C/

In the

Supreme Court of the United States

STATE OF HAWAII,

Petitioner,

v.

STANDARD OIL COMPANY OF CALIFORNIA, et al.,

Respondents.

No 70-49

Washington, D.C.
October 21, 1971

Pages 1 thru 35

HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF HAWAII, Petitioner,	:	
v.	:	No. 70-49
STANDARD OIL COMPANY OF CALIFORNIA, et al., Respondents.	:	

Washington, D. C.,

Thursday, October 21, 1971.

The above-entitled matter came on for argument at 10:02 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice

APPEARANCES:

MAXWELL M. BLECHER, ESQ., Los Angeles, California, for the Petitioner.

FRANCIS R. KIRKHAM, ESQ., 225 Bush Street, San Francisco, California 94104, for the Respondents.

C O N T E N T S

- - -

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: The Court will hear arguments in No. 49, Hawaii against Standard Oil Company.

Mr. Blecher, you may proceed whenever you're ready.

ORAL ARGUMENT OF MAXWELL M. BLECHER, ESQ.,

ON BEHALF OF THE PETITIONER

MR. BLECHER: Mr. Chief Justice, and may it please the Court:

The basic issue presented by this appeal on a writ of certiorari to the Ninth Circuit is whether the claim of a State parens patriae for damages under the antitrust laws presents a justiciable controversy.

At page 11 of their brief, the respondents assert that we are asking the Court, as they dramatically put it, "to boldly create new law".

And while I suppose most lawyers appearing before this august body would like, in some measure, to be the architect of some new jurisprudential principles, I must respectfully submit to you that it is the respondents, in asking you to affirm what we regard to be the erroneous decision of the Ninth Circuit, who in fact ask you to make new law by overruling the established law made by this Court.

I submit to the Court that under two separate sets of precedents and analysis, reversal of the Ninth Circuit's decision is required.

And to begin with, the case of this Court in 1945, in the State of Georgia vs. Pennsylvania Railroad, is, I submit, dispositive of the issue framed by this appeal.

In that case the Court dealt with precisely the same question laid before it here. Namely, whether a judiciable controversy existed by the claim of the State of Georgia for both damages and injunctive relief alleged parens patriae, based on violations of the antitrust laws in the railroad industry.

While this Court, in holding that such a justiciable controversy was presented and permitting the State of Georgia to file an original complaint in this Court, ultimately concluded that its prior holding in Keogh vs. Chicago and Northwestern Railroad presented an impediment to the collection of damages, I respectfully submit and I think it patently obvious that the interdiction of that defense is completely unrelated to the standing question presented by this appeal, and is no more relevant than if the claim for damages would have been barred, for example, by the statute of limitations, by relief, by res adjudicata, or by some other substantive legal defense.

The Court, in fact, dealt with the same question, whether or not the claim could be perfected in equity under Section 16 of the Clayton Act, which the Court recall interdicts private parties from securing injunctive relief on subject

matters which are under the jurisdiction, regulatory jurisdiction of the Interstate Commerce Commission. In that case the Court went on to hold that Section 16 did not interdict Georgia's claim parens patriae for equitable relief.

But the basic holding remains unimpaired. The district court found that the Georgia case was dispositive, and that this Court had ruled in Georgia that a justiciable controversy is presented by reason of a Section 4 claim for damages parens patriae under the antitrust laws brought by a State.

I respectfully submit that the underpinning of Georgia is the recognition by this Court that Section 4 of the Clayton Act, which permits treble damages, and Section 16 of the Clayton Act, which permits equitable relief, are co-extensive. A concept expressly articulated later by this Court in its first decision in Zenith vs. Hazeltine in 1969, which recognized the fact that the two statutes afford different remedies for the invasion of a property right. Section 4 permits damages and Section 16 permits injunctive relief against threatened future injury.

In the Georgia case, it must be clear, therefore, that the Court made a value judgment and said that the interest of a State in the protection of its general economy against invasion constituted a property right capable of protection, and capable of redress under the antitrust laws.

