IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 52, Original

UNITED STATES OF AMERICA,

Plaintiff,

v.

STATE OF FLORIDA,

Defendant.

BRIEF OF AMICI CURIAE STATES OF DELAWARE, GEORGIA, MAINE, MARYLAND, MASSACHUSETTS, NEW HAMPSHIRE, NEW JERSEY, NEW YORK, NORTH CAROLINA, RHODE ISLAND, SOUTH CAROLINA AND VIRGINIA

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Amici curiae the States of Delaware, Georgia, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, Rhode Island, South Carolina and Virginia file this brief, sponsored by their Attorneys General, pursuant to Rule 42(4) of the Rules of this Court.

QUESTION PRESENTED

This case, in which Florida is the defendant, and Original No. 35, in which amici curiae are the defendants,

place in issue for the first time the question of federal versus State ownership of the natural resources of the Atlantic continental shelf, and both cases raise the question whether this Court's decision in *United States v. California* should be applied to the Atlantic Ocean. The underlying historical, factual and legal issues have been fully developed in evidentiary proceedings in Original No. 35, which will probably be before this Court early next Term. Those underlying issues could not be and were not developed in this case, because Florida was expressly precluded from raising them when this case was severed from Original No. 35. The question presented is:

Should not this Court's consideration of this case be postponed for a brief period, so that it may be heard next Term together with Original No. 35, because (1) immediate consideration of this case without the benefit of the Master's report in Original No. 35 would deny the Court the opportunity of first confronting the issues on an adequate record and be inconsistent with this Court's reference of Original No. 35 to a special master; (2) reaffirmation by the Court in this case of the *California* doctrines and application of them to the Atlantic would seriously prejudice the rights and interests of amici curiae; and (3) no party will be injured by a short delay until next Term of the disposition of this case, or at least of the issues herein which overlap Original No. 35?

INTEREST OF AMICI CURIAE

Amici curiae are twelve of the thirteen Atlantic seaboard States. All of them are defendants in *United States v. Maine et al.*, Original No. 35. The aspects of the present case dealing with the Atlantic Ocean were originally a part of Original No. 35, but were severed from it on the theory that Florida's case presented no

issue of law or fact in common with the issues raised by the other twelve Atlantic seaboard States.

As this case proceeded, it developed that, notwithstanding the basis for severance, its disposition necessarily involves the resolution of several critical issues of fact and law which profoundly affect the rights and interests of amici curiae. These issues have been fully developed on an exhaustive evidentiary record in Original No. 35 before the Special Master, whose report in that case is imminent. Amici fear that a disposition of the present case, without the benefit of the record developed in Original No. 35, might result in determinations inconsistent with the historic title which they assert and would therefore be seriously prejudicial to their rights and interests.

PRIOR AND RELATED PROCEEDINGS

1. *Institution of Original No. 35 and Severance of Florida Therefrom*

The Atlantic Ocean issues in this case were formerly part of *United States v. Maine et al.*, Original No. 35, which was instituted in April 1969 by the filing of a Complaint by plaintiff against all thirteen Atlantic coastal States, *i.e.*, amici curiae and Florida. The issue raised by the Complaint was, and is, whether it is the United States or the defendant States which possess the exclusive right to explore and to exploit the natural resources of the seabed and subsoil underlying the Atlantic Ocean, extending seaward more than three miles from the ordinary low-water mark and from the outer limit of inland waters on the coast to the outer edge of the continental shelf. The Complaint sought to establish that exclusive right on behalf of the United States and to defeat any conflicting

"right, title or interest" claimed by the States. On June 16, 1969, this Court granted plaintiff's motion for leave to file the Complaint.

The Answers of the States varied in language, but generally claimed "some interest" in the area in question, denied plaintiff's claimed exclusive right, and asserted exclusive rights to explore and to exploit on behalf of themselves. See, *e.g.*, Answer of the State of Maine. Each of the twelve defendant States other than Florida alleged that it is the successor in title to the crown of England and certain of its grantees with respect to exclusive rights in the seabed and subsoil in question which were possessed by the crown of England and its grantees prior to the adoption of the United States Constitution, and that neither by virtue of anything in the Constitution nor otherwise have such rights been lost or transferred from the States to the United States.

