Supreme Court of the United States

OCTOBER TERM, 1970

In the Matter of:

GEORGE SAMUELS, et al., Appellants,	Docket No. 7
vs.	
THOMAS J. MACKELL, DISTRICT ATTORNEY, ET AL.	
and	
FRED FERNANDEZ, Appellant	
vs.	
THOMAS J. MACKELL, DISTRICT ATTORNEY, ET AL.	

Place Washington, D. C.

Date November 16, 1970

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IN THE SUPREME COURT OF THE UNITED STATES

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and	:	
FRED FERNANDEZ, Appellant	:	
v.	:	No. 9
THOMAS J. MACKELL, DISTRICT ATTORNEY, ET AL.	:	

Washington, D. C.

Monday, November 16, 1970

The above-entitled matters came on for argument at 11:50 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, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HENRY BLACKMUN, Associate Justice

APPEARANCES:

VICTOR RABINOWITZ, New York City, on behalf of George Samuels, et al.

MRS. ELEANOR JACKSON PIEL, New York City, on behalf of Fred Fernandez

FREDERICK J. LUDWIG, Chief Assistant District Attorney, QueensCCounty, Jamaica, New York, on behalf of Thomas J. Mackell, District Attorney, et al.

MRS. MARIA L. MARCUS, Assistant Attorney General of New York, on behalf of Thomas J. Mackell, District Attorney, et al.

* * * * * *

PROCEEDINGS

MR. CHIEF JUSTICE BURGER: We will hear arguments in No. 7 and No. 9, Samuels against Mackell.

You may proceed whenever you're ready.

ARGUMENT OF VICTOR RABINOWITZ, ESQ. ON BEHALF OF APPELLANTS

MR. RABINOWITZ: May it please the court.

This case, like the others on the calendar this week, is here for the third time and like the others it involves a common question concerning the propriety of a federal injunction, in some cases a declaratory judgement, against a pending state criminal prosecution. I am going to address myself initially and perhaps exclusively to that problem. The companion problem of the constitutionality of the state law has been briefed, it has been argued twice and in the time available to me, I may not get to it. Nor will I restate the facts except to call to the attention of the court two things which I think are of considerable importance. In the first place, there is no abstention problem at all in this case. The state court in the Epton case has passed upon the statute, has given an up to date reading of the statute, and we therefore must assume that the state court will apply the same reading to this case. There is nothing to abstain for. We have already gone through the procedure of getting a state court interpretation of the statute, and I do not understand that either the

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Attorney General or the District Attorney argues that we should abstain. The second point that I would like to make is that this is a multi-count indictment in addition to several counts of the indictment which are under attack here, there are a large number of other counts here, some fifteen or twenty of them which allege substantive crimes and conspiracy to commit substantive crimes.

Crimes of arson, of riot, of possession of guns, of the possession of explosives, conspiracy to commit arson, all those are in the indictment and in our opinion give the state all of the protection that it needs. On each of the previous arguments a question has been raised by the Bench as to why these cases have not proceeded, in view of the fact that there was no injunction issued by the Three Judge Court. And it has been explained to the Court that they have not proceeded because an Assistant District Attorney entered into a stipulation this was the explanation given by the District Attorney, an Assistant District Attorney entered into a stipulation in which he agreed that he would not proceed with the prosecution until this case had been finally determined because then no one thought that tt would take so long to finally determine it.

And I might say that efforts on the p rt of the District Attorney to relieve himself of that stipulation have thusfar been unsuccessful, he has made efforts in the Federal District

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Court. I might say that stipulation has nothing to do with the substantive crimes here. If the District Attorney had wished to proceed on the substantive crimes they could have been tried, and the appeals concluded and probably the sentences served, if they had been found guilty, before we had gotten to this point.

I think that it might be appropriate to just say a few words of history here, not at the moment the history of 1983, but the history of the power of the Federal Court to enjoin state criminal proceedings. That is not an invention of Dombrowski, for seventy-five years prior to Dombrowskiat least the Federal Courts enjoined the threatened enforcement of unconstitutional laws. This was not a doctrine that was born in 1965. I don't know when it started, but in 1897, in Smythe against Ames, the United States District Court enjoined the prosecution of a state criminal law. In Ex Parte Young, of course, this same thing happened. In Kullax against Reich, in 1950, Chief Justice, then Justice, Hughes said "While a court of equity has no jurisdiction" --

Q You can't cover the microphone.

A I'm sorry. "While a court of equity, generally speaking, has no jurisdiction over the prosecution of crimes of misdemeanors, equitable jurisdiction exists under unconstitutional enactments. When the prevention of such prosecutions is essential to the safeguarding of property."

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In the absence of an adequate remedy at law, and in Harris against Thompson in 1923, this court, repeating in effect that language, went on to say that "the plaintiffs are not obliged to take the risk of prosecution, fines, and imprisonments and loss of property in order to secure an adjudication of their rights."

Then came Douglas against Jeannette. I suggest that Douglas against Jeanette was a sport, and it happened primarily of course, because on the same day, as we all know, this Court issued its declaratory judgement in the Murdock case, holding the same statute unconstitutional,and it appeared that an injunction under those circumstances would be unnecessary. But the fact was, that as of Douglas against Jeannette we find this Court giving much more protection to property rights than it gave to First Amendment rights, despite the contrary history of this Court, through the famous footnote Four in the Caroline Products and Thomas against Collins and that whole line of cases still consistently applied by this Court which has pointed to the fact that they need more protection, quicker protection, than property rights, and which in fact has given that protection. Except that somehow, in this area, between Douglas against Jeannette and Dombrowski this rule was not observed in the specific problem of securing an injunction.

Then Dombrowski came along and I submit that it put Douglas against Jeannette in its proper place and I am not now

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referring to the abstention aspects of the Dombrowski case beaause as I say there is no abstention issue in this case, but I am referring to the availability of injunctive relief to stop the enforcement of a state criminal prosecution. In the period prior to Dombrowski while this problem of an injunction remedy was being worked out a parallel development in terms of the substantive rule of Baggett against Bullitt produced the Dombrowski decision and as I read Dombrowski the Court would have been unanimous on this case in that there is no abstention problem and as Iread the dissent in the Dombrowski case it is based exclusively on abstention.

The Dombrowski rule has turned out to be a very powerful weapon in protecting civil liberties and First Amendment rights. And it is ever so much more important now and has been for the past fifteem or twenty years, that is the problem of the protection of First Amendment rights, much more important than it ever was in the Fifth in the last five or six years in which the Dombrowski remedy has been available, the technique, the remedial device provided by Dombrowski has been of inestimable value in protecting First Amendment rights which always in our country need and will probably continue to need full protection.