So we say to you, as we said to the district judge, that where conduct violative of the antitrust laws affects the general welfare of the State, where there is an alleged price-fixing conspiracy which, on the record before us, we must accept as factually supported; where there is a pervasive price-fixing conspiracy, affecting a large number of consumers, that this kind of controversy which affects the general welfare and economy of the State rises above the question of local private rights, and involves a matter of State interest such that it raises a property interest under Section 4 of the Clayton Act, or Section 16 of the Clayton Act, which is protected parens patriae by an action by the State.

Now, we submit here that it is unnecessary to re-examine the rationale of the Georgia vs. Pennsylvania Railroad analysis.

We contend that the majority opinion of Mr. Justice Douglas and the dissent of Mr. Justice Stone adequately exhaust the merits of the respective positions which could be articulated in respect of whether or not a State parens patriae can make a claim for damages under the antitrust laws, where there has been an extensive injury to the consumers of the State by reason of a pervasive antitrust violation.

We ask only that the Court here reverse the error of the Ninth Circuit in holding that the Georgia case did not dispose of the present claim in the district court. And in

saying that, we urge upon you that what respondents who are here before you are in effect suggesting is that you repeal the decision in Georgia, which has remained unimpaired for more than 25 years.

I further respectfully submit to you that even absent a decision in Georgia vs. Pennsylvania Railroad, this Court, on the basis of prior precedent, would not be charging any new jurisprudential ground were it to affirm the holding of the district court and reverse the Ninth Circuit.

Recalling the case of J. I. Case Company vs. Borak, this Court said that it is the duty of the court to provide such remedies as are necessary to make effective a congressional purpose, and that where legal rights have been invaded and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.

Recently, in this year, the Court again, in the case of Bivens vs. Narcotics Agents, citing the Borak case, concluded that it was the responsibility of the federal judiciary to create a remedy to right a wrong where an Act of Congress interdicted specific unlawful conduct.

Now, how do those decisions apply even absent the Georgia precedent to this particular case? I would respectfully submit that they ought to be predicated against this Court's statement in Hanover Shoe vs. United Shoe Machinery,

that the high purpose of antitrust enforcement is best served by permitting private treble damage actions as an effective deterrent to violations of the law. And, as this Court recognized in Hanover, that any holding which permits a group of antitrust violators to retain the fruits of their illegal conduct because no effective suit could be brought against them.

Any such holding, I suggest respectfully, must undermine effective law enforcement through treble damage litigation.

So if we take the principles of Borak, as reaffirmed earlier this year in the Bivens case, against the background of the judicial and legislative purpose to be served by treble damage litigation, I respectfully submit that that series of precedents would require this Court to affirm the district court.

And here again we submit to you that it is the respondents and not the appellants who ask you to ignore established precedents in affirming the Ninth Circuit decision.

I think little need be said with respect to the subject matter of damages which also formed in part a basis of the Ninth Circuit's reversal of the district court's decision. I would respectfully characterize the holding of the Ninth Circuit in that respect as antediluvian, because long ago we passed the stage in development of antitrust or any law where wrongdoers are permitted to retain the fruits of illegal

conduct simply because there is some difficulty or lack of precision in the measurement of damages.

In Bigelow vs. R.KO. in 1946, this Court made that principle perfectly clear in antitrust law, and it is finally seeping down to the level of the district courts and the courts of appeal.

The gravamen of this charge, as presented by the State in the district court is that it is entitled, it is entitled to recover the overcharge by reason of the price fix imposed upon the consumers of the State. And that mathematical computation is capable, I submit to you, of almost precise measurement, the first mistake that permeates the court of appeals' determination that the damages in this case are simply too remote and speculative to be measured.

Q Assume this case was reversed and it was tried and that there was an award of money damages in favor of the State of Hawaii, that money would go what, into the general treasury of the State of Hawaii?

MR. BLECHER: We have presented the Court, Mr. Justice Stewart, with alternative views on that. It's essentially a matter of indifference to the State of Hawaii, except that the administrative burdens would be substantially reduced if your hypothetical were correct, that the money belonged to the State and, in effect, belonged to the citizens only because the State had it available for uses which would

reduce the tax burden of its citizens.

On the other hand, the State is not antithetical to the notion that it collect the money belonging to the consumers in the capacity as trustee and set up the necessary marchinery to permit those people who actually want the money to make a claim against the Attorney General.