The Answer of the State of Florida, on the other hand, relied solely for the source of its alleged title on a provision of its Constitution of 1868, approved and accepted by the United States Congress, which defined Florida's boundary in the Atlantic Ocean as the edge of the Gulf Stream. In Paragraph V of its Answer, Florida expressly disclaimed asserting any claim other than that said to flow from the boundary provision of its 1868 Constitution. In Paragraph VIII of its Answer, Florida raised a question concerning the location of the dividing line between the Gulf of Mexico and the Atlantic Ocean.

In January 1970 the United States filed a Motion for Judgment. In the brief accompanying its motion, the United States argued that all the contentions of the defendant States were precluded by this Court's decision in *United States v. California,* 332 U.S. 19, and subse-

quent cases.[1] These decisions, plaintiff argued, conclusively established that the Atlantic coastal States "had no rights in the submerged lands or natural resources seaward of the low-water line and outer limit of inland waters" during the colonial period, but that such rights had come into existence *ab initio* only after the formation of the Union and in favor of the Federal Government (pp. 21-23).

On January 30, 1970, the States of Delaware, Maine, Maryland, Massachusetts, New Hampshire, Rhode Island, South Carolina and Virginia filed a motion for reference of the case to a special master. The moving States proposed that "the case should be referred to a master to take evidence, making findings of fact, conclusions of law and recommendations for decree, and that the master be specially instructed to consider and report upon the scope and validity of the historical claims of the States to the submerged lands in question" (p. 2). The moving States contended that, not having been parties to the *California* and subsequent cases, they were not bound by the decisions in those cases, and that they intended "to offer proof substantiating" their historic titles to the seabed and subsoil rights in question "and showing that any past rejection of them was error" (p. 8). Separate motions for reference of the case to a special master were filed by New York, New Jersey and Georgia.

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[1] However, when Massachusetts sought leave to intervene in the *California* case when that action was pending in this Court, plaintiff had successfully opposed such intervention, stating: "Massachusetts cannot be affected by any judgment which may be enforced in this suit." Memorandum in opposition to motion of Massachusetts for leave to intervene, p. 1.

Florida also filed a motion for reference to a master, but in addition moved for severance of Florida from the other twelve States and for trial of Florida's case separately.

On June 8, 1970, the Court granted the various motions for appointment of a special master and appointed the Honorable Albert B. Maris, with authority to conduct evidentiary hearings and "to submit such reports as he may deem appropriate." The Court did not rule on Florida's motion for severance.

On December 18, 1970, Florida filed with the Special Master a memorandum of law in support of its motion for severance. Florida argued that severance was appropriate "since its boundary claims rest upon questions of law and fact entirely distinct from those applicable to the other defendant States, and, further, that . . . said boundary claim arises from an event or transaction entirely distinct from the events applicable to the other defendant States" (p. 1). Florida reiterated that its sole reliance was "upon express Congressional approval of her maritime boundaries at the time it was readmitted to the Union in 1868" (*ibid.*).

On January 8, 1971, the Common Counsel States[2] filed with the Special Master an answer to Florida's motion for severance, stating that they took no position thereon. The United States filed a memorandum opposing severance on the ground that the same underlying

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[2] As used herein, and in the proceedings before the Special Master, this term refers to the States of Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island and Virginia, all of which were represented by the same joint counsel (as well as by their Attorneys General) before the Master.

constitutional and legal issues were involved with respect both to Florida and to the other defendant States. On January 14, 1971, the Special Master issued an order granting Florida's motion for severance.