The issue here, relates to the application of the doctrine, I think the doctrine of Ex Parte Young and the doctrine of Dombrowski, to pending criminal prosecutions as distinguished

from criminal prosecutions that are not pending but are merely threatened. Now in substantive terms, the distinction seems quite illogical. The injury to the plaintiff is exactly the same, the interference in a substantive sense with state processes is exactly the same.

It is often impossible for an individual to forsee a criminal prosecution and I think the remarks by Mr. Reid in the case that was just argued make it difficult for a potential defendant who has not yet been arrested, he is faced with the problem that we are all faced with here today. Last week I argued a case in the Court of Appeals in the Second Circuit, in which I argued an alleged violation of New York State Flag Statute. I argued that a man whose neighbors had been arrested and who had seen arrests around him on all sides throughout New York State for specific violations of the Flag Statutes and who had a flag like that and who wished to fly it should be entitled to an injunction and the Attorney General of the State of New York came and said "He's too early. He hasn't been arrested yet."

So we have a situation in which either you are too early or too late. Either you have no standing, or you are barred by 2283. Now, of couuse, there are cases where as a result of some sort of peculiar procedural situation as in Dombrowski itself there happens to be a moment in between the threat of prosecution and the actual arrest but that does not happen in

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the normal case and it's really the extraordinary case in which it does happen. And so we have the thing that all of us don't like, namely the race to the courthouse door to see who can get in there first, whether we can come before the state prosecution or after the state prosecution and it seems to me that this results in a totally unsatisfactory situation.

Thank you.

(Whereupon, at 12:00 noon court recessed to reconvene at 1:00 o'clock p.m. the same day.)

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AFTERNOON SESSION

1:00 P. M.

MR. CHIEF JUSTICE BURGER: Mr. Rabinowitz.

CONSOLIDATED REARGUMENT BY VICTOR RABINOWITZ, ESQ., ON BEHALF OF APPELLANTS GEORGE SAMUELS ET AL

(RESUMED)

MR. RABINOWITZ: I recalled at lunch what I had intended to say in connection with that line of cases of Snipe against Ames and Ex Parte Epton and so forth that I must point out in all candor that in some of those cases and perhaps all of them, the Court did point out that it was not a pending procedure and that under the provisions of 2283 they could not have enjoined a pending state proceeding. And so there is, of course, that difference.

I think that that difference does not apply here and that brings us to the next point.

Why not extend Ex Parte Young and Dombrowski pending criminal cases?

Q Isn't this the pending case?

A Yes, this is the pending proceeding. This presents that issue very squarely.

Q I don't recall the evidence, unless the record shows all this. What essentially was the evidence on which the indictment was obtained?

A Well, my associate--my friend, Mr. Ludwig--will tell us that.

Q Just in a nutshell, so that I get--

MR. LUDWIG: Let me--of course, I don't know what the evidence was. All I know was that there was an indictment. The indi--I wasn't present at the Grand Jury and that evidence was produced before the Grand Jury. I don't know--know of anything in the record.

Q Well, then, who is going to tell us anything?

MR. RABINOWITZ: Well, like the other few times, I suppose he will this time also.

Q Well, that doesn't matter. I want to see the publicity at the time.

A Oh, there was a great deal of publicity at the time.

Now, let me get to the question of the extension of the extension of this doctrine to pending criminal cases. We are confronted of course with this question of 2283.

I might say that the District Court in this case jumped right over the threshold. They didn't give any consideration to what we have referred to as a threshold problem. They got right into the constitutionality of the statute. They felt that the statute was constitutional and thus avoided any necessity of considering this problem at all.

2283, of course, presents a problem which we think is

met by the fact that we argue that Section 1983 of the Civil Rights Law of 17--1870 and 71, specifically intended to provide an additional exception to 2283, and the statute itself makes no distinction between pending cases and cases which are not yet pending and it seems hardly likely that the Congress of 1871 was tremendously concerned over the problem of the Federal Government stepping in and interferring with State procedures.

As a matter of fact, the legislative history of that Act which have been discussed in a number of Law Review articles --such as cited in my Brief--the Rutgers Law Review, the Pennsylvania Law Review and elsewhere--I can't go into it now, of course--it seems to us makes it clear that what Congress was addressing itself to was the very specific problem of abuses by State Courts as well as by other State agencies. And the suggestion that Congress intended to permit injunctions to be applied before State prosecution occurred rather than after State prosecution occurs is certainly no where suggested in the legislative history at all.

And I would like to point out, and Mr. Justice Marshall mentioned this at the last argument, that in the series of laws that were passed after the Civil War, Congress provided for another example of stepping in and--giving the Federal Courts an opportunity to step into a State Court proceedings right in the middle of the trial, not merely after an indict-

ment, but right in the middle of the trial, in the removal situation, and gave the Federal Courts under some circumstances, which may be limited but nevertheless they do exist, circumstances in which a State Court could--a Federal Court could come in or at least a defendant in a criminal case could be removed to the Federal Court, thus stopping a criminal trial right smack in the middle of it, a position that we don't have to go through so far as this case is concerned.

Now, of course, as I say, I cannot at this time and there would be no point in oral argument anyhow in reviewing the legislative history of the Acts of 1870 and 1871. There is an article by Professor Amsterdam in the University of Pennsylvania Law Review, one in the Rutgers Law Review, and perhaps others which do discuss the congressional debates at considerable length and come to the conclusion that 1983 was intended to provide and to carve out another exception to 2283.

So we believe and all I can do is refer to that legislative history that there is no bar in 2283 to the relief that we are requesting here.

I would be blind and I suppose deaf also if I could --were not aware of the fact that there is a grave concern that the position which I am advocating here might lend itself to a great deal of abuse. That at a drop of a hat defendants either in anticipated or pending criminal court cases will go plunging into the Federal Court at the drop of a hat and will

seek and secure injunctions which will tie up a State Court proceeding.

I suppose that any doctrine that any court can apply under some circumstances is subject to what might be called abuse. Lawyers representing defendants are ingenious, they are imaginative, many of them, and they do think up or try to think up devices to protect their clients as vigorously and as well as they can and I have no doubt that any kind of a procedural device will give rise to certain cases where some people will say that the procedural devices are being abused and I think that is what the courts are for. The courts are there to prevent such abuse, if it be an abuse, from taking place.

And I am not--some say I am not very much concerned, but it isn't my job to be concerned; I don't--I suggest that the Courts need not be excessively concerned over this problem. By hypothesis these cases come before three-judge courts, and at the point that I apply--I think it was Mr. Rude in the arguments before--the three-judge court include the Court of the--a judge of the Court of Appeals and the possibility that injunctions will be scattered far and wide on trivial pretext I think is a relatively minor one.