But what we do say, in response to the question of whether or not there are other means available to redress the wrongs done here, what we do say is that the federal judiciary, particularly at this stage in life, ought not to be burdened by the problems of it administering a fund as is now being done in the collection of these cases under the antitrust laws. Case that are presented for appeal, for example, in the antibiotic litigation, with which this Court and courts of appeals and district courts have been burdened for three years, even though they are theoretically settled.

This is a matter, I submit to you, that ought to be resolved between the State and its government and the consumers; ought not to be burdened upon the courts with modus requirements and the administration of funds and that sort of thing.

So that the suggestion that's implicit by the respondents that the class action is really the appropriate means of redress in this kind of case, and that this is a claim which the State ought to assert, is, I respectfully suggest, window dressing.

Q Does the State of Hawaii have antitrust laws?

MR. BLECHER: Yes, it does, Mr. Justice White. It has an antitrust law fashioned almost verbatim after the Sherman Act.

Q Treble damages?

MR. BLECHER: Yes, Your Honor.

Q And is that cause of action open to the State?

MR. BLECHER: As far as I know, it is open to the State. I would assume that the federal precedents by statute are to apply in Hawaii, and since the State is the person for federal purposes, I assume it must be for State purposes as well.

Q And if there's treble damage -- these treble damages provisions lean on injury to business or property?

MR. BLECHER: Yes, I believe it does. I think it is patterned almost precisely and verbatim after the Sherman Act, and applicable portions of the Clayton Act.

Even addressing ourself back to the question of damages, even if the total overcharge were not the gravamen of the complaint, and even if the State of Hawaii were, for some reason, not entitled to that, the Ninth Circuit, I respectfully submit, erred when it said that the impact to the general economic welfare of the State was not, in this sophisticated day and age, capable of reasonably precise computation or measurement.

I submit that, today, as we pointed out in our brief in an article in the Columbia Journal of Law and Sociology, there has been discussion which would permit the quantification of damages just to the injury to the economy or welfare of the State.

And I also submit, in a more recent article, which we have not had time to cite, by an eminent professor of economics he concurs in this solution, that there are ways and methods by which economic testimony, economic analysis can quantify the impact to a State on its economy or general welfare resulting from a pervasive antitrust price-fixing violation.

Now, I respectfully submit here that there are no other means that are practicably available for the redress of this grievance.

And that's illustrated, I submit to you, by the fact that in the fourth amended complaint on file, as Count three, the plaintiff here, the State of Hawaii, had a class action seeking damages under the antitrust laws as representative of the consumers of the State of Hawaii as a result of this pervasive overcharge.

It's the respondents who now come before the Court and tell you that there are other and better means available for the adjudication of this kind of controversy, who opposed the maintenance of that class, successfully, and persuaded the district judge, as he put it, that the class was

unmanageable. It was this same industry and at least one defendant of the group that stands before you who persuaded Judge Augelli recently in the District Court of New Jersey that a consumer class action involving overcharges in the oil industry was unmanageable.

And I respectfully submit to you that unless the decision in Georgia is reaffirmed and the Ninth Circuit reversed and States are permitted to seek the redress of damages for pervasive violations to the consumers, these violations will go unredressed, the violators will be permitted to retain the fruits of their conspiracy, and the thrust of antitrust enforcement substantially diminish.

And for those reasons we respectfully urge you to reverse the Ninth Circuit's judgment.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Blecher.

Mr. Kirkham.

ORAL ARGUMENT OF FRANCIS R. KIRKHAM, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. KIRKHAM: Mr. Chief Justice, may it please the Court:

In view of the remarks of Mr. Blecher, I think it might be helpful to clarify what is before this Court and what is not. He referred to recovery of the amounts suffered by the -- damages suffered by the citizens of Hawaii.

In the third amended complaint in this case Hawaii

pleaded first the cause of action for damages, to wit, business and property, as a proprietor; and second, a cause of action for damages suffered by its citizens.

On the authority of an unbroken line of decisions by this Court, Judge Pence dismissed that count, as had the other judges who had considered it below, except for one, holding that the State of Hawaii had no standing as parens patriae to sue and recover for the injuries to its citizens.

