Supreme Court of the United States

OCTOBER TERM, 1970

In the Matter of:

Docket No. 2

EVELLE J. YOUNGER, Appellant	
vs.	
JOHN HARRIS, JR., ET AL. Appellee	

Place Washington, D. C.

Date November 16, 1970

ALDERSON REPORTING COMPANY, INC.

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C O N T E N T S

IN THE SUPREME COURT OF THE UNITED STATES
NOVEMBER TERM, 1970

EVELLE J. YOUNGER,

Appellant

vs

No. 72

JOHN HARRIS, JR, ET AL.,

Appellee

Washington, D.C.
Monday, November 16, 1970

The above-entitled matter came on for argument at 10:05 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HENRY BLACKMUN, Associate Justice

APPEARANCES:

CLIFFORD K. THOMPSON, ESQ.,
Deputy Attorney General of California
San Francisco, California
On Behalf of Appellant

A. L. WIRIN, ESQ.
Los Angeles, California
On Behalf of Appellee

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument first in No. 2, Younger against Harris.

Counsel, you may proceed whenever you're ready.

ARGUMENT OF CLIFFORD K. THOMPSON, JR., ESQ.

ON BEHALF OF APPELLANT

MR. THOMPSON: Mr. Chief Justice, and may it please the Court. This is an appeal by Los Angeles County District Attorney Evelle Younger and the People of the State of California, from a judgement in order of a Three Judge District Court in the Central District of California declaring unconstitutional on their face each section of the California Criminal Syndicalism Act Penal Code sections 11400-11402, and enjoining appellant Younger from continuing with a pending prosecution against appellee John Harris Jr.

On September 20, 1966, appellee Harris was indicted on Sec 11401 sub 3 for two violations of the Syndicalism Act for distributing literature advocating crime as a means of effecting political and econonic change.

Mr. Harris demurred to the indictment and moved to quash it in the state courts. He sought Writ of Prohibition in the Intermediate Appellate Court and petitioned for a hearing in the State Supreme Court. As we will argue later, in none of those cases did he adequately present his constitutional issue to the State Appellate Courts nor did he get a determination e

even from the trial court that the statute was constitutional in the form in which it was approved here in Whitney.

In the summer of 1967, Mr. Harris repaired to the Federal Courts, having been thwarted in the State Courts. He was joined here by three additional plaintiffs. A temporary restraining order was issued in August of 1967. Since that time the case has languished in the Federal Courts. That is over three years. The District Court held that it had jurisdiction to pass on every section of the Act by reason of the presence of Mr. Harris and appellees Dan and Hirsh who as members of the Progressive Labor Party, urged that they were inhibited in the peaceful advocacy of that parties' program by the Act and by the Harris prosecution. And by the presence of the plaintiff Broslawsky who as a history teacher urged or alleged in his complaint that the presence of the Act inhibited him in his customary practice of teaching about the doctrines of Karl Marx.

The court held that it had jurisdiction to review each section of the Act. It held that Dombrowski vs. Pfister mandated a declaratory judgement invalidating each and every section of the Act. It further held that the appellate Younger should be enjoined from continuing the prosecution which had been started the preceding year.

Our contentions to this Court are these: first, that the District Court did not have jurisdiction to pass on all sections of that statute, that except for the section under which

Harris was charged there was no case or controversy with respect to all other sections of the statute.

Secondly, that the District Court abused its discretion by refraining from abstaining and by declaring the statute unconstitutional on its face.

Thirdly, that the Smith Act does not pre-empt the Syndicalism Act. We think that that is a self evident proposition which requires no elaboration here.

Fourthly, that the Federal Anti-Injunction Stttute 28 USC 2283 bars the injunction issued here against the pending prosecution.

And finally we ur that the State Statute is constitutional. Not in the form in which it was approved in Whitney or condemned in Brandenburg. We have never urged that that statute was constitutional as it appeared here in Whitney but that it is constitutional in the light of narrowing State Court decisions decided between Whitney and Brandenburg. And we would urge also that if the Federal Court disagree with that, that if it chooses to interpose itself voluntarily between State Legislatures and State Courts, that it has an obligation to act like a State Court and uphold that statute in the manner in which the Federal District Court acted in the Mackell case.