Certainly, I do think that much of the problem can be solved by a proper hammering out of proper abstention rules which will see to it that lawyers do not come into the Federal

Courts prematurely and that the possibility of flooding the Federal Criminal Courts every time somebody is arrested for disorderly conduct charge under a statute that somebody claims is unconstitutional can be prevented by, as I say, proper abstention rules and proper use of discretion by the three-judge court.

Q You have in mind the statistics as to the increase in the three-judge Federal District Court cases over the last 33 years?

A No, I do not. I have heard that there has been a substantial increase though. I really don't know what the statistics are. I do know--

Q The Administrative Office of the United States District Court--

A I am sure would have that. And I really don't know where there has been an increase or what the increase has been.

Q Well, for whatever bearing it may have, it has been an enormous increase.

A Well, I--I--as I say, I have the impression that there has been an increase in the number of three-judge courts and how many of them are attributable to this kind of case I also don't know and I--I have never made such an analysis and I don't--I don't know what the answer to that is.

As I say, I think that there are ways of handling

that other than by selling out the baby, and that the rule of the Dombrowski case judiciously applied to pending criminal cases would have a great--a salutory effect on the protection of First Amendment rights. I am not suggesting that this be extended to all kinds of cases, and I don't think anybody else suggested that. But we do have, and have always recognized an exception in the area of First Amendment rights and I do think that the retreat--and I would call it a retreat in this situation--would be disadvantageous to protection of those rights.

I might point out that the relegation of Plaintiff to the State Court remedies in this case would really be serious, because--

Q It is a sort of an inaccurate wording, isn't it, relegating plaintiff to the State Court remedies? Whose plain--your Plaintiffs are--have brought--have been brought before State Courts as defendants in criminal cases. This isn't a matter of relegating a plaintiff--

A Well,--

Q --to one court or another--

A --that may be true. In fact, let me say it, upsetting the remedy that we are apply--appealing for--applying for in this situation, may very well mean that there will never be an adjudication of the New York State Criminal Anarchy statutes for the reason that I know the Court is familiar with

and Your Honor discussed in the Epton case, because there are the long series of substance of crimes and if the defendants are to be fo--will be found guilty of any of the substance of crimes, and they may be, then we may be confronted this time and the next time and the next time and the next time with repetitions of the Epton situation in which this court refuses to grant certiorari because there is an independent State ground justifying the sentence, with the result that the statute may remain on the books as an interrorum device for a long period of time and that seems to us totally unjustified given the nature of the statute and, if as we contend, the statute is unconstitutional.

And I might say that it is rather difficult for me to imagine how a plaintiff could come into court and seek relief under this statute prior to indictment. It seems to me it would be in the most unusual situation if a plaintiff came in and said, "I am intending to engage in conduct which may violate the State Criminal Anarchy law, and I want an adjudication"--or which will violate the State Criminal Anarchy law--"and I want an adjudication because the law is unconstitutional."

I would say that that remedy which is open and have some kinds of situations would not be open to the plaintiff in this case.

MR. CHIEF JUSTICE BURGER: Mrs. Piel?

CONSOLIDATED REARGUMENT BY MRS. ELEANOR JACKSON PIEL, ESQ., ON BEHALF OF APPELLANT FRED FERNANDEZ

MRS. PIEL: Mr. Chief Justice, if it please the Court, my client in this case is Fred Fernandez. Mr. Rabinowitz was speaking on behalf of ten of the defendants, 10 out of 15, and I have one of the 15. I say this because the particular circumstances of my defendant and the Plaintfiffs in this case I think point out some of the problems in this case.

My client is charged with three counts, the first three counts being a 48-count indictment with anarchy; the substantive charge is anarchy, and it goes down the statute.

The first charge is speaking anarchy. The second charge is thinking anarchy. And the third--the third count is assembling with anarchists.

The fourth count is a--a sort of a jumble; it is a lesser count of the conspiracy count and it includes overt acts having to do with each of the first three.

Now the last time I was before Your Honors, I outlined what I believed to be the compelling reasons why this was an appropriate case for Federal intervention. I have never felt that this--that it was necessary to gain relief in this case, that the court grant an injunction against the State proceeding. I have always thought that a declaratory judgment

would be sufficient. However, I naturally would not be against Your Honor taking injunction if Your Honors felt that the situation merited, although there are a number of allegations in the Complaint which have to do with the unfairness of the prosecution. There are appended to my Brief publicity that was issued, which I think has to do with the very unfair prosecution and I don't know whether Your Honors would rule on that without a hearing. And I think that would recommended further.

Q Your request asks for an injunction in this case?

A Oh, yes. I asked for an injunction,--

Q I see.

A --and perhaps it was timidity when I started checking through the law as to some of the difficulties involved in getting an injunction that I retreated to the declaratory judgment--

Q Had you asked only for a declaratory judgment--

A I wouldn't do it.

Q --there would not have been a three-judge court, would there?

A No. No, I think when--

Q There would have been an appeal to the Court of Appeals?

A That is correct. And I believe that injunctive

relief is appropriate and I believe that had my allegations been listened to, I should have had a hearing before that three-judge court as to those allegations as to the unfairness of the proceedings. I understand you can have an injunction for a facially unconstitutional--

Q Um-huh.

A --statute, but you also can have an unjunction at least under the language in Dombrowski where the facts show that the prosecution has been unfair. And I say that it is both that--

Q I thought you were now saying that you really perhaps shouldn't have asked for an injunction--

A No, no, I am only saying that I--that I would be pleased with one, which is different, if it were declared--

Q That is pretty far along the path if you would really be pleased.

A I think that the State Court would respect it. Now if the State Court does not respect that declaratory judgment, I would not want to be in a position where I couldn't come back. But I do believe in the policy of the relationship between Federal and State and I believe that the State Court would respect that injunction.

Now, coming back to a point which I believe was jugular and it has to do with the question asked me by Justice White at the first argument, and I don't know that I answered

it very well. That had to do with, in this case--we have the anarchy statute of the State of New York, passed as you all know, in 1902, and interpreted by the highest court of the State of New York in 1922; that interpretation was affirmed by this court in 1925, and nothing was done about that statute until William Epton was charged with it in 1964. The legislature went back to work on it, deciding that since it was going to be used they ought to make it constitutional and they tried to make it fit Pennsylvania against Nelson. The legislature I am talking about, in 1965. But meanwhile, this prose--the prosecution of Epton went forward and the Court of Appeals interpreted the statute as though the legislature had done nothing or as though the statute has been written as though the legislature later would vote.

Now the question of Justice White was: Was the statute--or is--the statute constitutional with the new gloss of the Court of Appeals. I said that it was not, and I argued that in my Brief. But I want to read to you what that State Court said, because I think within this language that one can see the gross unconstitutionality of the new interpretation.