Thereupon Hawaii filed a fourth amended complaint, with a totally different cause of action. And this time it asserted as its parens patriae count a claim for damages sustained by it as distinguished from its citizens, but a claim in addition to its injury to business and property provided by Section 4 of the Clayton Act, namely, a claim for injury to its general economy and prosperity.

Now, that claim was sustained by Judge Pence on what we think is the most extraordinary misreading of the Georgia case, which I'll come to in a moment, and it was appealed on special appeal to the Court of Appeals, and the only decision -- and only question before the Court of Appeals was whether the fourth amended complaint of Hawaii in this case, asserting a cause of action in addition to its cause of action for damages to business and property, for an injury to its general economy and prosperity is a claim that may be recovered under the Sherman Act.

We submit there were four reasons these claims could not be recovered.

First, because the injury to the general economy and prosperity of Hawaii is not an injury to its business or property within the meaning of Section 4.

Secondly, because even if it could be considered the business and property of Hawaii, nevertheless, the injury is so remote, consequential and indirect, as to fall clearly outside the area which the standing cases have held the injured person must be within.

Those two dispose of the case, and they were the only two decided by the court below. But there are two others that I will mention briefly that we think stand as insuperable obstacles to Hawaii's maintenance of this suit.

The first is that the very nature of the right which a State must assert in order to have a standing to sue parens patriae as a sovereign, namely, the injury to its citizens as a whole, to its entire social community, is a type of injury which cannot be measured by money calculus, and that an injunction is the only remedy that a court may grant.

And it is the only remedy which this Court has granted in any of the parens patriae cases before it over the course of nearly a hundred years.

And, finally, we contend that in this case, since the gravamen of the complaint is a price-fixing conspiracy, consumer-

oriented as is stated in the Reply Brief of Petitioners, directed at the consumers in a particular segment of the economy. That that is the type of injury on which a State may not sue parens patriae and that this is determined by the Oklahoma case in this Court.

Now, let me return to the points decided by the court below.

Q Well, just to make sure I understand your last point, your position is that the State of Hawaii could not sue for an injunction in this case?

MR. KIRKHAM: No, the State -- that is correct. Either an injunction or for damages.

Now to return to the two points that were decided by the court below.

In the first place, it has been settled of course, in at least the Northern Securities case, that the remedies provided in the Sherman Act are the exclusive remedies for the enforcement of the Sherman Act, and that the remedies for damages under the Sherman Act are those provided in the Clayton Act.

The Clayton Act provides that one injured by anything forbidden in the antitrust laws in his business or property may recover threefold of the damages. The term "business and property" has been construed over and over again by the courts to have its ordinary meaning as referring to a business venture,

and the Clayton Act has been construed to apply within that area in which the Sherman Act applies, which is in its freedom of commerce. It is, as this Court said in the Nord? case, an act tailored to the marketplace. And it has never been conceived by anyone that an injury such as an injury, an indescribable, an immeasurable injury, in addition to the injury to the State's business or property, which is not contested, is an injury to business and property of the STate within the meaning of Section 4.

When Congress amended the Clayton Act in 1955, to give the United States the cause of action similar to that that this Court had held in Georgia vs. Evans that belonged to the State, and permitted it to sue for an injury to its business or property. There is nothing in the reports, nothing that could possibly indicate that when that right was given the United States was being given a right to sue in addition for an injury to its business or property, the right to sue for some immessurable harm to its general economy and prosperity.

We believe that no precedent sustains that. And, as I say, the unusual thing in this case is the misreading by the court, the district court, of the Georgia case, to read that as requiring that decision.

Now, the Georgia case doesn't meet this case at all. In Georgia there were two counts in the bill of complaint by

Georgia which were considered by this Court. One was a suit, account alleging an injury to Georgia as a proprietor. For injury to railroads owned by it, its institutions, and so on. And under that count it prayed for treble damages, under the Clayton Act.

The other count was the parens patriae count, and under that count the State prayed for an injunction, and it also had an unusual money damage statement in there. It stated that the injury to the State of Georgia as parens patriae, an injury to its entire economy, was of such a nature that it could not be measured by money damages. But, said the State of Georgia, that doesn't mean that we have not been injured, and therefore we ask this court to award us "token damages" in an amount not to exceed $5 million.