To proceed, then, to the jurisdictional point. Our proposition that the Court lacked jurisdiction with all provisions excppt for 11401 sub 3 rests of two propositions. The first is

that the mere existence of a statute regulating free speech or association as opposed to its enforcement does not exude such a "chilling effect" as to give rise to a case or controversy under Article 3 section 2. Now there were some who thought that Dombrowdki held otherwise. But that notion should have been removed by this Courts' holding in Golden against Zwickler, and subsequently in Mitchell against Donovan. If we had any other result, of course, Federal Courts would spend a great deal of time, even more than they now do, rendering advisory opinions on rather troublesome questions of constitutional law, many of which need never be litigated.

Our second proposition is that plaintiffs Dan, Hirsh, and Broslawsky do not present a case or controversy. Now the standard is articulated as recently as Golden against Zwickler. Quoting Maryland Casualty against Pacific Coal says that "The question is whether under all the circumstances here there is a substantial controversy between parties having adverse legal interests of sufficient immediacy and reality to warrant issuance of a declaratory judgement." And we are also mindful of Mu. Justice Frankfurters' pronouncement in Communist Parties vs. Subversive Activites Control Board, that mere potential impairment of constitutional rights under a statute does not create a justitiable controversy in which the nature and extent of those rights mey be litigated. That is the standard.

The allegations are as I have said. Dan and Hirsh as

members of the Progressive Labor Party feel inhibited by the presence of the Act. Mr. Broslawsky as a history teacher somehow alleges that he is inhibited by the presence of the Act and the prosecution. We think these allegations are frivolous.

We point out that there are no overt acts by the State, there were no arrests, no searches, no seizures, no accusations, no threats of prosecution directed toward Dan, toward Hirsh, toward Browslawsky, or toward any person who was engaged in a similar errant conduct, and we invite the Courts' attention to, in effect, the finding of the District Court who in their opinion did say we are under no apprehension that Dan, Hirsh, and Broslawsky stand in any danger of prosecutinn by reason of the activities ascribed themselves in their complaint. So we think that those allegations do not give rise to justitiable controversy under Article 3 section2.

Now do we think the fact that the District Court had jurisdiction to pass on one section entitled it to conduct a search and destroy mission on our Penal Code.

First, that statute contains a severability clause. The legislature clearly stated that if it could not have all that it wanted, then it wanted all that it could have.

Secondly, itcontained different kinds of acts. Not all the subprovisions are free speech provisions. 11401 sub 1 is directed toward advocacy, subsection 3 toward circulation of literature, subsection 4 toward organizing and membership.

And subsection 5 involves crimes. It has nothing to do with speech, it is a pure conduct statute yet the District Court felt that it was warranted to pass on all those statutes. What we're asking the Court to do, then, is to take the section by section approach that was done in the Smith Act.

We think that any contrary view that to say that once the District Court has its foot in the door it can pass on everything in sight just completely ignores the principle of justitiability which underlines the Article three requirement. And they are that an informed decision can only result from a case which is contested between people having real interests. And all we have in this case is an uninformed decision by the District Court on overlooking a host of State decisions which are on point.

Our second point is that the District Court abused its descretion in refusing to abstain in declaring a statute unconstituional. The fact is the District Court in one sense did not exercise its descretion at all. It didn't think it had any. It said we may not abstain. Because this is a statute which is overbroad and which regulates free speech and Dombrowski tells us we must act. Our position is that where we can show the special circumstances present in this case, there can be no finding of irrepairable injury necessary to issue an injunction and there is no warrand tot declaring the state statute unconstitutional.

Now those factors are these: number one, the state statute is sisceptible of a narrowing construction indeed, our position is that that construction was placed on it as early as 1946 by a state decision by Justice Trainer, which we think anticipated, if it did not inspier the formulation in Brandenburg.

Secondly there is a pending vehicle, the Harris prosecution which if it is allowed to proceed, in 1970, can lead to the kind of determination which resulted in the Mackell case, and which will provide a limiting construction for that statute. One which will permit this Court to avoid the very difficult subset of constitutional questions, namely, what are the Federal limitations of state power.

Thirdly, there is an absence of bad faieh enforcement, in this case. There rre no allegations in the complatin, let alone demonstration that the state preceded against Mr. Harris without hope of convicting him simply to discourage him from exercising his protected rights.

