In the

Supreme Court of the United States

ROBERT MITCHUM,
d/b/a THE BOOK MART,

Appellant,

v.

CLINTON E. FOSTER,
Prosecuting Attorney of
Bay County, Florida,

Appellee.

No. 70-27

Washington, D.C.
December 13, 1971

Pages 1 thru 51

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v.	:	No. 70-27
CLINTON E. FOSTER, Prosecuting Attorney of Bay County, Florida, Appellee.	:	

Washington, D. C.,

Monday, December 13, 1971.

The above-entitled matter came on for argument at 1:11 o'clock, p.m.

BEFORE:

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

APPEARANCES:

ROBERT EUGENE SMITH, ESQ., Suite 507, The Alex. Brown & Sons Bldg., 102 W. Pennsylvania Avenue, Towson, Maryland 21204, for the Appellant.

RAYMOND L. MARKY, ESQ., Assistant Attorney General of Florida, The Capitol, Tallahassee, Florida, for the Appellee.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 27, Mitchum against Foster.

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

ORAL ARGUMENT OF ROBERT EUGENE SMITH, ESQ.,

ON BEHALF OF THE APPELLANT

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

This case arose in the State of Florida, in a town called Panama City, in which a State Court judge granted a closing requested by the prosecution of an adult book store, selling adult materials. And so identified.

This was predicated after a hearing in which the trial judge looked at a certain few publications, and felt that if these were representative the whole store should be closed.

It was injunctive --

Q You say "representative", representative of what? Of all the books, or --

MR. SMITH: Yes, sir; this is --

Q -- of some of the books, or --

MR. SMITH: This is not a store that was selling Time and Life. Consistent with what some counsel view the decisions of this Court, since Redrup?, to mean, it was an adult book store, identified as an adult book store, and, you know, you must be 21 to enter.

So that no one would enter and be intruded upon, on their privacy, looking to buy Ladies Home Journal or something of this nature.

So we are dealing with only adult merchandise, and the concession, or any representation that all the material was adult-only oriented; whether it be pocket novel, whether it be girlie magazines. There were all adult-only oriented material.

That was the way the view of the judge, we suggest, looked at the entire thing; and that's what I mean by the term "representative": adult-only versus reportorial or newspapers or things of that nature, sir.

And --

Q Well, do you suggest that some of the things that were in evidence and used by the judge were representative of Ladies Home Journal, for example?

MR. SMITH: No, sir; it was not contended that -- we said it was representative of it, of the material, and all the material was adult --

Q Well, what you mean to say, in adult material, is that it's material that deals explicitly with sexual --

MR. SMITH: Well, maybe not explicitly, it's suggestive or it's --

Q Well, it deals with sex?

MR. SMITH: Ripe materials, yes, sir.

Q And that's what it is?

MR. SMITH: Yes, sir.

Q And that was the whole contents of the store?

MR. SMITH: Yes, sir.

Was for adults only, roto-type materials.

Q Yes.

MR. SMITH: Yes, sir.

Q When you say "material", was it all literary or pictorial material?

MR. SMITH: A combination, sir. Mostly pocket novels, but a lot of girlie type magazines; primarily girlie type magazines that were either -- also some cover girl and exciting, which we are involved in in Bloss vs. Dykema, that have been held by this Court, by a 4-to-3 decision, then, seemingly to be protected. These same publications were in that particular store.

Thereafter, a --

Q Do you say it was all literary or pictorial, was it, or did it involve articles of clothing, and things like that?

MR. SMITH: It did not involve articles of clothing, it was strictly an adult book store, yes, sir.

Q Right.

MR. SMITH: And thereafter an injunction was sought, a temporary restraining order was sought; complaint was filed,

asking for a three-judge court. Judge Arnow granted a temporary restraining order, after first having found that Dombrowski vs. Pfister circumstances were present, irreparable harm --

Q Excuse me, Mr. Smith. May I ask: in this Florida statutory scheme, is this business of a procedure by which a vendor's place of business could be closed, is that a section of the general statutory scheme --

MR. SMITH: Dealing with obscenity.

Q -- dealing with obscenity?

MR. SMITH: Yes, sir.

Q And now, I gather, they have other alternatives besides criminal prosecution or, perhaps -- or are they --

MR. SMITH: This was not a criminal prosecution, Your Honor.