A request in the nature of a request to an international tribunal to award reparation.

As far as the decision of this Court indicates, the request for token damages in the parens patriae count was not again mentioned or considered.

But what this court held was: first, on Georgia's proprietary count, which was the only count for treble damages in the case, the court could not recover damages because of the rule of the Keogh case, which does not permit treble damages in respect to rates approved by the Commission; but that this did not dispose of the main prayer of the complaint,

which was for an injunction. And the court then went on to hold that Georgia, as a sovereign, had the right, had a standing to sue for an injunction against the conspiracy that underlay the rates that had been fixed and that injured Georgia. And that's all the Georgia case holds.

And it has always been quite impossible for me to understand how Judge Pence could have misread the case. It has no bearing whatsoever upon a claim of a State to obtain treble damages under the Clayton Act for an injury to its business or prosperity.

That claim wasn't pleaded, it wasn't argued, it wasn't considered, it couldn't possibly have been in the mind of the court.

The next ground of decision by the court below, we think equally compelling. At least since the decision of the Eastman case in 1910, the courts of this nation have held that injuries that are remote from the stream of commerce upon which the conspiracy acts may not be recovered. It's the rule of every circuit, certiorari has been denied in numerous cases.

The rule has been stated in various ways. It has said that the injury must be direct instead of indirect; it's said that the person who seeks damages must be within the target area at which the conspiracy was directed. Under this principle, employees of corporations who have suffered from a

conspiracy, creditors of that corporation, stockholders of that corporation, royalty holders, lessors have been held not to be within the area of direct, which must be proved before recovery may be had under the Clayton Act.

On the other hand, where the impact of the conspiracy was intended to fall upon particular suppliers, as in the case of a conspiracy concerned with exclusive dealing, then not only the competitor or the person who conspired but his supplier has been held to be sufficiently connected with the conspiracy. And in some cases where the lessor has had rents that are computed upon the receipts of the lessee, who has been injured by the conspirary, he has been held sufficiently direct.

But no case has even considered effects of a conspiracy upon consumers in a particular segment of a State's economy upon the entire economy and prosperity of that State, which is reacted upon by everything that happens within the State.

And it seems clear beyond question that it lies entirely outside of the area of any realm of directness. It is far less direct than the charity to whom the corporation might have contributed but for the injury; it's far less direct than the injury to the school to whom the son of an employee might have gone but for the diminution of his earnings occasioned by the diminution in earnings the corporation occasioned by

conspiracy. It's simply outside the area.

For these reasons the court below reversed the district court, and we think properly so. And it is not necessary to go beyond that in order to sustain that decision.

But there are two principles, we think, that are important, which the State would have to overcome, as we submit it cannot, if it were to maintain its action in this case.

The first one of these, as I mentioned a moment ago, is the fact that when a State appears parens patriae it must assert a right which is as sovereign in its nature as the decisions of this Court have held, which affects the welfare and the health and the prosperity of the entire community.

This Court has described it as rights over and beyond the State's properties rights, and all the rights of its citizens.

That type of right is the type that Georgia asserts, and that Hawaii asserts in this case. It states that the injury that has been done has hindered its economic growth, it has prevented its manufacturers from growing, it's the type of injury that was alleged in the Georgia case.

But that type of injury is an injury which the State of Georgia itself said in its bill of complaint in this case, and understandably so, is not measurable by a money calculus. It simply does not present a case of controversy, it's not a

justiciable issue. And it certainly is not an issue which, under any rational system of law, could be tried to a jury. There is no way. And to segregate the economy of a State from the economy of the United States, actually from the standpoint of proof, with the models that econometricians have made it would be easier to measure the effect upon the national product of the United States than it would be upon a State. The economy of the State is so dependent upon the surrounding States.

It simply doesn't present a justiciable issue. And therefore, the only relief that could be granted would be an injunction against the wrong that is being directed against that State.

Now, the final reason is this: It was articulated by the dissenting judges in Georgia and the opinion of the Court that met the views of the dissenting judges makes so very clear the principle upon which I rely.