Tha advantages of abstention, I think, are many and familiar. First, if the state court invalidates a statute, we avoid a direst Fedexal afront to state sovereignty. Our state courrs are quite capable of doing that if the constitution demands it. They did it as recently as Vogel against the County of Los Angeles, cited by the District Court on the authority of ---Keeishan invalidated a state employee loyalty oath which was required by our state constitution.

Alternatively, the State Court may provide the limiting construction which allows this Court and other Courts to avoid the substantive constitutional issues. It avoids the kind of delay we've experienced in this case, where the case has remained here for years. Now I recognize that there are some exceptional circumstances but this is not the first case like this to be in the Federal system for three years. Bell against Patterson is another example of such a delay. This Courts' calendar today I think illustrates the increased burden on the Federal Courts which result from an interventionist position. That burden shoudd be transferred to the State Courts.

Among other reasons that will engourage them to assume full responsibility for protecting Federal rights and not to abdicate the field on the assumption that if we don't handle it the Federal Courts will have to resolve it. And ultimately State Courts are not only the ultimate arbiters of State law, they are the best arbiters. They are more familiar with it; they know what they're doing. This opinion has to be a very curgent example of that principle.

And finally there is a perhaps somewhat novel consideration that we urge, In our view the abstention doctrine and the no-rewriting maxim -- that is that this court and Federal Courts do not have the obligation to construe state statutes, to the extent that they must construe Federal statutes -- are doctrines which have to co-exist or cannot exist al all. Both

were authored by Justice Frankfurter . The no-rewriting maxim is in a sense a luxury and it can only be enjoyed because of abstention. If you abandon the abstention doctrine, then you have to assume the responsibility for acting like a state court, and doing what the state court would do to save its statute. We think that that is implicit in your courts language and in Fox against Washington. So, in a sense the abstention then confers another benefit. It allows you to avoid that very difficult responsibility.

To proceed, then, to the special circumstances which we think mandate abstention in this case. Now as to the susceptibility of this statute to a saving construction. First, the guidelines for that construction have already been provided in this Courts' opinion. In Brandenburg against Ohio and in the Smith Act cases, Dennis, Yeates, Scales, and Melville.

Secondly, there can be no doubt but that the California acts would faithfully apply that guideance. The District Court recognized that when it said that the California Courts regularly have shown full allertness to the constitutional requitements and to the decidions of this Court. In effect, our statute comes before this Court in the same posture that the Smith Act did and that was susceptible of a limiting construction. However, we think that ours has even been more limited.

As to the bad faith aspect, unquestionably, a showing of bad faith enforcement is essential to demonstrate the irrepair-

able injury necessary to warrant injunctive relief. Now we have injunctive relief here, and bad faith was not shown. But we think that it is also a circumstance to be considered on the question of declaratory judgement. Where the statute is vague, it offers the possibility that state officials may take advantage of that vagueness to expand the scope of the statute to include protected conduct whish they personally disfavor. When that occurs, abstention may be mandated. It did not happen here, as it happened in Dombrowski.

We do not have the arrests, search and seizures, a futile attempt to vindicate state federal rights in the state courts as occured in Los Angeles in our case. None of that is present here. We think this court has recognized this, albeit somewhat cryptically, in the affirmances in Brooksagainst Briley, and in Wells against Reynolds, particularly the Wells case. That involved the District Courts determination not to declare unconstitutional a Georgia Statute denouncing circulation of insurrectionist papers on the grounds that the statute could be construed narrowly so as to save it from constitutional objection and because of an absence of bad faith. That holding was affirmed.

Now we recognize that this court in Zwickler against Kouda drew a sharp dichotomy between declaratory and injunctive relief, and to a certain extent we're urging and we do not hesitate to urge the assimilation of the test for those two.

We agree with the laguuage of Mr. Justice Douglas in his dissent in Mitchell against Donovan. Ordinarily a declatory judgement invalidating a state statute does in fact result in the same quantum of interference and disruption of state proceedings as does an injunction. If that is true then the criteria for determining whether you ahve a declaratory judgement or an injunction ought to be the same. And if that requires a reconsideration of Zwickler, then that's valid. We think that---

Q. Section 2283, it refers to an injunction, but not to a declaratory judgement. Are you asking us to read the statute to equate---injunction?