Q No, I understand that. But isn't there also a provision for an injunction against distribution and sales of magazines?

MR. SMITH: Yes, sir.

Q And this procedure -- this procedure is what?

MR. SMITH: A nuisance.

Q A nuisance. And that's independently of the injunction procedure?

MR. SMITH: Yes, sir. That's correct.

Q Now, in either case, whether either procedure is employed, may it then be followed by a criminal proceeding?

MR. SMITH: Your Honor, in this particular case, a criminal procedure had predated the civil procedure. They had taken some of the publications which were the subject of a pending criminal case and utilized those in the civil procedure that followed thereafter. The injunctive relief sought was as to the closing of the entire store --

Q Perhaps that answers my question. Then, I gather, either the injunction procedure or this closing procedure may be conducted independently of any criminal proceeding.

MR. SMITH: Yes, sir; that's correct.

Q Is that it?

MR. SMITH: That's my understanding, yes, sir.

The temporary restraining order was issued by a -- Judge Arnow. Thereafter a -- Judge Arnow issued another temporary restraining order continuing it, pending a hearing on a three-judge court, because the trial judge wanted to cite the petitioner for contempt, because he had offered something for sale after the Federal District Court had said that the injunctive order was not proper, or at least was stayed pending the three-judge court hearing.

Nevertheless, ultimately we got to the question of the three-judge court. And after the three-judge court had convened, this Court decided the Atlantic Coast Rail Lines case. And that seemed to close it as far as the three-judge court was concerned below. They vacated all injunctions that were

pending, and they denied the injunctive relief sought below based, they said, upon the anti-injunction law as interpreting it from the Atlantic Coast Rail Lines case.

This, we suggest now, is a civil proceeding; this is not criminal, single criminal proceeding as we had in some of the other cases that this Court decided, as in Younger vs. Harris.

Q And not dealing with -- I want to be sure -- not integrated with any criminal proceeding?

MR. SMITH: No, sir; it was not integrated. It was a separate proceeding and the judge's order was to close the entire business, and to not remove from the premises any of the publications that were there. And ultimately, thereafter, he issued an order allowing the publications on the premises to be seized; and we have set out a list of the publications which were seized in the Appendix, most of which are in the handwriting, I think, of the sheriff and his deputies; and that is in -- it's a rather substantial compendium, beginning on page 198 of Volume 1 of the Appendix in this case, and continuing through to the end, to page 251.

So these were the publications which were seized by virtue of the court order after the closing.

Now --

Q What's happened to them? Have they been destroyed or anything?

MR. SMITH: No, sir, they have not been destroyed.

Q May they be --

MR. SMITH: They have been returned --

Q Oh.

MR. SMITH: -- since that time, as a result of other activities that occurred in the judicial system in the State of Florida.

In another case, which Mr. Marky has called to the attention of this Court, and I believe he has placed it in the back of his brief, called Mitchum vs. Schaub, the Florida Supreme Court, when considering the issue, a comparable issue, decided that the judge below had been a little too ambitious, and, too, in his rulings and reversed upon the concept of Near vs. Minnesota. And this was July 9, 1971, after this Court had noted probable jurisdiction in the Mitchum vs. Foster case.

Q And this was in another case?

MR. SMITH: A separate proceeding, sir.

Q But with Mitchum as a party?

MR. SMITH: Yes, sir; and Mr. Marky and I were counsel.

Q And involving the same material?

MR. SMITH: No, sir. Same type of material, but not -- a different geographical location.

Q But you never went to the Florida Supreme Court in this case?

MR. SMITH: Sir, we went to a different court, went

to an appellate court, and it's working its way up.

Q I know, but you didn't attempt to go to the Florida Supreme Court?

MR. SMITH: It's working its way up at the present time, I gather; except this is what has occurred, Your Honor: The court, the intermediate court of appeals treated it. In Florida, if a constitutional question was presented, the State, in this particular case, the Mitchum vs. Schaub, moved to transfer the matter because of its importance as a constitutional issue out of the District Court of Appeals and into the Supreme Court.

While the other case ended up in the District Court of Appeals, and the District Court of Appeals affirmed Judge Fitzpatrick's order below, and said that what had occurred in this case was proper and Judge Fitzpatrick was not wrong, just as late as 29 November 1971.