On February 5, 1971, the United States, by the Solicitor General, addressed a letter to the Special Master suggesting that the Master submit to the Court a report recommending severance of Florida from Original No. 35 and consolidation of the issues respecting Florida with certain outstanding Florida-related issues in *United States v. Louisiana et al.*, Original No. 9. The Solicitor General's letter contained the following:

> "[T]he United States does not want to argue twice – once as to the twelve States remaining in No. 35, Original and again as to Florida in No. 9, Original – questions of colonial or constitutional law common to the Atlantic coast claims in both cases. It was our understanding that you did not intend to place us in that position, and it is our understanding from Florida's Amended Answer and from discussions with counsel for Florida that Florida does not intend to argue such questions, though it reserves the right to claim the benefit of any applicable ruling that the Court may make regarding those questions as to the twelve States remaining in No. 35, Original."

The proposed order suggested by the Solicitor General, and appended to his letter, carried through the above thought by the following proposed provisions:

> "It appears that the State of Florida, while reserving its right to the benefit of any applicable ruling that the Court may make in this case, does not itself intend to present any evidence or to make any argument with respect to the defenses raised by the other defendants herein – namely, those

defenses based upon the alleged rights of British colonies under colonial grants or charters, or based upon a claim that States of the Union have constitutional rights of a proprietary character in the submerged lands and natural resources of the bed of the territorial sea within their boundaries."

* * * * *

"This order is made upon the condition that in No. 9, Original, the State of Florida will not present any evidence or make any argument with respect to the rights of British colonies under colonial grants or charters, or with respect to any claim that States of the Union have purely constitutional rights of a proprietary character in the submerged lands or natural resources of the bed of the territorial sea within their boundaries; but the State of Florida shall be entitled in No. 9, Original, to the benefit of any determination that the Court may make in No. 35, Original, with respect to those questions, to the extent that such determination may be relevant and applicable to the factual situation of the State of Florida."

On March 29, 1971, the Special Master issued his Report Upon Motion of the State of Florida for Severance. The Master agreed that Florida's claim, resting as it did solely on the Constitution of 1868, "is entirely different from those of the other defendant states" (p. 2). The Master concluded (p. 3):

"On the basis of the position of Florida as thus stated, it appeared to me that while there are undoubtedly questions of law and probably also of fact common to the causes of action of the United States against the 12 defendant states other than Florida which have been joined in this action, there are no questions of law or fact, except possibly with respect to the construction of the Submerged Lands

> Act, common to those 12 causes of action and the cause of action asserted against the State of Florida. I accordingly concluded that the cause of action against Florida was misjoined with the other 12 causes of action in this case and should be severed and proceeded with separately, as provided by Rule 21, F.R.C.P. Counsel for the United States agreed with this view."

At pp. 5-6, the Special Master adopted the condition quoted above, suggested by the United States, which limited the evidence and arguments which Florida could present in the recommended severed and consolidated proceeding:

> "This order should be upon the condition that the State of Florida will not present any evidence or make any argument in the consolidated cause with respect to the rights of the British colonies under colonial grants or charters, or with respect to any claim that the States of the Union have purely constitutional rights of a proprietary character in the submerged lands or the bed of the sea adjacent to their coasts; but the State of Florida should be entitled in the consolidated cause to the benefit of any determination that the Court may make in No. 35, Original, with respect to those questions to the extent that such a determination may be relevant and applicable to the factual situation of the State of Florida."

On March 29, 1971, the United States and the State of Florida filed a Joint Motion in No. 9 Original to implement the Special Master's Report by consolidating the Florida-related issues in No. 9 Original and No. 35 Original and to appoint a special master. On June 28, 1971, the Court granted this motion, as well as Florida's motion for severance, and appointed Judge Maris Special

Master in the new consolidated proceeding, which was docketed as No. 52 Original.

2. *Evidentiary Proceedings in Original No. 35*

In the meantime, proceedings had begun before the Special Master in No. 35 Original, involving the twelve defendant States other than Florida, with a conference on July 28, 1970. Those proceedings have continued for almost four years. Briefing was completed in March 1974, and the case is now pending before the Special Master for his report. Evidentiary hearings were held before the Special Master totaling 14 days of testimony, with a transcript of 2,800 pages. The testimony of ten expert witnesses was heard: five on behalf of the United States, four on behalf of the Common Counsel States, and one on behalf of the State of Virginia. Plaintiff and all the defendant States introduced voluminous exhibits, totaling 1,257 in number and amounting to many thousands of pages. The briefing schedule has involved more than one year, and briefs totaling some 1,200 pages have been filed.