A. No, Your Honor, I'm saying that the statute reflects a policy of noninterference with the states.

Q. And that the policy shoudd include injunctions?

A. That's right. And say that the statute satisfies the relationship between the states and the Federal Government because the court only issues a declaratory judgement instead of an injunction has got to be the final exaltation of form over substance. We have been without this statute for all practical purposes for three years. There has been no injunction against future prosecutions, only against the prosecution of appellee Harris. And we haven't got our statute. Now we think that the ---

Q. Have you missed it very much?

A. Well, I think, Justice Stewart, that if you read the

California papers and follow the almost daily bombings and police assassinations and other things that we're familiar---

Q. There are a good many other statutes that cover that sort of conduct, I presume, aren't there?

A. They punish it onee it has occured. The problem is that not only in California but in New York and other states its quite obvious that statutes which punish conduct like that which has algeady occured are not enough to do the job. There's no question about that. I mean, if you've got to wait until the breach has occured, then enforcement is really hopeless. We'll just have to weed them out and accept whatever punishment that's going to be dealt out, which is going to be considerable.

Now the third factor in this case is that unlike many of the cases there is a pending vehicle in which the statute can be construed. Now that wasn't true in Keeishan, it wasn't true in Zwickler, it wasn't true in a lot of cases where abstention was deemed inappropirate, Now the appellee has taken the position that if fact this is not all an abstention case, but the state courts either did pass on the state statute or had an opportunity and failed to do do, and therefore the Federal court had refrained from declaring our statute unconstitutional, it would be abdication rather than abstention.

Now I want to answer that because it is not in the briefs and it was not until reargument last term that we understood that there had been a mutual misapprehendion of the state law

on that point

In the state trial court Mr. Harris demurred the indictment under Penal Code Section 995. The state trial court said the motion to quash is denied and the demurr is overruled. That statute is constitutional. But the state trial court had before it memoranda referring to Scales, Dennis, Yeates, and some California decisions so its determination which pertained only to one section under which Harris was charged was not a finding that the statute was constitutional as it appeared here in Whitney, but in light of what, we think, the constructions that could be placed on it. And then the state trial court--if it ever gets to the point where it can issue instructions to the jury--that is where we will find reflection of the judicial gloss

In all events Mr. Harris then sought a Writ of Prohibition from the imtermediate Appellate Court pursuant to Penal Code Section 99a. We have two Writs of Prohibition in California One is a 999a Writ, the other is a civil code procedure 1102 Writ. The former does nothing but give an accused an opportunity to have an appellate Court review a superior courts determination on the question of probable cause. Is there a sufficient quantum of evidence to make the man go to trial? That is all. It does not raise constitutional issues.

Harris' complaint is that he proceded with that vehicle. So what he is saying is that the Courts cannot abstain because

I presented, I elected the wrong remedy in the state courts by which to present my constitutional claims.

He then proceded to the California Supreme Court with a petition for hearing. It was denied. That is discretionary, there's no question about that. And if he had selected the correct remedy--the Writ of Prohibition provided for by 1102--our position is that that also would bave been discretionary. It is certainly clear that a denial of a Writ of Prohibition is not a ruling of the merits in California.

Now the scope of discretion in a state court on a Writ of Prohibition under 1102 is something of a murky question. No one is really clear, and I don't know ifthe state courts are. But we think the obscurity of that question should demonstrate to this court that for federal courts either to say that abstention is proper or improper according to whether the man has presented the constitutional claim in a pre-trial setting is only to enmesh the federal courts in determinations of sometimes very difficult questions of state procedural law. They ought not to do it, because its not a proper basis at all.

Now finally we arrive at the anti-injunction statute. After Atlantic Coastline last term, Federal District Court can no longer enjoin a prosecution in spite of the stttute on the theory that it's merely a legislative enactment of the Comity Principle. It must bring it within a specific exception.

Now here it's clear that the District Court did not enter

its injunction against Mr. Younger in aid of its jurisdiction or to effectuate its judgement. In fact it has told us why it did, that was to insure that we would have an appeal to this court under 1253. Of course, it could have done that by simply enjoining future prosecutions, which would be tolerable under Dombrowski and Hammer but it did not. Sothe question then becomes whether or not this injunction can be justified because the suit is under the Civil Rights Act.