In anticipation, we suggest, of this case being heard today, Judge Fitzpatrick entered a final order and said, in essence, that he had been overbroad in his interpretation and he was now cutting back and limiting the effect of his order.

November 29, 1971. I will leave a copy --

Q In this case?

MR. SMITH: In this case.

Q On what circumstances?

MR. SMITH: To the publications which were before him.

Q Were they the same --

MR. SMITH: No, sir; to the publications, the similar named publications which are before the Court --

Q But the store remains closed now?

MR. SMITH: The store is now out of business.

Q I mean then.

MR. SMITH: It remained closed for a substantial period of time, yes, sir, pending going through the appellate route.

So, again, it went to a District Court of Appeals, which affirmed Judge Fitzpatrick's order.

Q Right. Could you have gone any further then in the Florida courts?

MR. SMITH: Yes, we would have gone had it not been for the entry of this order.

Q For the entry of this order.

Q Modifying orders?

MR. SMITH: Pardon?

Q Of the modifying orders?

MR. SMITH: Yes. November 29, 1971.

Q Well, what about -- what's your position with respect to what's left under the order?

MR. SMITH: We have a petition for rehearing pending.

In that particular case. And what's left of the order, in essence, Your Honor, is that no longer do we have a nuisance law closing which says that the entire store is closed.

Your Honor, it is questionable, in all candor, based upon what happened on November 29, 1971.

Q Could you speak a little louder?

MR. SMITH: It is questionable, based upon what happened on November 29, 1971.

Q Of course now, I take it, if you can afford it you can open the store and -- with everything except those few --

MR. SMITH: Yes, sir.

Q -- that were before Judge Fitzpatrick?

MR. SMITH: That would be correct. That would be correct.

Q He withdrew his injunction closing the store?

MR. SMITH: Closing the entire business. Yes, sir.

Q Where is that in the record?

MR. SMITH: Pardon, sir?

Q Where is that in the record?

MR. SMITH: This is a brand new -- this just came down, sir; I just got it, I think it was --

Q Could we have copies?

MR. SMITH: Yes, sir; I will leave it here.

Q If you leave it with the Clerk, he'll make

copies for us. It might have helped if those had been supplied to the Court in advance of today's argument.

MR. SMITH: Yes. Unfortunately, Your Honor, I just got this on Friday -- on Monday from local counsel, that -- of course it's not Mr. Marky's fault, but -- .

We had argued and said that the law in Florida is unconstitutional. We raised a facial attack upon the constitutionality of the law as it is -- the obscenity law. Myer vs. Austin is a case which has been pending in this Court for some 13, 14 months, and which two of the three-judge court in Jacksonville declared the Florida obscenity law to be unconstitutional.

Q I think, though, Mr. Smith, the present state of the judgment below doesn't raise this question at all.

MR. SMITH: No, sir.

Q How can we have a judgment before us that -- under which you can appeal it?

MR. SMITH: In the case below we raised many issues regarding the constitutionality of the law, including its facial and its application.

Q Did you seek damages, as well as --

MR. SMITH: We sought damages as well. We said the irreparable injury at the time we instituted suit was the holding of the court closing the entire store. The three-judge court said, We don't reach any of your issues, because, under

Atlantic Coast Rail Lines case, we are now foreclosed from acting under the Civil Rights Act.

Q Well, now, suppose the three-judge court had had before it this order of November 29; would they not have been right?

MR. SMITH: Working on the standing based on the Atlantic Coast Rail Lines case?

Q Well, in doing nothing without reason --

MR. SMITH: No, sir.

Q Are you interested in sustaining the -- in this case, the power of the three-judge court to issue an injunction?

MR. SMITH: Yes, sir. We want to go back to the three-judge court, and have our full hearing on the merits involving the obscenity law in general, as we have attacked it. And not just what has occurred here.

Q Well, did you raise the facial attack in the State court?

MR. SMITH: We raised the facial attack in the Federal Court.

Q Before Judge Fitzpatrick?

MR. SMITH: Yes, sir; it was raised before Judge Fitzpatrick.

Q And that was raised in the Court of Appeals?

MR. SMITH: Yes, sir. Raising and preserving, of course, is England vs. Louisiana Medical Examiners, that it

requires us to.

So this is where I come, having to argue the case, as we suggest, predicated upon what had occurred on November 29th.