In these proceedings the defendant States have introduced massive evidence, never previously before this Court, to establish that they have valid historic titles to the seabed and subsoil resources at issue in Original No. 35, notwithstanding the Court's belief in the *California* case, arrived at without the benefit of any evidentiary record, that no such historic titles existed.[3] For the

[3]Original No. 35 is the first of the "tidelands" or continental-shelf cases which the Court has referred to a Special Master for evidentiary proceedings bearing on the underlying legal issues. In the *California* and all succeeding cases those issues were decided on the pleadings and briefs alone.

convenience of the Court, amici curiae file herewith ten copies of the Brief for the Common Counsel States (Annex 1 hereto, volumes 1 and 2) and of the Rejoinder Brief for the Common Counsel States (Annex 2), submitted to the Special Master, in which the contentions made in Original No. 35 are fully set forth together with the evidentiary basis for them.[4]

At pp. 4-5 of their Brief (Annex 1, volume 1) the Common Counsel States summarized their contentions as follows:

> "Very briefly, the position of the Common Counsel States is that the record establishes that under the law and practice of England prior to and during the 17th and 18th centuries the seabed comprising the continental shelf of England and of English possessions was subject to an exclusive right of exploitation in favor of the English crown. In that period no generally recognized principle of international law prohibited or denied that exclusive right to the English crown. During the period 1492 to 1776, England acquired by right of discovery and the performance of symbolic acts of sovereignty the territories now comprising the defendant States and the adjacent continental shelf. During that period the crown granted its right of exploitation over part or all of that continental shelf to colonial proprietorships and governments. At American indepen-

[4] The purpose of this submission is not, of course, to litigate the issues in Original No. 35 in advance of the Special Master's Report. Rather, the briefs are submitted to show the nature of the contentions involved and to give some indication of the extensive supporting evidence which will be included in the record in Original No. 35.

dence those rights passed individually to the successor independent States. If any portion of the Atlantic continental shelf was not granted to the colonial proprietorships and governments by the crown prior to 1776, then such portions were retained by the crown until they passed to the adjacent coastal States individually at independence.

"Nothing has occurred since 1776 which has divested the defendant States of the right of exploitation of the continental shelf which they had thus acquired. The States preserved their respective rights when they entered into the Articles of Confederation and into the Constitution of the United States. Nor have those rights been divested by any acts of abandonment or renunciation on the part either of the United States or of the States from 1776 down to the present, or by operation of international law. Thus they still exist in their full force and vigor.

"Finally, even if it should be held, contrary to our submission, that the exclusive right here at issue did not exist on behalf of any one prior to 1945, but came into existence as a wholly new right between 1945 and 1958, then it is the position of the Common Counsel States that it came into existence as a right of the States rather than of the Federal Government, because of the allocation of powers and property incorporated in our Constitution, and particularly because of the status of the defendant States as residual sovereigns of their land territory and as owners of the unallocated or ungranted public lands within their territories or appurtenant thereto."

Each of the above contentions involves important questions of fact which this Court has never decided on the basis of an evidentiary record, though it expressed

views respecting many of them without such a record in the *California* case. The evidence submitted by amici curiae to the Special Master included the testimony of expert witnesses who testified in detail that the seabed and subsoil rights at issue were owned by the crown of England long before plaintiff came into existence and were fully recognized by English law, American colonial law and international law long prior to 1776. Amici's experts also testified, on a factual basis, that it was never intended that such rights be extinguished or transferred to the Federal Government during the revolutionary or Confederation periods or pursuant to the Constitution, but rather that factual analysis demonstrates that these rights were intended to, and did, remain with the individual States as successors in title to the antecedent colonial governments and to the English crown. Further, amici introduced expert testimony and other evidence to show that there is no inconsistency between State ownership of these rights and the federal foreign affairs and defense powers as was assumed in the *California* decision.[5]

The proposed findings of fact and conclusions of law submitted by the Common Counsel States to the Special

[5] The witnesses for the Common Counsel States were Lyman B. Kirkpatrick, Jr., Professor of Political Science at Brown University and former Executive Director of the Central Intelligence Agency; Morton J. Horwitz, Assistant Professor of Law at Harvard Law School; Philip C. Jessup, former Judge of the International Court of Justice and former Hamilton Fish Professor of International Law and Diplomacy at Columbia University, and Joseph H. Smith, George Welwood Murray Professor of Legal History at Columbia Law School. Virginia's witness was David H. Flaherty, Assistant Professor of History at the University of Virginia.

