities of San Jose, Sunnyvale, and Santa Clara, despite the fact that many of the traps are outside of that area.

4. Since the beginning of the California trapping program, not a single

Medfly has been found in any agricultural produce anywhere in the state.

5. The ratio of artificially released sterile flies to wild flies captured in the traps since the beginning of November has averaged in excess of 20,000 to 1. This ratio compares to a ratio of 100 to 1 set by the United States Environmental Protection Agency as a danger point which might indicate inadequacy of the present eradication program.

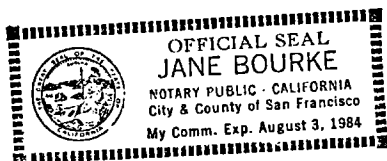
Based upon the above, it appears that the probability of a serious outbreak of the flies is negligible if the present eradication program is continued.

Even if the present program was to prove unsuccessful, the Department of Food and Agriculture has a "last resort" contingency of urban aerial spraying. While the amici in this case do not endorse the criteria proposed for employing aerial spraying, they are worthy of

note: the Department, according to criteria issued by its project director on February 18, 1981, states that "Five or more fly finds combined with at least one larval would be compelling evidence that aggressive breeding and reinfestation was occurring (sic) and that aerial application should be implemented as soon as possible." Thus it is the expressed intent of the Department of Food and Agriculture to take extreme action when a very small population of flies has been identified. Notwithstanding the above, Texas has taken steps which, according to the Department of Food and Agriculture, could deprive California of tens of millions of dollars in agricultural sales without there being any evidence that any produce has been or ever will be infested with the Mediterranean fruit fly.

Steve Dreistadt  
Steve Dreistadt

Subscribed and sworn to before  
me this 4 day of March, 1981.



Jane Bourke

Notary Public

My commission expires 8/3/84.