Now whether 42 USC 1983 is a specific exception to 2283. Our position is that it isn't. That if it were, would engulf the rule. And you would have a situation where state court prosecutions could be interrupted while defendants repaired to the federal courts for any alleged violation of due process. It's hard to know where they would stop. So we think that the language of that statute which is rather plain means what it says, and bars the injundtion.

Now as to the constutitionality of the Act itself, I would repeat that the Act is not before this Court in the form in which it appeared in the Whitney case. Brandenburg does not dispose of the merits of this case. Out position is that our statute has been construed by the state courts to conform to the requirements of Brandenburg.

In 1946 Chief Justice Trainer said that the Criminal Syndicalism Act could be applied only when there is eminent danger that the advocacy of the doctrines which cease to pro-

hibit will give rise to the evils that the state mey prenett. We think that was the inspiration for the test in Brandenbutg. Certainly it satisfies it. Of course the words of Justice Traiher are as much a part of that statute ss if our legislator had put them in there. This court recognized that principle in Winters against New York and in Alberts against Malloy. In 1920 we had a decision in People vs Malley. That case said that you had to intend the unlawful consequences resulting from your advocacy. There was a literature case. In fact it involved the very section at issue in the District Court proceeding. It was, of course, not cited or referred to by the District Court. It did say that the person distributing literature must intend the consequences reasonably attributable to his distribution.

Subsection four is the organizational membership section. These are discreet acts; you cannot organize, and that's construed now in California meaning you have to be on the ground floor, this Court recognized that in Yeats. You cannot organize an organization without being active in it and without having a knowledge and intention that its unlawful purposes be fulfilled. By no stretch of the imagination is that a status crime. The requirements of activeemembership, it goes beyond the requitements of active membership set down in Scales and similar statutes.

Well, we think that section and the others are constitu-

tional and finally, just to reiterate that if a Federal Court reaches those, if it chooses to interpose itself between the State Court and the state legislature, that it has a responsibility to do to the statute what the S ate Court thinks it would do. That responsibility was discharged by the New York State Court. It was not here. We are just unable to reooncile those results. We don't think that sufficient discretion reposes in the District Courts to reach those opposite results. And if their discretion is that wide then discretion is simply a softer word for arbitrary.

Thank you.

Q Mr. Wirin?

ARGUMENT OF A. L. WIRIN, ESQ

ON BEHALF OF APPELLEES

MR. WIRIN: Mr. Chirf Justice, and may it please the Court. First to deal quickly, as far as my time is concerned with the question put by Justice Stewart to Mr. Thompson. In the appelles opening brief we cite a gross or so of California statutes which penalize not only acts of violence but threats of violence and in a brief which is gold colored, called Appellees Supplemental Brief on Reargument, at page 17, in a footnote--it has been said that the heart of many of the opinions of this Court are in footnotes, but that is an aside--anyway, on page 17 in the footnote which begins on page 16, footnote 17a, we cite a statute in California which makes it a crime to incite to

tiot. There need be no actual violence, merely an incitement to riot, is a crime in California as it is in many states.

Now, secondly, with respect to another issue, with which I think I can deal quickly, it is true as Mr. Thompson has stated to Your Honors, that in the suit filed in the District Court in California there were four plaintiffs, three in addition to appellee Harris, and to none of the plaintiffs , with the exception of Harris, we admit there is no direct threat of prosecution.

Q. What of the history teacher, and the two, who were the two others?

A. One was a member of the Progressive Labor Party---

Q. That party is Harris?

A. Yes.

Q. And who was the fourth?

A. I've forgotten. In any event, the order which was made by the District Court---

Q. An order of preliminary injunction.

A. Was made totally for the benefit of and with respect to the appellee Harris. We think all of the appellees except Harris are not proper appellees in this Court. And we think that Your Honors have said that---

Q. Because of the---declaratory judgement. Is that right?

A. That's right. Because no injunction was issued after

then and no declatory judgement was issued because the Court hadn't taken jurisdiction of the merits of the case in order to declare the rights, though I will get to that later.

