No. 90, Original

SUPREME COURT OF THE UNITED STATES

October Term, 1980

STATE OF CALIFORNIA,
Plaintiff,
vs.

STATES OF TEXAS, FLORIDA, ALABAMA, MISSISSIPPI, AND SOUTH CAROLINA,
Defendants.

ACTION IN ORIGINAL JURISDICTION

REPLY BRIEF OF PLAINTIFF STATE OF CALIFORNIA

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

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 W. HAMILTON
MARY HACKENBRACHT
M. ANNE JENNINGS
Deputy Attorneys General
6000 State Building
San Francisco, CA 94102
Telephone: (415) 557-3920

Attorneys for Plaintiff
State of California

UNITED STATES SUPREME COURT

STATE OF CALIFORNIA, Plaintiff, v. STATES OF TEXAS, FLORIDA, ALABAMA, MISSISSIPPI, AND SOUTH CAROLINA, Defendants.	NO. 90, Original REPLY BRIEF OF PLAINTIFF STATE OF CALIFORNIA

The State of California submits this brief in reply to the briefs submitted by the defending states.

I. THE COURT SHOULD GRANT OUR MOTION FOR LEAVE TO FILE BILL OF COMPLAINT.

The reply briefs of the defendants indicate that the quarantines of some states have been modified to comply with the quarantine established by the U. S. Department of Agriculture ("USDA"),[1/] and that the quarantines of other states have been challenged--and temporarily enjoined--in actions brought by California growers in lower federal courts.[2/] This situation gives rise to

---

1. South Carolina and Alabama have modified their quarantines to conform with the USDA quarantine. S.C. Br. 2; Ala. Br. 6. The Mississippi quarantine apparently conformed with the USDA quarantine at all relevant times, Miss. Br. 2 n. 2, and thus no controversy apparently exists or ever existed between California and Mississippi.

2. The quarantines adopted by Texas and Florida have been challenged in actions brought in federal district courts by the California Grape and Tree Fruit League, and the district courts have issued temporary restraining orders in the two cases. Tex. Br. 2; Fla. Br. 17 n. 3.

the question whether the Court should decline to review the controversy on grounds that it is moot with respect to some states, and that it is being properly resolved at lower federal levels with respect to other states.

Turning first to the mootness question, we filed a supplementary brief on July 24, 1981, addressing this question. As noted in our supplementary brief, this is the second time that another state or states have adopted quarantines restricting the shipment of California-grown fruits and vegetables in interstate commerce. Cal.Supp. Br. 5. Moreover, we noted that the conditions leading to the adoption of the defendants' quarantines have not been corrected, in that the Medfly infestation still exists in California. Id. at 3-4. Further, we noted that the

defendants might adopt new, more restrictive quarantines if Medfly larvae are found in other locations in California, such as the Central Valley where most of California's fruits and vegetables are grown. Id. at 4-5. For these reasons, a recurring pattern of conduct has emerged whereby a state or states may adopt new quarantines in response to the spread of the infestation. It is thus eminently possible that the defending states, or other states, will adopt new quarantines if the infestation spreads to other areas in California in the future. In short, the legal controversy threatens to continue until the underlying biological problem has been solved, which may take some time. Therefore, the Court should grant our motion for leave to file bill of complaint so that it can proceed to resolve the controversy now.

Turning next to the pendency of the lower federal actions, such actions may bear on the question whether the Court should grant interim relief in this case, particularly since the lower federal courts have granted temporary restraining orders. Such actions do not, however, bear on the question whether the Court should grant our motion for leave to file bill of complaint. As noted in our opening brief, the Court has some latitude to determine whether California is acting in a proper parens patriae capacity in this case, and thus whether the Court should review our action. Cal. Br. 99. Two of the defendants--Texas and South Carolina--object that California is not acting in a proper parens patriae capacity. Tex. Br. 1; S.C. Br. 1. The other defendants do not make this objection. We have already addressed this

matter in our opening brief, Cal. Br. 80-94, and will not repeat our discussion here. We note simply that, if this Court determines that California is acting in a proper parens patriae capacity, it would be improper to deny California the opportunity to present its case because of the pendency of private lawsuits. Otherwise, California would be unable to have its case heard in any forum, because this Court's jurisdiction is "exclusive" in actions between states. See 28 U.S.C. § 1251(a)(1). As we noted earlier, California has sovereign interests in this case apart from the limited economic interests of its agricultural industry. Cal. Br. 80-97. If the Court decides that California is acting on behalf of sovereign interests, it should hear the matter. For purposes of this question, it is not relevant that the same issues are raised in private lawsuits.