You will recall that the State Court said that of course we were wrong in 1925 looked at in 1967. So we went and reinterpreted the statute which this court--and we reinterpreted some days ago--and we are going to interpret it

consistent with constitutional requirements. What are these constitutional requirements--I am now reading--which now be read into our criminal anarchy statute to preserve its constitutionality? It is clear that the proscription of mere advocacy of the violent overthrow of the Government would be an unconstitutional infringement upon free speech. The advocacy of the overthrow of the Government by force and violence must be accompanied by intent to accomplish the overthrow and there must be a clear and present danger that the advocated overthrow may be attempted or accomplished.

That other one (?) sounds constitutional, but then--and mind you, we are talking about, and this is crucial to my argument--we are talking about the overthrow of the government of the State of New York--we are not talking about the United States Government.

Now the Court goes on, having made that statement:

There is no doubt this is applying the law to the facts--there is no doubt that Epton intended to inflame the already-intent passions of the troubled people of Harlem and to incite them to greater violence. Furthermore, the defendant's exhortations calling for organized resistance to the police and the destruction of the State and the sacking of Harlem during the week of July 18th, formed a sufficient basis for the trial court and jury to conclude that his words and action created a clear and present danger that the riots

then wracking Harlem would be intensified or if they subsided, rekindled.

Now, I submit that the gloss that the gloss that the Court of Appeals put on the anarchy statute was gloss on a riot statute and was not on an anarchy statute. And I--because the evils (?) that the legislature has a right to proscribe would be the overthrow of the Government of the State of New York, if you follow their logic. Now I say that the Court of Appeals made this error for a historical reason because there can be no advo--there can be no illegal act of the overthrow of a State Government. There couldn't--there can't be ever since 1789 when the Constitution was ratified.

And I want to go back in the history to remind Your Honors of the fact that there was once a rebellion against the State Government, before the Constitution was ratified and during the period that the Articles of Confederation brought our country together and that rebellion was called Shay's Rebellion, and it came about when the soldiers came back from the Revolutionary War and they found that creditors were making things very difficult; they were in debt, and they didn't like it, and the next thing there was a rebellion. And it was led by a man by the name of Daniel Shay and it was put down by a Gen. Benjamin Lincoln, who had to be paid for his efforts from the proffers of the State of Massachusetts because there was no Federal government.

And it was Shay's Rebellion, a lost rebellion against the State Government that gave the impetitus to the Constitution of the United States. And so it is, that Hamilton, writing in 1787, in the Minutes of the proceedings of the Constitutional Convention, said: "How are all these evils to be avoided?" And these evils, of course, are the evils of the--of Shay's Rebellion. "Only by a complete soverignity in the general government. The general power must swallow up the state powers. Otherwise it will be swallowed by them.

Two soverignties cannot progress within the same limit. Now General Washington also had occasion to comment on this problem, and, in a letter written in 1787, the same year that Hamilton was writing, he said: "You will lo, ere wished, have heard of the insurrection in the State of Massachusetts. These disorders are evident marks of a defective government. Indeed, the--part of the people of this country are now so well satisfied of this fact that most of the legislatures have appointed and the rest, it is said, will appoint delegates to meet at Philadelphia on the second Monday in May next in a general convention of the States to revise and correct the defects of the Federal System."

And then it was Thomas Jefferson who wrote in a letter to Madison the same year, "The late revolt in Massachusetts has given more alarm than I think it should have done. Calculate that one rebellion in 13 States in the course of 11 years is

but one for each State in a century and a half. No country should be so long without one, nor will any degree of power in the hands of government prevent insurrection. Let me add that a bill of rights is what the people are entitled to against every government on earth, general or particular and what no just government shall refuse or let rest on instincts."

Now why am I using these quotations? Because, of course, you cannot have the overthrow of the State Government and so the beholder itself is an absurdity.

There was argument in the case of Pennsylvania against Nelson which we have urged in our Brief with regard to the unconstitutionality of this law which underlines with the coming of the Smith Act the supersedure of the sedition field by the Federal Government. But I think a better argument than the argument made by this court there is the fact that you really cannot have a--the overthrow of the State Government because the minute that government is threatened with its overthrow it is a matter of federal concern.

Now you can have acts of--you can have acts proscribed which disturb the public peace, which you can proscribe them to be of a greater degree if they impinge upon the State House or if--it seems to me that you can describe harms (?) in many ways having to do with the imagination of the legislatures and of the prosecutors to meet the situation. But it is a travesty to go back to a law such as the anarchist statute of

1902 and to believe that by putting a gloss on it, taking out the general government and pretending that it isn't there, that you are really talking about the Government of the State of New York, that you can really make that law constitutional.

Now, the Bill of Rights aspect of--what Jefferson had to say also brings me back to the--to the First Amendment and to the importance of the First Amendment in the considerations in this case.

My client is being charged with three standing counts of anarchy, and one misdemeanor count of anarchy, and one count of ars--conspiracy to commit arson in the third degree, which in New York is a misdemeanor.

Now you will hear from Mr. Ludwig that it isn't so what you have said on other cases before you, why would you would ask them, "Do you need the anarchy counts in an indictment which has serious gun-possession charges and one arson count, conspiracy to commit arson in the third degree?", and he will tell you as he would in his briefs that the anarchy is necessary to prove the illegal intent of the defendant.

Now following that logic as to my client, my client, in order to prove his intent for one count of conspiracy in the third degree to commit arson, which is a misdemeanor, is being charged with three felony counts which seems to me that the tail is wagging the dog or there is something disproportionate about the state of affairs.

I have, as I said, outlined to you before, the reasons I believe this is a most compelling case. It involves the First Amendment in the sense of it being the public business.

In the Complaint against my defendant he is charged with disseminating pamphlets and their titles are mentioned in the indictment. Those titles are "Total Resistance--"--and these are in writing; something called "Total Resistance in Writing"; "Commanding Self-Defense" and "The Struggle for Black State Power in the United States". Now, every--every charge in anarchy, except the first one, mentions specifically the fact that he is supporting and disseminating these documents.

Now, certainly a statute or a law which would permit someone being criminally prosecuted for the dissemination of these pamphlets is overbroad, and close to the heart of his rights under the First Amendment.

Q Is he charged with any other overt acts besides distributing pamphlets?