In Oklahoma vs.Atchison, Topeka & Santa Fe, a bill of complaint was filed in this Court alleging that the railroad had overcharged the citizens of Oklahoma on rates, and it alleged that the industry of Oklahoma, the oil industry, the building industry, construction industry of Oklahoma, as a young growing State, was being seriously affected by this overcharge, and that the overcharge of these rates was adversely affecting the economy of the State and would hinder its growth and

development.

Charges which are virtually identical with the charges that are made in this case, but not with those in Georgia. This Court dismissed the bill, holding that the gravamen of the complaint was simply the allocation of injury to individual citizens of the State, and each of those citizens had a remedy.

Now, when the Georgia case came, allegations there were also made that the economy of the State had been hindered, its growth hindered, and had been seriously and adversely affected. But this Court construed, in meeting the allegations and the decision in Oklahoma, this Court construed and quite specifically stated that it construed the allegations in the Georgia bill to allege a conspiracy directed at Georgia as a State. And, further, that the conspiracy there alleged was to establish discriminatory rates discriminating against Georgia, geographically, as a State, so as to erect a trade barrier around that State and disadvantage it economically vis-a-vis the other States of the Union.

Now, this extraordinary allegation, of course, was the type of allegation that was not present in the Oklahoma case, and it did give Georgia standing, if it could prove those allegations, for an injunction -- not for damages -- against the continuation of that conspiracy.

Q Do you agree with that?

MR. KIRKHAM: Yes, I agree with that. I agree with

that.

Q What are the prerequisites for an injunction? What kind of a -- I suppose it's to prevent irreparable injury?

MR. KIRKHAM: It would be to prevent irreparable injury and one --

Q Well, what kind of injury would it have been to Georgia as a State?

MR. KIRKHAM: Well, the allegation --

Q Aside from injury to its economy or its citizens.

MR. KIRKHAM: Well, there were two types of injuries: one was the injury that Georgia suffered by the excessive rates paid by railroads owned by it and by institutions that it owned --

Q I understand that.

MR. KIRKHAM: -- and the other type of injury was the injury to Georgia as an organized community.

Q Well, what kind of an injury is that? I mean how would that be manifested? What would be a symptom of it?

MR. KIRKHAM: A symptom of it? It would be very difficult to prove, Mr. Justice, but Georgia alleged that its industries had been hindered, that in the north industry had grown and in the south it had been retarded.

Of course, when they came to prove --

Q Well, you'd still be proving injury to individual

industries and citizens.

MR. KIRKHAM: It would be -- and somehow you would finally aggravate them.

Q Or you would just roll it up in a ball and call it its economy?

MR. KIRKHAM: Could call it its economy.

Q And you would agree that the State could get an injunction on that basis?

MR. KIRKHAM: Well, I would agree that Georgia -- I would agree that Georgia, and the injunction that this Court said could be granted in Georgia does not operate as a precedent for an injunction in this case.

Q What if you were wrong about that?

MR. KIRKHAM: Mr. Justice, I can't be wrong about that, because --

Q You mean your fourth point is essential for you to win here?

MR. KIRKHAM: Oh, no, no, no, no, no. No. I'm talking about the distinction of the Georgia case.

Q Well, let's assume, then, you are really wrong on your fourth point, that the State can get an injunction in this case because there is some kind of an injury that you want to prevent irreparable harm to.

MR. KIRKHAM: It has no bearing on this case. It has no bearing on this case because, in count one the State --

Q Well, you'd still have to be saying that there is some injury to the State.

MR. KIRKHAM: That is true.

Q To get an injunction.

MR. KIRKHAM: I am simply saying, Your Honor, that the State does not have standing to sue parens patriae. It's another reason for dismissal. But as far as its impact upon this case is concerned, it's negligible.

Q Yes, but just assuming the State does have standing and has the legal right to an -- and an injunction would issue in this case. Let's just assume that.

MR. KIRKHAM: Well, an injunction can issue in this case, Mr. Justice. It can issue under count one of the complaint, under Section 16.

Q Well, I know, but -- no, let's assume that they can get an injunction and its parens patriae --

MR. KIRKHAM: It would be no different from the relief that it could get.

I would simply say this, that a court in the appropriate administration of justice would say the State sues as parens patriae and as a proprietor.

As parens patriae it does not have standing to sue, but it has the right to obtain the same relief under count one, and so we grant the injunction.