Further, the issuance of the temporary restraining orders against Texas and Florida--although relevant on the question whether this Court should grant interim relief--is not relevant on the question whether the Court should hear this case. First, the restraining orders are only temporary, and it is possible that--after the preliminary injunction motions are heard, or after the merits tried, or after the matters reviewed at the appellate level--the defendants may be allowed to resume their quarantines, or even adopt more stringent ones.[3/] Second, since

---

3. Indeed, we are informed that Florida has already filed a motion for stay pending appeal in the U.S. Court of Appeals for the Fifth Circuit, seeking to overturn the temporary restraining order issued by the district court. In its reply brief here, Florida properly concedes that the issues in the case are "not moot" with respect to Florida because of its continuing support for its quarantine. Fla. Br. 17 n. 3. [Footnote 3 continued, next page.]

this Court's jurisdiction is "exclusive" in actions between states, California cannot lawfully be a party in the actions pending in the lower federal courts. Thus, the lower federal actions have not been finally adjudicated, and California cannot be a party in the actions in any event. For these reasons, we believe that this Court should decide to review this matter so that California can have its own case

---

(Fn. 3 cont.)

Texas argues that the issues in the case, as applied to Texas, are "moot" because Texas does not intend to seek appellate review of the temporary restraining order. Tex. Br. 2. The temporary restraining order, however, applies only to Texas' existing quarantine, and thus does not prohibit Texas from adopting another quarantine in the future. Indeed, press accounts of July 28, 1981, indicate that the Texas Governor has issued a proclamation calling for inspection of all California produce entering Texas, which indicates that Texas may be contemplating some additional action to restrain the shipment of California-grown fruits and vegetables in Texas.

heard in the proper federal forum.

It should also be noted that, if this Court grants our motion for leave to file bill of complaint, it does not deprive itself of the right or opportunity to dismiss our complaint on grounds of "mootness" at a later time, depending on future events. That is, if California successfully eradicates the Medfly, no reasonable possibility would exist that the defendants would adopt quarantines restricting the interstate shipment of fruits and vegetables grown in California. Under that assumption, no controversy would exist between the states, and the Court should properly dismiss our complaint on grounds of "mootness." That situation does not exist at the present time, however. To date, the Medfly infestation still exists in California, and thus there is a constant threat that

the defending states, or other states, will adopt future quarantines restricting the shipment of California-grown fruits and vegetables. As long as that threat exists, our action cannot be deemed "moot," and the Court should thus decide to hear our case.

Finally, if the Court grants our motion for leave to file bill of complaint, it is our intention to have the preemption issue--but not the interstate commerce issue--raised expeditiously before this Court by way of a motion for summary judgment. The preemption issue presents a pure question of law, and the interstate commerce issue--which depends on extensive analysis of a changing factual situation--does not. The preemption issue is simply defined: we assert that the other states cannot adopt quarantines more stringent than the USDA

quarantine, and the defending states assert that they can.[4/] Thus, by raising only the preemption issue, we intend to place the case in a posture whereby the Court can expeditiously reach an important legal issue that, in our judgment, will definitively resolve this continuing interstate controversy. This is the kind of question that is proper for this Court to decide, and this is a proper posture for the Court to decide it. Therefore, the Court should grant our motion for leave to file bill of complaint.