A Yes, there are other overt acts having to do with suggesting of violent activities. Well, let us see, obtained and possessed in the County of Queens an indeterminate amount of gunpowder for making explosives. He was charged--and as to--as to any kind of--those are overt acts. Of course, I don't know whether my --

Q You are not arguing the First Amendment question is it, possession of dynamite in large quantities--

A No, but I believe that a law that would proscribe the possession of dynamite in large quantities would be perfectly constitutional. But a law that includes in its andit(?) the distribution of leaflets it seems to me is not. And we have a time in the period of our country when dissent is raising its voice and when people are dissatisfied, when the black people are dissatisfied--and when they are--

Q If this case goes to trial, Mrs. Piel, he might be found--there must be a dismissal of the charges relating to the distribution of pamphlets and papers, but conceivably a guilty verdict could come if the jury was satisfied on the possession of dynamite and guns and the other things--

A But maybe the jury would be affected in its judgment as to--there might be a fact issue on the dynamite and guns, and maybe the jury would be affected by hearing what his thoughts are, with regard to community self-defense,--

Q You are asking us to try to decide that kind of an issue before the case ever goes to trial in the state courts, aren't you?

A Well, only because my client is being charged with advocating the doctrine of the overthrow of the government of the State of New York, and I am saying that that kind of a charge against my client is inappropriate and is prejudicial

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and furthermore against a very, very basic right under the First Amendment, and that when the things are jumbled up and put together, it may well be that the prejudice of the anarchy charge will lead to a conviction on the other charges--the other charge is arson in the third degree, the only other charge my client is charged with.

I think that this case has an overwhelming compulsion and I urge Your Honors to read the four points that I made in a very brief Brief which I have just filed with the Court having to do with the peculiar situation as to why relief is requested here. And I also wish to urge upon you that if I can't get all I want, meaning I want injunction. As Judge Friendly paraphrased a description of the legislature in--that the legislature passing the anarchy law in 1902, I want all I can get.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mrs. Piel.

Mr. Ludwig.

CONSOLIDATED REARGUMENT BY FREDERICK J. LUDWIG, ESQ.,
ON BEHALF OF THE APPELLEES

MR. LUDWIG: Mr. Chief Justice, may it please the Court, this proceeding in the State Court, State of New York, County of Queens--Queens is one of 62 counties in New York State, it is a part of New York City, has a population of about 2 million; it is the fifth largest county in the United States, began so far as I know with an investigation by the police of

the City of New York in October of 1965; that was two years be-- a year and several months before we were in office in the District of Attorney's of Queens County. It stemmed from activity of the FLQ, a Quebec revolutionary organization, which attempted to blow up the Statue of Liberty and resulted in three convictions. For some reason the police continued their investigation with this group in Queens and this investigation went into the Black Brother Improvement Society. Several undercover men from the New York City police were assigned.

One of them became a member, a member of the board of directors, vice president and was in on all of the high conspiracy.

Nobody came to the District Attorney from the police until April of 1967, and, at that time, they indicated how things had progressed. They had progressed beyond the mere advocacy, the naked advocacy of overthrowing the local establishment. They had reached the point where they had accumulated weapons, canned gasoline, cans of oil, black powder, to explode, blueprints, and had designated areas that were to be blown up. They had even devised a time table; they had engaged in training programs for the use of these things. Even then the District Attorney did move until they held a dry run that wasn't so dry because four shots were fired in the Jamaica section of Queens, on June 16, 1967.

Furthermore, they had now formulated and made definite

a second conspiracy that involved only three people, Ferguson, Harris and this undercover policeman. This conspiracy was to kill two moderate civil rights leaders, Whitney Young and Roy Wilkins. They had gone quite far; they had already acquired the weapons, they had devised a plan, they had cased Roy Wilkins' house--unfortunately he lived in a sort of cul-du-sac about a mile from the court house in Queens.

Now, we then proceeded and presented this case to a Grand Jury--

Q Well, what you have told us now, is that--

A This--

Q --are you telling us that that was presented to the Grand Jury?

A These--this was presented to the Grand Jury on June 20, 1967 and we have nothing in the record on these facts. This Court is forced to rely on my sayso and that is because of this anticipatory nature of the guilt. With one exception. We presented the matter to the Grand Jury and it was no special Grand Jury, it was an ordinary Grand Jury; they just happened to be sitting on that day, on June 20, and they returned two indictments, and I will dispose of one of those indictments because this Court has already done so on June 29th of this year. And that was the indictment of Ferguson and Harris, who are two of the Appellants here. Ferguson and Harris were charged with conspiracy to commit murder in the first degree against

Whitney Young and Roy Wilkins. They were brought to trial on a superseded indictment that was returned in February of 1968 On this charge, before a judge and a jury they were convicted in June of 1968. They went through two appellate courts and unanimously 12 appellate judges in New York--5 from the Appellate Division and 7 from the Court of Appeals--found there was proof, sufficient proof all the way through beyond a reasonable doubt. There was some defense over whether a continuance shouldn't have been granted in that trial.

They applied for certiorari to this Court and there you did have a trial record for review, and this Court denied certiorari on June 29th. I would add this just as a minor appendix. Justice Harlan continued these two on bail until this Court disposed of their application for review. They have not surrendered since June 29th. They have been indicted for jumping bail in the first degree. They may be in Algeria right now, and yet we have counsel here asking this court to review an equitable determination below when two of the persons they represent in a single petition are coming in, to say the least, with unclean hands.

The question now before this Court is not an accusation by the District Attorney Mackell or the Attorney-General of the State of New York. The Attorney-General of the State of New York had nothing whatever to do with this case. Mr. Mackell didn't present it to the Grand Jury. What they are complaining

about is an indictment by a Grand Jury in New York. That Grand Jury consisted of 22 persons on June 20, 1967; it was the same Grand Jury that superseded its first indictment on June 15, 1968.

Now does an indictment mean in New York? In New York an indictment means that you must--the New York State Constitution, Article 1, Section 6, has the identical words of the opening clause of the Fifth Amendment of the Federal Constitution, and nobody is going to stand trial except on indictment--of the Grand Jury.

But the New York Legislature has been much stricter about that requirement than has Congress or the federal rules of criminal procedure. The New York Legislature says no indictment can be amended, and that even if a person when he is first arrested, comes in and pleads guilty, his plea is annulled, because he cannot plead to a felony unless he has been indicted and accused by a Grand Jury.

Moreover, his lawyer cannot come in and say "We will waive the indictment, let us plead out to something else." Not permitted in New York. I don't have this in my Brief, but I just make a brief reference to People Ex Rowe, Walker with Defense Martin 293 N. Y. 361. This is the procedure in New York.

Now what quantum of proof is required before a Grand Jury in New York? We have Costello against the United States, a case decided by this Court 10-12 years ago, where they said a Grand Jury, a Federal Grand Jury, can indict on hearsay, pure

100 per cent hearsay; the testimony of an accountant in an income tax evasion investigation, 100 per cent hearsay, that is sufficient indictment in a Federal Court.