The problem of measuring the economy does not come

until you reach the area of damages.

Q I understand that. But --

MR. KIRKHAM: The injunction is against the continuance of the conspiracy.

Q But if the State can get an injunction here, I assume you're saying that some court would be saying, and if we said it we'd be saying it, that it is an injury to the State which the injunction must issue to prevent. And then you get down --

MR. KIRKHAM: Yes, but I think that would be bad law.

Q Well, I understand that. But let's assume that you're wrong.

MR. KIRKHAM: Very well. Then it has no effect upon the result in this case.

Q Because even though the State is injured as a State in its economy, or somehow, it's -- you just can't measure it, is that it?

MR. KIRKHAM: That's right. And the only wrong that the petitioner complains of as injuring that State is the conspiracy, and the conspiracy, if proved, may be enjoined.

Q Of course the court below didn't decide it on that basis, --

MR. KIRKHAM: No, no --

Q -- it is not measurable.

MR. KIRKHAM: It did not reach the point with respect to parens patriae, didn't find it necessary to, and, most respectfully, I submit that it is not necessary to reach those points.

Now, if I may say just a word in closing. I am not unmindful of the policy argument that petitioner is urging before this Court with respect to liberal enforcement of the antitrust laws. I think there can be no disagreement with the fact that the Sherman Act expressed its principles just as fundamental to our economic life as the Bill of Rights is to our civil liberties.

But, as I pointed out earlier, it has been held from the beginning that the remedies under the Sherman Act are the exclusive remedies for its enforcement. Cases like J.I. Case and Bivens and Sullivan, to which Mr. Blecher referred, are cases where the Court has, as it always has, supplied from its arsenal of actions a remedy for any person who has suffered from a violation of his rights enacted by statute where the statute does not provide for a remedy.

But here the statute does provide for remedies, and they have been held over and over to be exclusive.

The other point is, I think, that factually -- Mr. Blecher, I think, is mistaken. This Court is familiar with the statistics that are handed down by the administrative office. In the last ten years the number of private treble-damage

actions filed every year in this country has nearly quadrupled. As of last June there were over 2,000 antitrust cases pending in the federal courts of this country. And as all of us who are familiar with the nature of those cases know, they are -- many, many are class actions; and the result is that there are literally millions of plaintiffs before the courts of this country today in treble damage antitrust actions.

Q Do you think the federal -- the Congress could give the States standing to sue on behalf of its citizens to recover treble damages?

MR. KIRKHAM: Yes, I think so.

Q I mean, there would be a ground of facts -- grounds for a case of controversy?

MR. KIRKHAM: I think they could probably, that Congress could give the States a right to sue for damages to its citizens. I don't think it's likely that Congress would. Most unlikely that it would.

Judge Rayhal, in one of these cases, has held that the State can exercise its powers, the ancient powers of the king, parens patriae, as protector of incompetents, idiots, and lunatics. And he has said that any antitrust defendant, potential defendant, who does not have a size large enough to make him wish to litigate it as non sui juris, therefore incompetent, and therefore the State can sue. This decision I think will be appealed.

But the last statement I do wish to emphasize is that in fact the remedies provided by Congress are providing a very formidable arsenal for the enforcement of the antitrust laws.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Kirkham.

Mr. Blecher, you have 14 minutes left.

REBUTTAL ARGUMENT OF MAXWELL M. BLECHER, ESQ.,

ON BEHALF OF THE PETITIONER

MR. BLECHER: Thank you, Mr. Chief Justice.

Respondent's suggestion that the Georgia case did not dispose of this because the claim for damages in the Georgia case was solely with respect to Georgia's own railroads. Its proprietary interest is, I respectfully submit, clearly refuted by the language of the Court itself. The majority opinion holding, as it did, that Georgia may maintain this suit as parens patriae acting on behalf of her citizens. That was the language of the holding, and in making that holding, the very next phrase is: "we treat the injury to the State as proprietor merely as makeweight".

So it seems perfectly clear, when you read the allegations of the Georgia petition, that they alleged one total injury to the economy, to the citizenry of the State. And in reaching that analysis, I think it perfectly obvious that a State is for purposes of bringing a parens patriae lawsuit, whether it be injunction or damages, nothing more than

the aggregation of its people which, as Mr. Justice White points out, when altogether, is called the economy or welfare of the community.