In any event, it is our view that under the gun case decided by Your Honors last term, and in view as I said in one of my briefs prior to Your Honors ruling, they are not proper appellees and the question as to whether or not there is a justitiable controversy between these other three plaintiffs and the appellant we think is not an issue which Your Honore need reach and certainly we do not press.

Which brings me to discuss the issues which are before Your Honors. And that is first, I am going to try to avoid for Your HOnors in this session to repeat the arguments I made last year which was bottomed largely on the First Amendment, for I realize now, more than I did then, that there are issues in this court which need to be resolved favorable to the appellee Harris, long before the First Amendment is reached by this Court, and these issues, with respect to which I must conceed, I gave summary consideration in my argument, namely the applicability of section 2283 and the problem of abstention are the core issues to which I want to address myself.

I of course recall Justice Brennan -- I mean not since he hears so many lawyers argue -- his admonition to me that I'd better meet the problem of section 2283 before long and then my time ran out before I gave it the kind of consideration

which I think I can give it this morning. Now we agree, of course, that before we can prevail I think -- by we, I mean Harris can prevail -- we have to successfully cross the threshold of 2283. And we think we have done it for the following reasons, and incidentally I'm going to assume for the purpose of my argument that the exceptions to section 2283 are not a barred charter of rights exceptions to be narrowly construed -- I needn't say that I have in mind Your Honors decision of last term -- we think the injunction issued in this case comes within the sections specifically provided for byCongress in section 2283.

First, we think that the preliminary injunction in this special circumstance of the posture of the case as it presented itself before the Three Judge Court below, if the injunction was in aid of the jurisdiction of the Federal Court, and to borrow and to use and to accept the face of this court was necessary in the aid of that jurisdiction and to affect--- judgement.

And that is because of the following: The matter came on before the District Court on a motion to dismiss the indictment. I'm mis-stating mydself. A motion to dismiss the complaint, of a motion by the State.

Q. There had been a demurr to the indictment in the State court, but you're not talking about that.

A. I'm talking about the jurisdiction and the provident

by the District Court.

Q By the Federal District Court.

A. I do expect to reach the problems in the State Court, time permitting. But in the Federal Court the posture of the was that a complaint had been filed urging that the Statute was unconstitutional under the Federal Civil Rights Act and the defendant, the appellant here, Younger, had filed a motion to dismiss. So all the District Court had before it was a motion to dismiss and I say all because I mean it did not have the case before it on the merit. The case wasn't ready for an adjudication, declaratory judgement or otherwise, on the merits. ---motion to dismiss. The Court determined to overrule the motion to dismiss.

Therefore, the next steps in the case would be the filing of some responsive pleading by the appellant here, the defendant there, a responsive pleading which was never filed. It would pass that. Now it is our view that wholly aside from any authority that the District Court had to issue an injunction, it did have authority, particularly in the peculiar circumstances of this case by way of declaratory judgement to pass upon this statute and to determin whether on its face it is over overbroad. Therefore, it had jurisdiction over the cause, and continued to have jurisdiction over the cause until the merits of the cause were before the District Court and until the merits of the cause, namely whether or not the Court should, by

way of declaratory judgement, determine whether or not the statue was constitutional on its face, until it reached that point the Court had authority under section 2283 to issue interstitial pendentilite unjunctive relief which it did so as to maintain its jurisdiction whatever the cost.

For if no preliminary injunction were issued, and assuming it had jurisdiction ultimately by way of declaratory judgement to decide the constitutionality of the statute --for the purpose of my present argument -- if no preliminary injunction issued, the jurisdiction of the District Court thereafter, after the defendant here filed responsive pleadings to adjudicate the statute, would have been aborted, would have been mooted, if the proceeding -- setting aside the problems of abstention which I'll come to in a moment -- if the proceeding were allowed to go forward in a State Court so in order, in our view to maintain jurisdiction in order to protect and affect to it any judgement -- I'm now paraphrasing the language of section 2283-- which judgement it had jurisdiction to make thereafter, we think it had authority to issue this interstitial preliminary imjunction until it could reach the merits.