By statute, Section 249 of our Code of Criminal Procedure, provides that the Grand Jury can receive none but legal evidence. Section 251 of the same Code says, that the Grand Jury cannot indict unless the evidence before it if unexplained or uncontradicted, would be sufficient to warrant a trial jury to convict.

Finally, Section 489 of the same Code, by statute, prescribes the standard of proof for a trial jury, and it provides that the defendant is presumed to be innocent, and if there is any reasonable doubt about whether his guilt is satisfactorily sure, he is entitled to an acquital. Those are the standards that apply to the Grand Jury.

Beyond that, 22 people on the Grand Jury found this proof beyond a reasonable doubt in coming down with this 48-count indictment.

Now, beyond that, you are entitled to judicial review at the trial court level, about what the Grand Jury does, and here apparently the Legislature has been very liberal in conferring upon one State Supreme Court justice enormous power over the Grand Jury. In Section 671, it says that regardless of whether the defendant makes a motion or not, if the judge thinks in furtherance of justice this indictment should be set

aside, he has the power to do it.

Now these applications have been made on--of the superseded indictment and they have been denied by several judges on the State Court level. Now that is how far this case has proceeded in the State courts. This case was in the State courts from June 20th, 1967 until March 12, 1968 when application was made to the three-judge court. Now it has been in the Federal courts for 979 days counting today--979 days.

Now there are two facets to this case and I think they stem from Ex Parte Young and Justice Brennan's opinion in Dombrowski. And as Dombrowski laid down, first of all, this is anticipatory Federal relief, expedited Federal relief.

Judge Brennan, I think, said if you have a statute that is overbroad or base on its face, or if there is bad faith in applying a statute that might otherwise be valid--on either of those grounds--in Dombrowski, Justice Brennan said the Federal Court may grant anticipatory relief, as they did in Ex Parte Young on a question of economic due process.

Later, Justice Brennan, in Cameron too, in 1968, seemed to say that Dombrowski rested primarily on the second of those two points, and he said that I think--and he refers to the fact of Dombrowski, where there had been arrest, where there had been raids, where there had been seizure of materials under some Communist control act, and these had all been fought by the State Courts of Louisiana, and notwithstanding that,

the State Legislative Committee under Fiscett and other people continued the investigation and that was the sign of bad faith, so far as State action is concerned, was concerned. Now in this case, I don't think you can come in on the first of the two grounds in Dombrowski for several reasons.

First of all, in Epton, which was decided on May 16, 1967, this indictment June 20, 1967--a month and five days later. Epton qualified, narrowed the construction of the old Criminal Anarchy statutes in New York. They had been upheld by the way, in Gitlow against New York. There had been a trial prosecution under it in 1922.

In upholding it, they said first of all, the mere advocacy of criminal anarchy is out, the Court of Appeals said. Second, they said you not only have to advocate the overthrow of the Government, but you have to have an intent to overthrow the Government that must accompany that advocacy, and third, they said, there has to be clear and present danger. Every rule in this indictment that we have talked about, those first four, criminal anarchy, everywhere we talked about that in this indictment, we would shrink it down to the very narrowest possible dimension. We identify the general target as the State of New York or the political subdivisions of the State, or the executive officials of the State; we identify particular targets in there,as publicly owned and operated transportation facilities of the City of New York, and publicly--streets, man-

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holes of the City of New York where plans, detailed blueprints to pour gasoline had already been made. And we identified the means every time we alleged these things in this pleading before the Court, we identified the means as force and violence, to wit: the use of bombs, shotguns, rifles, gasoline, gun powder, et cetera, all the way through.

Consequently, I don't see how, when this Court considered the People against Epton, I think in January 1968, on both Appeal and Certiorari, and this Court denied repeal of People against Epton. Justice Douglas, if I can remember, I have to remember back, in writing a rather lucid dissent, his only objection, if I can recall, was to what the trial judge did in the Epton case. He said the trial judge had submitted a great many overt acts to the jury and some of those overt acts were in the area of protective speech, if I recall Justice Douglas' dissent from the denial of certiorari.

So the Epton case has already been narrowly--the Epton case has already narrowly construed this statute.

Now, you asked well, what about the bad faith in this case. We did not accuse anybody in this case, none of the 15 defendants were accused by the District Attorney; they were accused by this Grand Jury. And if there is any bad faith, the bad faith lies on the part of that cross-section of the community, those 22 persons. But there is no bad faith in this case. Any question about publicity has been reviewed fully

by the State Courts below with lengthy opinions written. One of them is an appendix to my Brief, by one of the Justices on the State Court. And besides if the only complaint is about some publicity, remedies lie in the change of venue at the time of trial and not by anticipatory Federal relief.

You asked why we have to have these four counts of --relating to criminal anarchy, three substances of criminal anarchy and one on conspiracy to commit criminal anarchy, which is a misdemeanor.

And I have previously told the Court, on two occassions that the weapons law of New York differentiates between hand guns and shoulder guns. The hand gun's mere possession is alone enough. To show the guns you must prove both possession and intent to use unlawfully against another. 37 of 41 of the counts of this 48-count indictment fielded that.

There is a second reason, and a very important reason, and this reason goes back to a unanimous opinion of this Court written by Justice Black, Cole against Arkansas, where he said that you have to give notice in advance of trial of anything you intend to prove at that trial. We would necessarily have to bring in this conspiracy to overthrow local government in the trial for the possession of 37 of the 41 weapons in this case. If you remember, in Cole against Arkansas, the fellow-- the defendant was charged under one section of the State statute, that was the accusation. He was tried on, not con-

victed on that, but the highest Court of Arkansas affirmed his conviction under another section of this statute, found there was sufficient evidence, and this Court objected. In the opening words of the quote that I have in mind from Justice Black was that there is nothing more fundamental to due process of law, and this goes back to Magna Carta, than that a person is entitled to be accused in advance.

We had a case in Queens about a year ago where three murders occurred. It was a division of spoils of a robbery that was committed on July 1, 1968. On July 4, 1968, these three murders among the thieves had occurred, and there were indictments for murder. But no indictments for robbery, and in the course of trying this case, it would have been necessary to refer to the fact that the defendant was one of the participants in this robbery and that there was a dispute over the spoils. The gasoline station owner claimed that $11,000 had been taken from his safe. The man, the bad man among the robbers, had only $6,000, so that led to the murder of three of the robbers. But because it was necessary to refer to that robbery and to the participation of these persons in it, an indictment was found for robbery.

And during the course of the trial many references were made to the robbery, but defense counsel does not stand up and scream that they had never been accused of a robbery, nobody had ever accused them of robbing. And that is the reason why

we have to have these other counts in the indictment.