We suggest that, if we're permitted --

Q Did you say that what you submitted, do I understand you correctly, followed what England said when you submitted the constitutional question to the State court? You said you were not, however --

MR. SMITH: Waiving --

Q -- waiving your right to come back to the Federal Court?

MR. SMITH: Yes, sir.

Q On those issues if they're decided against you?

MR. SMITH: Yes.

Q Well, you may not have waived, but you -- the State proceeding was underway before the Federal proceeding was --

MR. SMITH: Yes, sir.

Q -- was started.

MR. SMITH: Yes, it was a civil proceeding underway.

Q And England is an abstention case, where there hasn't been any State proceeding pending.

MR. SMITH: Yes, sir.

Q Except after abstention.

MR. SMITH: But there is some language which suggests that we should say something, as was done in this case.

The -- we're asking for the right to have the -- to say that the 2283 does not act as a bar to injunctive relief when a proper case is made out, and we say that at the time we made out a proper case, we don't think circumstances have been rendered moot, and we'd like to have a chance to have the Court consider the other constitutional arguments regarding the statute, which were raised at that time, and to seek prospective criminal injunctive relief from cases which are not now pending.

The history of the anti-injunction statute is of course one that starts back in the early days, in 1870 -- 1773, when the first act was passed by the Congress. It has been suggested that the first act may have been limited only to the Justices of this Court.

However, 80 years later, this Court considered that was not so, and held it applicable to all of the courts.

There were subsequent amendments that occurred, particularly after the 1941 Toucey case, in which the -- certain exemptions existed in the law and were stricken out. And thereafter the exemptions stricken out, a relitigation of issues already decided by the Court.

And Justice Frankfurter seemed to suggest, in the Toucey case, that the exceptions to the anti-injunction action

could be inferred from other Federal legislation, and it did not have to expressly say so.

After Justice Reed, in dissenting this case, felt there should be a certain flexibility supplied by judicial interpretation, and seemingly, in 1948, it was recodified. That was the partial prospect involved.

In the Leiter Minerals case, the Court said that the anti-injunction statute did not apply to the United States, and so it was perfectly -- it could be an exception in that regard. Seemingly as an issue of policy.

This Court decided in 1955, the Amalgamated Clothing Workers vs. Richman Brothers case, in which Mr. Justice Frankfurter again spoke for the Court, and, in essence, Mr. Justice Frankfurter suggested that this Court could not whittle away the intent of Congress in the Anti-Injunction Act.

In 1970, when the Atlantic Coast Rail Lines case came down, the decision said that a federal injunction could not be obtained unless -- because of the anti-injunction statute. That was not a civil rights case; and so we say that there would be some exception to it.

There have been many decisions throughout the country. There is an amicus brief that has been filed here from the Third Circuit relating to certain judgments of the Third Circuit Court of Appeals. There are Fifth Circuit Court of Appeals judgments, and three-judge court judgments throughout the

Fifth Circuit, which are wide-ranging. There's a new one out by Judge Goldberg, cited Hobbs vs. Thompson, this is brand new; it's just been reported in the advance sheets, 448 Fed 2d 456, in which Judge Goldberg undertakes to explain what this Court meant in Younger vs. Harris and the other cases.

But it seems, we suggest, that the anti-injunction statute gives way, when we're dealing with public rights versus private rights. Because we think that that seems to be implicit in the Leiter Minerals Company case. And we say that when there are public rights, because of the need to protect and preserve the public rights, that the anti-injunction statute could be considered not to be applicable.

Q Why is this -- is this an argument that 1983 is within the --

MR. SMITH: 2283 -- oh, yes --

Q -- special authorization exception under 2283?

MR. SMITH: It's different. No, sir; I am not saying that. We of course have argued that in our brief, but, aside from that, we think there are essentially three grounds: one is, is it an exception? And in this context, the argument I'm taking now, it is not necessarily exception but that, as a matter of policy, when, seemingly, private versus public rights are involved --

Q Well, then, that means we have to leave in -- what do we do, leave a brief on 2283 out of the picture

entirely?

MR. SMITH: No, sir. It just -- in the -- there's an anti-injunction statute. Leiter Minerals vs. U. S., this Court said it wasn't meant to apply to the United States Government.

Q That's right.

MR. SMITH: Because the United States Government was protecting public rights.

Q Well, we said that only a couple of weeks ago in another case --

MR. SMITH: Yes.