Moreover, there is the civil---

Q. Was there any effort by the State to move the case, the State prosecution?

A. Well, you know, Your Honor, that's kind of a double edged sword, but I'll take up the sword, nonetheless.

Q. One edge at a time.

A. One edge at a time. There was. There was, in other words, I mean the problems about abstention. In answer to Your Honors question, I did, but I do. That is to say, the State said it would go forward with the prosecution unless the Federal Court issued an injunction. So that we felt that there was a necessity of some kind of interstitial injunttive ruling under section 2283. Now additionally, as Your Honors know, of course, because of your concern with this problem and the ruling of Your Honors in the Atlantic case last term, we think in your course, section 2283, in addition to the exceptions which I have discussed also makes --- out of the section where there is an Act of Congress. Now we think here, that there are two Acts of Congress, I suppose one would be sufficient, if it were sufficient.

One is the Civil Rights Act, which I do not propose to argue in oral argument because I know it will be argued fully in oral argument in cases following in the --- extensively. That statute confers jurisdiction on a Federal Court to grant relief under the Felsome Rights act at law in equity and in any other manner and I suppose injunction is equity and so we think that it is an exception. Moreover, we think it is not accidental, on the contrary it is meaningful, that section 2283 of the 28 US Code follows section 2281 which predeeds section 2284 and those sections expressly confer jurisdiction upon a

Federal Court to adjute a state statute to be unconstitutional. That statute confers jurisdiction of a Federal Court to hold a state statute unconstitutional, and to issue an injunction, where that statute is repugnant to the constitution.

Now the purpose of this suit, the thrust of the suit filed in the Distæict Court, is whether this statute is repugnant to the Constitution because violating the First Amendment. And so if Your Honors won't accept the four exceptions which I have indicated I hope you'll find one of these exceptions not wanting and therefore there has been a compliance with section 2283. But even if section 2283, and as I say, I'm giving you my argument, the exceptions are narrow rather than broad, or in attitude merely liberal in construction. Assuming we can pelter and junp the hurdle of 2283 -- if we can't we're done for, so far as the injunction is concerned -- but we think we're not undone. But nonetheless there is the problem of abstention and I would do a disservice to the Court as well as to Mr. Harris if I stuck my head in the sand and didn't recognize the importance of that question and the importance to which this Court has --- treated the question.

Q Did you aay you had filed a brief recently?

Q. A. Your Honor, it depends on what recently---not this term, but we filed two briefs last term. And in that connection, Your Honor, I want to say something about the length of this case and I know, I hope Your HOnors will not take umbridge at

what I say. This case has been in the Courts a long time, but it has been virtually three years in this Court and it's not a question of placing blame on anyone, but I'd better say that I hope you won't take it out on the appellee because of the delay, there have been delays in this case due to the fact that this Court has not been complete and there was also a delay in the District Court I will conceed, because at that time the District Court had the matter, this Court had not yet decided Brandenburg, the District Court was confronted with the problem of anticipating what the present law was and ruled that Whitney was no longer viable in view of other decisions of this Court made that ruling prior to Brandenburg.

Now I deal with the problem of abstention. And if I may say so, it seems to me that this Court in declaring or adjudging judicial policy as it does can control the prominent issues of injunctions or even declatory judgements by the District Court through the judicial formula of abstention and that matter is that is entirety in Your Honors hands. Now for the purposes of my argument, I'm going to assuemtthat it is tle law -- now I'm talking about abstention as distinguished from injunction--- that there should be abstention only in unusual cases. Because I think or I try to recognize that under our system the Federal District Courts should intervene or intercedeaalbeit the rights whichare ar atake are in the First Amendment and hence the most important. The other special cir-

cumstance is that the statute is sweeping on its face. It is an old statute, It has been on the statute books of California for over fifty years. We have cited to Your Honors in our briefs studies ehich have been made about the statute and its enforcement, none of which arqument has been challenged by the prosecution. Professor Chaffee, Professor Kirchway, of Columbia Law school, Professor Whittens, who was cited by Your Honors as an aurhority in Brandenburq, all have come to the view that this statute was aimed aqqinst the industrial workers of the world. That it has been a statute which in actual enforcement has been cruel with respect to which California and the entire nation ought to be thoroughly ashamed because it was used soley for the purpose of supressing opinion.