We do not concede, as Mr. Rabinowitz supposes, that the doctrine of abstention ought not to be applied here. We do not concede that at all. We think our position is completely consistent with Dombrowski, with Ex Parte Young, and no grounds have been made out why there should be no abstention in this case.

The major point we would like to make is that the statute that is alleged to be unconstitutional in New York as part of a comprehensive reorganization of our penal law in New York was repealed on July 20, 1965, that repeal to take effect on September 1, 1967. That is the criminal anarchy statute we are talking about. So its future chilling effect had stopped and ceased on September 1, 1967. It had to be applied to these defendants because the conduct we allege to be criminal on their part occurred between October 1965 and June 20, 1967, sometime before September 1, 1967.

So the future emanation so far as potential offenders of this law are concerned, it no longer existed, had not existed, and did not exist at the time application was made to the Federal Court on March 12, 1968. There had been no more criminal anarchy statute that is complained about in force in effect in New York.

So the potential harm, the chilling effect that might emanate from this statute, ceased long before the appli-

cation was made for Federal relief in this case.

I should like to point out that apart from that statute we have of course, 2283, and this is the historic act of 1793, that Congress enacted as an amendment to the fundamental judiciary laws of 1789, and the three words in 1983 of Title 42, Suit In Equity (?), do not really constitute and cannot arguably be made as a question of statutory interpretation an exception to the--expressly authorized by Congress. That is what Congress required in 1948 when it recodified 2283; they want an expressly authorized exception.

Now I have kept notes for many years on what I think are expressly authorized exception to 2283. This would be the second title. The first title is the Doctrine of Abstention. Even if you get by abstention this case, unlike Dombrowski, involves a pending proceeding in the State Court. It was pending from June 20, 1967, until March 12, 1968.

Here are the kind of exceptions that I think this Court has allowed, has expressly authorized.

Will you have in the statute an authorization to stay any state court proceedings. You have that in the Habeas Corpus Act and you have that in the Inter-Pleader Act of 1926. It says that the District Court, Congress says, gives them the power to stay any State Court proceedings or any Federal Court proceedings, both in the Habeas Corpus and in the Inter-Pleader Acts of 1926.

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Another formula is a provision that they can stay any court proceedings but without reference to state court, and that appears in the Bankruptcy Act and the Frazier-Lemke Act, Home Mortgage Act.

Third place. Third says that all proceedings shall cease. This appears in the old Ship Owners Liability Act of 1851.

A fourth proceeding is that the State Court shall proceed no further, and that appears in our removal, or Federal Removal Statute.

I would like to add two more. These four I mention in my Brief. I would like to add two more that my research has turned up since I worked on the Brief, and that is the Federal Civil Rights Act of 1964. It has a prohibition that with respect to use of public accommodation. It has a prohibition to punish or attempt to punish any persons exercising any right or privilege secured by that public accommodation, the Civil Rights Act of 1964, and it couples this with authorization for injunctive relief to see that this is carried out. Now that is what I mean by expressly authorized by Congress.

That appeared in the Civil Rights Act of 1964, Title 42 of the United States Code, Section 2000, A, Subdivision 2(c), and A Subdivision 3(a). And the Fifth Circuit in Dulrose (?) against Reiner (?), 343 Federal Circuit 226, has sustained that as an authorized exception.

Finally, you have an exception that is also, I think ought to be added, make an even half dozen. You have an exception in the Right to Vote Act, when the Federal Government moves into the Federal District Court and asks for an injunction against State officials or State proceedings that interfere with a person's right to vote. This comes from 48 United States Code 1971(c). Those, I think, are what we mean by expressly authorized exceptions.

Now the American Law Institute is not Congress but they have been studying this question of jurisdiction between State and Federal Court and it has been represented to this Court that they are in favor of the Dombrowski type of intervention at the District Court level. But I find that the American Law Institute reading that draft on Sections 1371 and 1372, do not favor, do not feel that Dombrowski authorizes these injunctions and, quite the contrary, in their proposed section 1371(c) they go back to Ashwanda against the TVA, and all of those cases that support abstention of the Federal District Court.

Finally, on this point of the bath (?) of Section 2283, we might look at what Congress has said in other situations so far as anticipatory relief is concerned in the Federal Court vis-a-vis State Court proceedings. The power of the Federal District Court to abort, to prevent the natural pollution, the natural development of a State Court Proceeding.

One, we have the Removal Statute and this Court has been very strict on removal statutes. The most recent determination, in City of Greenwood against Peacock. They indicate how strict they are before you can remove a case that is already in the Federal Court. That removal would be under 1443, subdivision 1.

On the other hand, this Court has been willing to allow the removal where it is very clear that the basis is strictly and solely one of color, not general civil rights but color and the Court carefully pointed that out in Racial against Georgia in Volume 384, 1966.

So we do not have the power to abort any State Proceedings from the Removal Act. One of two different remedies that this Court has in addition to the Injunction and Declaratory Judgment Acts here.

Next is the question of Habaes Corpus, or, if you examine that very carefully, you find that Habaes Corpus is permitted only at the exhaustion of State remedies of the crime in the statutes which appears in Section 2254, Patent (?) 28, appears only explicitedly by the wording of Congress to apply to post-conviction, post-State conviction remedy.

But this Court many years ago, in Ex Parte Worth (?) in 1886, extended it to pre-conviction and this Court has never interferred with that interpretation on the restriction of Federal Habaes Corpus to get relief for a defendant in the

trials of the State Criminal process.

Finally, this Court itself is a constitutional tribunal but its jurisdiction over appellate matters is fixed by Congress under Article 3 of the Constitution, and if you examine the requirements in this Court in order to review State determination, one thing above everything else stands out, and that is that the State Court, State judgement, must be a final judgement. This Court has used these terms, the statute provides that in Section 1257. It must be the final word of a final court, otherwise this Court has no power to interfere with anything the State tribunal does below. And this is a constitutional tribunal. The Federal District Courts are creatures of Congress. Congress tomorrow could abolish the Federal District Court without any need of constitutional amendment.

Under those circumstances, I would suggest that this Court, called upon as they are to make an exception, a conception 2283, in the light of the existence of all of our Federal statutes, and also, and especially because of the delay that will attend State criminal proceedings as is evident by this case, 979 days to today, this case has been in the Federal courts.

Thank you.

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

Mrs. Marcus?

CONSOLIDATED REARGUMENT BY MRS. MARIA L. MARCUS, ESQ.,
ON BEHALF OF APPELLEES

MRS. MARCUS: Mr. Chief Justice, and may it please the Court, this Court recently had occasion to examine and analyze Section 2283, the anti-injunction statute in Atlantic-Danville (?) Railroad versus Brotherhood of Locomotive Engineers. And although this Court was dealing there with the necessary ineffectuation of its jurisdiction clause, rather than the authorized statutory exception clause, the Court general comments on the statute are very pertinent to the case here today.