Master in Original No. 35 are set forth at the beginning of the Brief for the Common Counsel States (Annex 1, volume 1), pp. F-1 *et seq.* Many of these proposed findings and conclusions would, if accepted by the Special Master, require this Court to reexamine statements relating to historical fact and to the factual basis for conclusions of constitutional law made by this Court in the *California* case. See, *e.g.*, Findings and Conclusions 1, 8, 12, 22-45, 50-53, 55, 64-70. Amici have, in short, pursuant to the clear mandate given to the Special Master by this Court in granting the motions for reference to a master, asked the Special Master to make a thoroughgoing examination of the factual underpinnings of amici's case even though this could involve conclusions directly at variance with views expressed by this Court in *California* without the benefit of an evidentiary record.

The United States has not disagreed with amici that these issues are properly before the Special Master. The United States has itself introduced voluminous evidence on these issues, and presented the testimony of five witnesses treating the same subjects as those dealt with by amici's witnesses. The several briefs filed by the United States do not dispute the relevance of any of these issues, but rather argue all of them on their merits. The United States has indeed relied heavily on the *California* decision, but recognizes that that decision cannot dispose of the issues in the context of the reference to the Special Master, and has confined itself to contending that the *California* and subsequent decisions place "a heavy burden" on amici in demonstrating the erroneousness of the views expressed in those decisions. Brief of the United States, pp. 25-29. The United States' proposed findings of fact and conclusions of law likewise deal with the merits of amici's contentions and evidentiary presentation.

In their Rejoinder Brief (Annex 2), pp. 2-3, the Common Counsel States summarized their position on *California* as follows:

> "We think it so clear as not to require extended discussion that in declining to grant plaintiff's motion for judgment on the pleadings, and in granting the motion of the Common Counsel States for reference to a Special Master, the Supreme Court indicated its desire that the States' contentions be examined on their merits, rather than being foreclosed at the outset by reliance on the *California* decision as plaintiff had urged. So far as that requires, the Special Master has a mandate to take a wholly fresh look at the soundness of the *California* and subsequent decisions and to recommend in his report that they be overruled if they are found to have been historically and constitutionally unsound. Otherwise the entire proceeding before the Special Master would have been a pointless exercise. As we understand plaintiff's position, it recognizes that the Special Master may properly recommend the overruling of *California*, but contends that he should do so only if defendants have sustained 'a heavy burden.' We think this position is inconsistent with the desire for a fresh evaluation which the Supreme Court's action expressed, and also unsound for the reasons stated at Br. pp. 5-7. Finally, while we believe it unnecessary that we sustain 'a heavy burden,' we submit that the evidence adduced in this proceeding does decisively demonstrate the historical and constitutional unsoundness of *California* and its progeny."

The United States filed a Response to the Rejoinder Brief, but expressed no disagreement with the position stated above.

3. *Original No. 52: Briefs and Master's Report*

The evidentiary hearings in the severed *Florida* case, which were conducted pursuant to narrow limitations on Florida's right to present evidence (see p. 9, *supra*), were much less extensive than those in Original No. 35. Similarly, the United States refrained from introducing the evidentiary materials which it has introduced on its own behalf in Original No. 35. As a result, briefing was completed in August 1973 and the case was submitted to the Special Master for decision.