Q -- involving the National Labor Relations Board.

MR. SMITH: Yes, sir.

Q But -- now, what are the rights of the United States Government involved in that?

MR. SMITH: We say rights of the people --

Q I see.

MR. SMITH: -- termed it rights of the people.

Q In other words --

MR. SMITH: Public rights.

Q -- not only is the United States not bound by the prohibition of 2283, but also something called the rights of the people; is that it?

MR. SMITH: Yes, sir -- well, public versus private rights. Judge Griffin Bell of the Fifth Circuit, writing in Machesky vs. Bizzel, which is mentioned in our brief, talks

about the difference between the two categories, and suggests that, as a matter of comity, that the -- that when public rights are involved, the anti-injunction statute --

Q And what are the public rights here?

MR. SMITH: Here it is the right of the public, the First Amendment right, the chilling of speech, the right to be able to use and close up an entire business entity, which is offering -- at least presumptively protected First Amendment materials; and we say that this is the right in this, and Mr. Justice Brennan, writing in, for instance, Quantity Books vs. Kansas, this Court pointed out that the public, in essence would only be able to have access to publications which had been the subject of seizure, depending upon the right of the distributor to get additional copies, which themselves would be subject to seizure.

And that it was the public, seemingly, the public's right to have access to non-obscene materials, which could be involved.

So we're talking throughout --

Q But you're not talking about the public, you're talking about the adult public.

MR. SMITH: We're talking about the interested adult public, yes, Your Honor.

Q Well, that's the only group you're talking about.

MR. SMITH: Yes, sir, because there is no question

of minors --

Q That's not the public.

MR. SMITH: Yes, sir. There's no question of minors involved here at all.

Q Well, I mean it's not the public in general; this is a class of the public you're talking about.

MR. SMITH: Yes, sir.

Q Are you addressing yourself to the case as it is now or the case as it was before --

MR. SMITH: The case as it was, Your Honor.

Q -- the 29th of November?

MR. SMITH: The case as it was, in all candor. We say that in Dombrowski vs. Pfister, the distinction of saying that if you win the race to the courthouse door, it's all right, and you can stay in the Federal court, versus saying if they win the right -- they win the race to the courthouse door and follow in the State court, you don't have that right, and say he's artificial.

Q They may be artificial, but not with -- it's rather the whole point in Section 2283, which dates back to the Year One of the existence of --

MR. SMITH: Yes, sir.

Q -- this country as a nation, isn't it?

MR. SMITH: Yes, sir.

Q That's the whole point of it.

MR. SMITH: But we say that the --

Q Who wins the race.

MR. SMITH: -- the -- the --

Q Whoever wins the race, then the litigation proceeds in that court. And that's exactly what 2283 has the effect of saying.

MR. SMITH: Yes, sir.

Q It goes back to the very first Congress of this nation.

MR. SMITH: Yes, sir. The conflict between federalism and the State court rights to proceed is the same, because immediately after a federal court enters, has a suit entered and the State court proceeding is undertaken, there still becomes a possible conflict with --

Q There's no conflict if the federal court stays out of it, and is told to stay out of it.

MR. SMITH: Yes, sir.

Q That's exactly the purpose, the self-evident purpose of 2283 and its predecessor was to keep a federal court out of it; and thereby to avoid conflict.

MR. SMITH: Yes, sir.

Q Do you agree with that?

MR. SMITH: Yes, sir. It seems that that would be the original purpose, yes, sir.

Except when there's unusual circumstances, that this

Court --

Q Well, wouldn't you agree also, Mr. Smith, that the federal judges have no monopoly on enforcing the Federal Constitution.

MR. SMITH: Yes, sir; that's correct.

Q That's equally the responsibility of State judges, isn't it?

MR. SMITH: That's correct.

Q Well, then, I don't quite follow you. The State courts don't have one whit different responsibility from federal judges.

MR. SMITH: No, sir; but if -- suppose special cirumstances seems to be present, and if they were present, there would be a justification, we suggest, for the federal court to intervene. It makes it clear that there is this, a certain type of harassment. If there is the irreparable harm involved in this --

Q The only harassment that we've seen -- we said in the Younger line cases, of course, that harassment, bad faith; but is that suggested here?