So it is not a current statute adopted by the leqislature of the State of California to meet a current danqer or need in California. It is an old statute for which I have had no favorable comment from any source except for the Attorney General of California in the briefs in this case. Even in this case in order to enforce the statute the AttorneyGeneral of California has annexed as exhibits to his opening brief circulars published by George Lincoln Rockwell and the American Nazi party and other qroups in San Francisco, to show the qreat danqers which California faces feom militant qroups. Groups with which no claim was made that Harris had any connection of anv kind. It is the kind of a statute which lends

itself to unfair and harsh and cruel prosecution. Now I conceded in the argument last time that the issue as to the constitutionality of the statute could still be adjudicated by the Courts of California in the event of trial but we think in th this case it was proper for the District Court to have granted the ruling and to have begun to declare the statute unconstitutional though it didn't do so definitively, because of t the historic cruelties and evils accompanying every sedition prosecution.

With some of them Your Honors are familiar. Your Honors summarized them in the New Your Times case. And we think, therefore, that if a statute, sweeping on its face has in the past been oppressively used, that one needdnot wait to go through all the state courts where he has under a particular procedure in the state court attempted to secure a ruling from the state court with respect to the constitutionality of the statute, which this appellee did before he repaired to the Federal Court.

Hence, we think, then, that under these special circumstances that there is no prohibition so far as the anti-injunction statute is concerned, 2283, and so far as the declaratory judgement statute it was proper, the appellee having attempted to secure redress under California procedure to have repaired to the Federal District Court for relief under the Federal Civil Rights Act.

Q. Thank you, Mr. Wirin. Counsel, you have a few minutes left.

FURTHER ARGUMENT OF CLIFFORD K. THOMPSON, JR., ESQ., ON BEHALF OF APPELLANT

A. If I may, Mr. Chief Justice, I'd like to make two points. I think there is an illuminating passage in the District Courts opinion. It's the last full paragraph. The District Court tells us, we believe, that our declaration that the Act is unconstitutional on its face is all the relief that is necessary to be accorded the plaintiffs. That's plural. At this time. Inasmuch that we are confident that this decision stands, the defendant would adhere to it, I would refrain from further prosecutions under the Act. In the preceeding paragraph, the Court says "Nor do we imply the existence of a likilihood that the courts of California would entertain such prosecutions if instituted." I think we should take the District Courts' word for it that they did not need to enter that injunction in order to protect either their jurisdiction or to effectuate their judgement.

They were quite clear about that, and they were equally clear about hao many plaintiffs they had before them. They refer to plaintiffs in the plural in their injunctive order, which on its face tells us that the state statute is unconstitutional. The order appealed from. Now I ---

Q. The order only enjoins the prosecution of Harris,

does it not?

A. That's correct, Your Honor.

Q. Your point is that the opinion is tantamount to a declaratory judgement for the benefit of all of the plaintiffs as to the unconstitutionality of this Act as a whole?

A. Precisely.

Q. The injunction itself is considerably narrower, is it not? In that it refers to Harris?

A. Yes it is, I think, however, that the District Court would be quite surprised if they found out that they had given inadequate relief to all the plaintiffs before them,I think they felt that there was no way to separate the two questions of propriety, of injunctive relief and declaratory relief because under Dombrowski in order to determine the procedural question of whether or not to intervene, you must first pass on the substantive question. The determination of intervention or abstention is a derivative judgement, which is an extraordinary ---

Q. I think that the point Mr. Wirin was making, one of his points at least, was simply that the other three plaintiffs were not proper appellees. Because at the most all they got was a declaratory judgement and if you'd wanted to appeal that you should have gone to the Court of Appeals. And they would have given it to the appellees there. That's the way I understood him. Perhaps I misunderstood.

A. I understand Your Honor, I hope that we haven't wasted three years here.

Q. No, you're quite rightly here with respect to Mr. Harris.

A. I understand, but I would reiterate that unless we have relief under the declaratory aspect then what happens, we think, on the injunctive aspect is that is's quite moot.

Thank you.

Mr. Wirin: Your Honor, may I have a second to tell Justice Stewart where the order is in the record?

Q. By all means.

A. Thank you. I hope I'm not --- it's in the appendix at pate 16.

Q. Thank you very much. Thank you, Mr. Wirin, thank you, Mr. Thompson.

(Whereupon, at 11:00 o'clock, a.m. argument in the above-entitled matter was concluded.)