This Court said that 2033 is not merely a rule of comity, it is a binding rule on the power of the Federal Courts, and that even if general equitable principles at intervention are satisfied, which they are clearly not in this case, the Federal Courts may not intervene in a pending case unless one of the statutory exceptions is involved. And Mr. Justice Black further commented that these statutory exceptions should not be enlarged by loose construction.

Now if the rest of Section 2283 cannot be an expressly authorized exception of 2283. In fact, not only is there nothing in the statute that so indicates but the section creates no substantive rights, it merely refers the right already granted by other statutes and by the Constitution.

Thus, it is clear that since under 1983 cannot re-

solve an injunction against court proceedings. Now Appellant Fernandez argues that declaratory judgement makes their issue.

What it really means is that if the State official is conscientious and he wishes to abide by a Federal Court declaration then a State proceeding of the disruptive statutory scheme is nullified.

However, if the State official is not conscientious, he may continue with his state proceeding through the usual Appellate review and finally to this Court. Now this kind of penalty cannot possibly have been the congressional intent in enacting 2283. Quite the contrary. Its intent is very clearly to prevent this kind of disruption of State court proceedings.

Now, Appellant--one of the Appellants has stated that it is illogical to distinguish between pending proceedings and future proceedings. But this is precisely what Congress did in enacting the anti-injunction law; it made that distinction because it wanted to avoid disruption of proceedings already commenced.

This morning it was suggested by Counsel that once a court has jurisdiction it could issue declaratory judgement and if that were not obeyed then an injunction could be issued to effectuate the judgement. In other words, what he was suggesting was a two-step procedure could be used instead of one step.

Now this obviously would make unnecessary the

list of exceptions in 2283 and in fact, it would make a joke of 2283 because it would merely mean that you could accomplish these steps with the statute on its face what you may not accomplish in one step.

It should be pointed out that State courts have both the power and the duty to rule upon Federal constitutional issues, in the same way as the Federal courts. And if a statute is overbroad State courts have the same power to strike it down to prevent any chilling effect on First Amendment rights.

There can be no reason therefore to the power of the State courts' jurisdiction over such pending proceedings. And absolutely no motive for apriori (?) assumptions that such State courts would be less willing or less able to protect rights originating in the constitution.

Congress has provided in the Federal removal statutes for the narrow classifications in which such judicial protection cannot be expected.

Now, the case of the bar (?) furthermore would be unlikely candidates for the articulation of any new rule respecting declaratory intervention since they do not involve any rights to the court house door (?) there is obviously no evidence of any bad faith prosecution and no effect upon First Amendment rights. Counsel for Appellants say that there is no abstension problem here. As Mr. Justice Stewart earlier pointed

out this court has differentiated non-intervention for abstension. And for this reason and as--said that it gave continuing validity to the principle of non-intervention. There is a difference between a Plaintiff having a choice of form and a Defendant in a State proceeding when the tide has turned against him wishing to come into the Federal Court to disrupt that proceeding.

Counsel for Appellant Samuels in his Brief suggests on the merits of this case that the clear and present danger test which this Court approved in Daniels should be overruled. It hasn't suggested any substitute test and apparently it is the position that speech cannot create the kind of danger that the State has a right to prevent. No matter what the context or circumstances of that speech is. But this Court has repeatedly noted using the example of the man shouting fire in a crowded theater, that something which is pure speech can create a physical danger. And so the question is the circumstances and the context of that speech.

Counsel for Appellant Fernandez referred to pamphlets and writings, but even looking at these writings they are far from abstract in lecture discussion of doctrine, but instead they are centered around organizing youths for acts of violence, how to put together gun powder and other materials for the making of bombs, and proficiency in scare tactics. These were the writings that were involved.

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Another point was made that the kind of riots which you saw described in Epton case do not constitute overthrow of the Government. I think this is a very unrealistic and nieve theory, because there are many ways to overthrow a Government and only one of them is the replacement of one group of government officials by another group of government officials by another group of government officials. That is another kind of overthrow. But another kind of overthrow very clearly is the paralysis of the government system. In New York City, for example, the cutting off of electrical power; the sabotage of transportation lines, and attacks on the police make it impossible for the government to render essential government services. And this is as much an overthrow as is the replacement of particular people. And in fact, it is also makes a kind of chaos which prevents government from operating acceptably.

Appellants also claim that the statute at issue will have a deterrent effect upon the advocacy of unpopular ideas. But analysis indicate there can be no deterrents in this case. Prosecutions under both the old and the new statutes which are called the criminally anarchy statutes must be governed by the rule set down in Epton, and that decision made it very clear that mere abstract advocacy of doctrine is outside the ambit of the statutes and therefore outside the ambit of any prosecution, both this one and future prosecutions.

Therefore, the only group whose life might be affected--might not be affected by the Epton decision. It would be a hypothetical group which was deterred before the Epton decision. However, this group cannot be prosecuted for their activities because the prosecution places the advocation of unpopular ideas as such, the new advocation of unpopular ideas, outside the statute ambit. And therefore, this group cannot be prosecuted and for that matter cannot even be identified. And this kind of controversy with an unidentified group of this kind which cannot be prosecuted obviously presents no live grievance under this Court's decision in Grove versus Negro (?).

But we have here a pending prosecution and obviously no possible effect upon Appellant's First Amendment rights.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mrs. Marcus.

Mrs. Piel, you have three minutes left.

REBUTTAL REARGUMENT BY MRS. ELEANOR JACKSON PIEL

ON BEHALF OF APPELLANT FERNANDEZ

MR. PIEL: Thank you.

I am not sure I will take all my time. I do wish to disagree with the Court, a thought which came across my mind as I sat down and that was that was that I sought the enjoining of the entire prosecution in this case. It is true that when I commenced I challenged the Grand Jury statute of

the State of New York which of course, were I to prevail, would have invalidated the entire prosecution, setting up the challenge to the Grand Jury statutes although we maintained they were unconstitutional because that challenge did not meet the test of the First Amendment. I reviewed that position and I do not feel that the entire prosecution should be invalidated. In fact, and I wish to underline it, if any challenge in the Plaintiff and Appellant Fernandez's case is to the anarchy statutes of the State of New York. In his prosecution with regard to arson in the third degree, insofar as these pleadings are concerned, is perfectly appropriate and should proceed.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mrs. Piel.

This is submitted.

(Thereupon, at 2:10 o'clock p. m. the consolidated reargument in the above-entitled matter was concluded.)

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