In its Brief to the Special Master, notwithstanding the basis on which Florida had been severed from the other twelve States in Original No. 35, the United States took the position that "the question of the extent of state sovereignty under the Constitution is similar with respect to all thirteen States" (Post-Trial Brief of the United States, p. 4). The United States relied heavily on the *California* decision as applicable to all coastal states and as precluding a decision in Florida's favor. After citing *California* and its progeny (*id.* at 11), the United States declared:

> "The dispute in the present case – *i.e.*, who has the right to the natural resources of the seabed and subsoil in the disputed area off the coast of Florida – is similar to the disputes in the cases cited above. Those Supreme Court decisions provide the basic law for resolving this dispute." *Id.* at 12.

In particular, the United States relied on *California* as holding that (1) during the colonial period no seabed or subsoil rights existed in the continental shelf (*id.* at 20); (2) our law prior to 1945 did not recognize, and in fact precluded, any seabed and subsoil rights beyond the three-mile territorial sea (*id.* at 20-21); (3) seabed and subsoil resources, including those in the Atlantic, beyond

three miles were first claimed by President Truman in 1945 (*id.* at 21-22); (4) under the Constitution, the States own only "inland waters," and the bed and subsoil of all waters below low-water mark in the sea belong to the United States unless expressly alienated by it (*id.* at 12-13). Every one of these propositions is a subject of intense controversy in Original No. 35 and has been the subject of extensive evidentiary proceedings and voluminous briefing therein.

Florida's brief relied solely on the approval by Congress of its 1868 Constitution and the maritime boundary described therein. That confirmation, Florida argued, entailed the conveyance by the United States to Florida of exclusive seabed and subsoil rights within the boundary. Post-Trial Brief of the State of Florida, pp. 17-38. This contention, of course, contradicted the view expressed in *California*, relied on by the United States, that no seabed and subsoil rights beyond three miles existed until 1945, and thus that such rights could not have been conveyed to Florida in 1868. Florida was powerless to rebut this contention on historical grounds, since the Special Master's Report on severance had expressly precluded Florida from presenting any evidence or making any argument "with respect to the rights of the British colonies under colonial grants or charters" (p. 9, *supra*). Nor could Florida argue that *California* was wrong as a matter of constitutional law, since the Special Master's Report had also expressly precluded it from presenting evidence or making arguments "with respect to any claim that the States of the Union have purely constitutional rights of a proprietary character in the submerged lands or the bed of the sea adjacent to their coasts" (p. 9, *supra*). Florida was restricted to making the narrow argument that "the holding in the *California*

case has been overruled, in effect, by the submerged lands act." Post-Trial Brief of the State of Florida, p. 32.

Amici were not parties to Original No. 52 and received no notice of any of the proceedings therein or copies of the briefs filed. The Special Master's Report of January 18, 1974, a copy of which was mailed to amici and their counsel by the Special Master, was the first inkling amici had had that issues intimately involved in their own litigation had been raised and argued in Original No. 52.

Given the limitations under which Florida was struggling, the result was almost a foregone conclusion. The Special Master's Report of January 18, 1974, rejected Florida's contentions out of hand:

> "In the opinion of the Court in *United States v. California,* 1947, 332 U.S. 19, 38-39, it was expressly held that the United States, rather than the State of California, has paramount rights in and power over the marginal belt of territorial sea, an incident of which is full dominion over the resources of the seabed within that water area . . . Later, the Court expressly pointed out that the doctrine of *United States v. California,* 1947, 332 U.S. 19, is applicable to all coastal states. *United States v. Louisiana,* 1960, 363 U.S. 1, 7.
>
> "The State of Florida contends that the United States accepted the cession of Florida from Spain as a trustee for the states later to be created from that territory, that the cession included rights of ownership in the maritime belt of territorial sea along its coasts and that when the State of Florida was admitted to the Union it received those rights as trustee for its people. *Pollard's Lessee v. Hagan,* 1845, 3 How. (U.S.) 212 and *Shively v. Bowlby,* 1894, 152 U.S. 1, are relied upon to support this position. It is a sufficient answer to this contention, however, to recall that the doctrine of these cases

was restricted by the Court in *United States v. California*, 1947, 332 U.S. 19, 36, to the inland waters of a state shoreward of the low-water mark along its coast and that the doctrine is not applicable, as the State of Florida contends, to the seabed of the ocean seaward from the low-water mark." Report, pp. 9-10.