It's perfectly obvious, it seems to us, that the Georgia case said that the total controversy rose above the question of a mere local or private right, and that Georgia, acting on behalf of its people, was entitled to litigate the question of recovery of damages parens patriae in addition to the claim for injunctive relief.

And, carrying that to its logical extension, if, as respondents contend, parens patriae doctrine is totally unnecessary because the sweep of Clayton 16 is sufficiently broad to permit suits for injunctive relief wholly apart from the doctrine of parens patriae, then I respectfully submit the entire question presented to this Court in Georgia was futile, a waste of the Court's time to present to it an issue as to whether a justiciable controversy existed, because the question litigated in Georgia is whether that ball of wax, that economy, that general interest of the State constituted a property right capable of protection by both damage relief and injunctive relief.

And if there has been an injury, if there has been an injury to the State that permits it to acquire injunctive relief, then, as I pointed out in our opening, it seems to me we've long passed the day where that injury is not susceptible

of some reasonable monetary estimate for purposes of recovering damages. And the starting point has to be the overcharge to the consumers as a whole.

Now, for these reasons, we think that the Ninth Circuit's opinion must be reversed.

Let me leave you with this final thought, if I may. While it's true that there are a large number of antitrust cases, as Mr. Kirkham correctly points out, pending in the district courts, most of them are the result of singular type litigation following government complaints and indictments.

And the impact on the courts in those cases is going to be substantially reduced, I submit, by permitting, instead of the aggregate number of cases, a single case by a State through, generally, an elected or appointed responsible official, to recover damages for a pervasive price-fixing agreement.

While the respondents have made many technical legal arguments which are designed to preclude the recovery by the State in a case such as this, they have not answered the question which I say to you is the singular -- of singular importance, and that is, Mr. Justices, what happens to the money they have acquired as a result of this legal conduct?

If you follow the path they have charted for you, they retain it in antitrust enforcement and this bill of rights, to which Mr. Kirkham refers, suffer enormously.

I say the case cries for reversal.

Q Let me just ask you, if -- your theory is that the injury to the State is separate from that of the consumers?

MR. BLECHER: I say it is separate -- I think, Mr. Justice White, that you --

Q Well, at least you claim an injury to the State?

MR. BLECHER: Yes.

Q And that if the State recovered, could any consumer recover again?

MR. BLECHER: I think that would --

Q I mean for his separate injury.

MR. BLECHER: I think that would depend upon the -- a clarification of Georgia, that this Court would be required to make, consistent with the --

Q Yes, but what's your answer to it? Could he or couldn't he?

MR. BLECHER: I would think that the appropriate mechanism would be for the State to recover the money, to keep it, and assume that the citizens are benefitted by the return of the money to the State.

Q And so you would dismiss the citizens' suit?

MR. BLECHER: Right.

On the other hand, where --

Q So it really is -- his damages really are being recovered by the State?

MR. BLECHER: In one form or another. But, recognizing the problems that might be present by the first approach, as I suggested to Mr. Justice Stewart, the State is not antithetical to the view that it recover under what we think is the alternate parens patriae approach; and that is recover as trustee, with an obligation imposed upon it to return the money to those people who can present an appropriate claim through the machinations of State or mechanics of State government.

Q But on either of your approaches, then, what the State is recovering is money representing damages suffered by its citizens?

MR. BLECHER: No, no, I wouldn't say that, Mr. White. Under the second theory, clearly it recovers the citizens' money. Under the first, I think that one of the measurements of the impact upon the economy of the State or upon its general welfare has to be the total overcharge to the people.

Q But you would still bar the citizens' suit?

MR. BLECHER: Not under the first approach.

Q Well, I thought you said you would.

MR. BLECHER: No. I -- that's a mistake, I --

Q So you wouldn't -- if the State kept the money in its own treasury, the citizen should be able to sue for his own injury?

MR. BLECHER: That is correct, and that's what Judge Pence held in this case. That's what the district court judge

held.

Q Well, thank you. I just wanted to make it clear.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Blecher, Mr. Kirkham.

The case is submitted.

[Whereupon, at 10:51 a.m., the case was submitted.]