II. THE COURT SHOULD GRANT OUR APPLICATION AND MOTION FOR INTERIM RELIEF.

In our opening brief, we argued that

---

4. Florida specifically argues that it has the right to adopt a quarantine that applies to areas beyond the scope of the USDA quarantine. Fla. Br. 15. Thus, a clear dispute exists between the litigants on the preemption issue.

the Court should grant interim relief because of the likelihood that California will prevail on the merits, and because the balance of irreparable harm weighs in favor of California. See Cal. Br. 104-159. We do not repeat our arguments here. A response is necessary, however, to allegations made by some defendants that California caused the Medfly infestation to spread by failing to timely commence its aerial spraying program. See Fla. Br. 3-4; Ala. Br. 2-3. In fact, Alabama argues that the aerial spraying decision was delayed by action of the "highest State officials" of California, apparently for reasons unrelated to entymology or other scientific factors. Ala. Br. 2.

The charge is totally untrue. According to the head of California's Medfly eradication project, California established a Medfly technical review committee--

consisting of federal, State and academic experts--to determine whether, and under what circumstances, aerially spraying should commence. Declaration of Jerry Scribner, Ex. B, at 7. This committee developed criteria to measure the success of the existing eradication program, and to determine whether an aerial spraying program should be commenced. Id. This committee did not recommend aerial spraying earlier in this year, for the reason that larval finds were insufficient to justify such a program. Id. In short, it appeared that the existing eradication program was successful, and that there was no need to aerially spray. Starting in late June 1980, however, many larval finds were made in the area of the infestation, thus indicating a new breeding generation of Medflies. Id. at 3. The number of finds greatly exceeded

the criteria that had been established by the Medfly technical review committee. Id. at 7. Thereupon, on July 7, the committee unanimously recommended the commencement of an aerial spraying program. Id. On July 10, the Governor issued an order authorizing the program. Id. at 7-8. The program commenced on July 13. Id. at 8. It is thus clear that California took timely action to embark on an aerial spraying program once it was clear that such a program was necessary.

Indeed, Florida, in arguing that California improperly delayed its aerial spraying program, submits a declaration of a local expert, Charles Poucher, who also submitted a declaration on our behalf in our earlier action against Texas. In his earlier declaration, the declarant stated:

> "Fruit stripping is a community affair with full backing of most of the people involved. . . . Ground spraying with malathion bait spray is on schedule. . . . There is no known Medfly infestation within 35 miles of any commercial host crop. . . . The dedicated, united efforts and close working relationship by State and Federal Medfly officials are making the program work." Declaration of Charles Poucher, at 2, Ex. D in support of California's Motion for Leave to File Complaint, California v. Texas, Original No. 87.

It is thus clear that California did not commence an aerial spraying program earlier this year because there was insufficient scientific basis for such a program. Florida and Alabama, in asserting that California delayed the aerial spraying program for other reasons, make wildly speculative charges that have no basis in fact.[5/]

---

5. Mississippi also argues that the Medfly infestation poses a threat to the public "safety" which greatly outweighs California's concerns for its agricultural

(Fn. 5 cont.)
"commerce." Miss. Br. 10. In fact, the Medfly, whatever its other vices, poses no threat to the public safety whatsoever. All scientific authority agrees that the effects of the pest are confined to the economic arena, and do not extend to the public health arena.

Alabama asserts that California is already complying, or intends to comply, with the trap density requirements provided in the defendants' quarantines. Ala. Br. 6. This is not true. The defendants' quarantines require that detection traps be set at a minimum rate of five traps per square mile in the "county of origin" of the affected produce. Cal. Br. 18, 23, 28, 33, 38. The USDA quarantine does not have a minimum trap density requirement. California and the USDA have entered into a protocol, however, whereunder California has agreed to establish traps at a minimum rate of five traps per square mile in "urban and host crop" areas. Thus, the defendants' quarantines establish trap density requirements on a county-wide basis, and California has agreed to establish trap density requirements only on the basis of urban and host crop areas. In short, California and the defending states impose different trap density requirements on the same producers; producers can lawfully ship under California law in circumstances where such shipments are in violation of the laws of the defending states.

CONCLUSION

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

Dated: July 28, 1981

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

By 
RODERICK E. WALSTON
Deputy Attorney General

Attorneys for Plaintiff
State of California