4. *Comments of the Parties in Original No. 35 on the Special Master's Report in Original No. 52*

The Rejoinder Brief for the Common Counsel States in Original No. 35 (Annex 2), filed a few weeks after the Special Master's Report in Original No. 52, commented on that Report as follows (pp. 4-6):

"In his Report in *United States v. Florida* (Supreme Court, Oct. Term 1973, No. 52 Original, January 18, 1974), the Special Master relied on *United States v. California* in rejecting Florida's claims, and pointed out the language in *Louisiana* to the effect that *California* is 'applicable to all coastal States.' Report, pp. 9-11."

* * * * *

"We believe that the Special Master's reliance on *California* in his Florida Report was conditional upon the following language of his earlier Report recommending severance: 'Florida disclaimed any intention to claim any rights derived from England under colonial grants or charters or any purely constitutional rights of a proprietary character in its capacity as a state of the Union, except that if any such rights should hereafter be determined in this case to exist with respect to any of the other 12 defendant states, Florida would want to be entitled to the benefit of that determination to the extent relevant and applicable to its factual situation.' Report of the Special Master upon Motion of the State of Florida for Severance, p. 3. We think it

> apparent that the effect of the above language was to hold the question of the validity of *California* in abeyance in the *Florida* litigation, with Florida later to obtain the benefit of any overruling of *California* in the instant litigation 'to the extent relevant and applicable to its factual situation.' Consequently, the Report in applying *California* to Florida's case presumably did so by assuming the correctness of that decision *arguendo* and did not foreclose Florida, let alone the Common Counsel States, from the benefits which might accrue if, in this case, the Master determines to recommend that *California* be overruled."

The United States filed a Response to the Rejoinder Brief from which the above passage is quoted, but in that Response did not take issue with or comment in any way upon the above passage.

ARGUMENT

Florida's case is now before the Court. The case of the other twelve Atlantic States has been submitted to the Special Master and will doubtless be before the Court next Term, probably early next Term. Amici urge that this Court postpone argument and decision in the instant case for the short time until Original No. 35 is also brought before it. The basis for this request is severalfold.

First, the two cases are interrelated and consideration of them together will assure that common issues are determined on the most complete evidentiary record. Notwithstanding the basis on which the *Florida* case was severed from that of the other States, it is now apparent from the briefs and arguments, and from the Special Master's Report in Original No. 52, that both cases share in common a number of issues of critical importance. Among those issues are the following:

1. Whether any title or proprietary rights existed in the seabed and subsoil of the Atlantic continental shelf beyond three miles prior to 1945.

2. Whether such proprietary interests as the States might otherwise have had in the seabed and subsoil are consistent, in light of relevant factual, historical and constitutional considerations, with the relationship of the States and the Federal Government.

3. Generally, whether certain views expressed by the Court in *United States v. California,* concerning or involving the history of seabed and subsoil rights and claims in English, American colonial, early American federal and international law and practice, should be reaffirmed and applied without change to the Atlantic continental shelf, or whether upon reexamination they should be modified in various respects.

In the instant case, the Court is being asked by the United States to adopt for the first time the *ratio decidendi,* dicta and factual assumptions and conclusions of the *California* decision in a case involving State versus federal ownership of seabed and subsoil rights in the Atlantic continental shelf. Yet the record and argument in this case were developed without the participation of amici – that is, without twelve of the thirteen Atlantic coastal States – and under limitations which expressly precluded Florida from making any effective argument that *California* should not be so applied. In Original No. 35, on the other hand, the interested parties have participated and a full record on the relevant issues has been made. Only through review of the forthcoming Special Master's Report in Original No. 35 can this Court determine on an adequate record whether views expressed in *California* should be applied to the Atlantic seaboard or not. Only Original No. 35 has involved the

complete evidentiary analysis of the relevant issues which this Court obviously contemplated and desired when it referred the original, unsevered case to a Special Master.

It is, of course, common practice for this Court to consider together interrelated cases involving common issues. This course serves to avoid duplication and allows all relevant issues to be resolved at the same time. This approach is especially appropriate here, moreover, because it is Original No. 35 that will provide the essential factual background against which the common issues must be evaluated and resolved.

Second, amici believe they could be seriously prejudiced if the Court were to proceed to decide Original No. 52 before receiving the Special Master's Report in Original No. 35. The position of amici throughout has been that only evidentiary hearings could lay a proper basis for determining whether views expressed in *California* were still viable and should be applied to the Atlantic continental shelf. This Court obviously believed that evidentiary hearings would assist it in resolving these questions, since it rejected the motion of the United States for summary disposition and granted the motions of the States for reference of the case to a special master.

That evidentiary basis has now been fully laid, and within a few months the Court will have the benefit of the analysis of it by an exceptionally able and distinguished Special Master. No interest will be harmed if the Court waits to avail itself of these important advantages before moving to decide issues necessarily and inextricably involving the continued vitality *vel non* of the California doctrines and their applicability to the Atlantic continental shelf. On the other hand, an affirmance by the Court of the Special Master's *Florida* Report, without waiting for his report in Original No. 35,

would create precedents injurious to the interests of amici and in their view wholly unsound. In the light of the imminence of the time when the Court will be in a posture permitting orderly decision of the issues, a short delay in the disposition of the *Florida* case is fully justified and indeed essential.

The outcome of this litigation is of immense importance to the Atlantic coastal States, since it will determine whether and to what extent they retain proprietary interests in the vast and valuable mineral resources lying off their shores. Amici have already devoted great time and expense to providing the Special Master with extensive expert testimony and documentary evidence to establish their claims and to refute factual and policy contentions of the United States made on its own behalf. Amici respectfully but earnestly suggest that fairness to them warrants delaying the resolution of this case until amici can also be heard and can make available to the Court the full factual record now being appraised by the Special Master.

Third, there can be no significant prejudice to any party from the short delay here sought in the disposition of this case. The United States may contend that it is important to expedite the decision in this case in order to begin exploitation of the undersea resources lying off Florida's coasts. The relief amici seek applies only to that aspect of the case in which Florida seeks to establish, on the basis of its 1868 Constitution and the approval thereof by Congress, its entitlement to seabed and subsoil rights in the Atlantic Ocean beyond three miles. On the basis of the Special Master's Report and the briefs to him in Original No. 52, there is no overlap of facts or issues between that case and Original No. 35 with respect to the issues regarding the dividing line between the Atlantic and the Gulf of Mexico or regarding Florida's claim to certain alleged historic bays as internal waters. It appears

more reasonable to postpone disposition of this case as a whole; but if the United States should contend that there is some reason for expedition in deciding any of these issues, it would be feasible for the Court to decide them while preserving the issues overlapping Original No. 35 for disposition along with that case next Term.

If the United States should contend that there is some reason for expedition in deciding the issues which overlap Original No. 35, the short answer is that the United States cannot in any event obtain clear title to the Atlantic outer continental shelf off Florida prior to the decision of Original No. 35. This is so because of Florida's entitlement "to the benefit of any determination that the Court may make in No. 35, Original, with respect to those questions to the extent that such a determination may be relevant and applicable to the factual situation of the state of Florida." Report of the Special Master Upon Motion of the State of Florida for Severance, see p. 9, *supra.*

Moreover, the delay cannot be substantial in any event. The report of the Special Master is expected at any time and Original No. 35 should be ripe for disposition by this Court at its next Term. This litigation has been pending for several years and the United States has not heretofore argued that there were extraordinary reasons requiring special expedition. In view of the time and effort already devoted to the litigation, there is all the more reason to

follow the course that will result in the most orderly and mature disposition of the common issues.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this 24th day of April caused three copies of the foregoing Brief of Amici Curiae to be mailed, postage prepaid, to The Honorable Robert H. Bork, Solicitor General of the United States, Department of Justice, Washington, D.C. 20530, and to W. Robert Olive, Jr., Esquire, Special Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32304.

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April 24, 1974