MR. SMITH: Yes, sir. It is. But if, in the Younger line of cases, this Court has said that bad faith and harassment may be the type of situation which would allow an injunction to proceed, then isn't it saying that 2283 is not an absolute bar to the impositions?

Q Well, it isn't, because we expressly saved that question in those cases.

MR. SMITH: Well, there, of course, there's a conflict as to whether --

Q Didn't we?

MR. SMITH: -- you did or did not. The Atlantic Coast Rail Lines case seems to say no. If read literally, Your Honor, it seems to say that this is -- that nothing is an exception, so to speak, unless those things were specifically --

Q Yes, but in Atlantic Coast Line there wasn't any question of harassment or the lack of good faith. And if you get a State prosecution that lacks good faith, what you're really saying is that it's not a State prosecution at all.

MR. SMITH: Well, then that's what it comes back to.

Q This doesn't qualify as a prosecution.

MR. SMITH: It qualifies as a prosecution, yes. It is a prosecution.

Q Well, if it's just a harassment,which --

MR. SMITH: But then the court, in reaching that rationale, would suggest by then saying that the 2283 is not applicable in that kind of case.

Q Well, but Younger v. Harris line of cases save that question.

MR. SMITH: Yes, sir; I know that.

Q While saying that you could have an injunction.

MR. SMITH: Yes, sir.

Q That's in unusual circumstances.

MR. SMITH: Yes, sir. And we say that those type of unusual circumstances were presented in this case, first was presented to the court down below, and those were the complete closing of the business entities, on the basis that without any question as to what would occur in the future, it was a total, complete prior restraint in operating that business activity. And at that time the case was presented.

Q Am I correct that since that time the State courts have opened up the place, and have removed the bar against doing business, and have returned all of the books except the nine books;is that correct?

MR. SMITH: Yes, sir, in stages --

Q All that relief was granted in the State courts.

MR. SMITH: On November 29, 1971.

Q Well, I thought you said the books were given back earlier.

MR. SMITH: The books were given back earlier, but with regard to allowing the store to open --

Q So, as of now, all you want is for us to declare it a statutory injunction?

MR. SMITH: Yes, sir. Let us go back in the State court and have our hearing on whether there's other than insufficient --

Q You mean in a three-judge court?

MR. SMITH: That's right. I'm sorry. A three-judge federal court.

Q I take it, Mr. Smith, if, many will agree that, 1983 suits are within the express authorization exception, you wouldn't have to deal with whether it's public or private rights argument, would you?

MR. SMITH: Not as presented here, no, sir.

Q But you would still have to deal with them in Younger v. Harris?

MR. SMITH: Yes, sir; but of course that was criminal; this is civil.

Q Well, you'd still have to deal with whether Younger v. Harris rights now apply to civil cases as well as criminal?

MR. SMITH: Yes, sir.

Which we suggest a very excellent --

Q Because Younger v. Harris was a 1983 suit.

MR. SMITH: Yes, sir; I'm aware of that.

As I pointed out to the Court, there's an excellent analysis by -- of what you all meant in Younger v. Harris in Hobbs vs. Thompson, decided by Judge Goldberg in the Fifth Circuit.

Q Is that cited in your brief, did you say?

MR. SMITH: No, sir; that has just been reported,

448 Fed 2d 456.

Q 448, 456?

MR. SMITH: Yes, sir.

Q Thank you.

MR. SMITH: Thank you.

Q Excuse me, the District Court didn't -- in view of its understanding of the effect of 2283, the District Court did not, did it, consider any question of whether or not there was harassment here? They thought it was absolutely -- that an injunction was absolutely barred, did it not?

MR. SMITH: Yes, sir; but the District Court judge, Judge Arnow --

Q Well, the single judge; I'm now talking about the District Court's final order in this case.

MR. SMITH: In no way considered that.

Q I mean the three-judge court.

MR. SMITH: Yes, sir. In no way considered that, because it felt absolutely barred by Atlantic Coast Line --

Q Whether or not there was harassment, the court thought it was barred from issuing an injunction, did it not?

MR. SMITH: That's correct.

Q So it's never had an opportunity to consider the issue of whether or not --

MR. SMITH: That is correct.

Q -- there was the kind of harassment that would

have made this case one of the exceptional situations referred to in Younger and its companion cases, because of its view that 1983 -- that 2283 wholly barred an injunction in this action, regardless of whether or not there was harassment. Is that it?

MR. SMITH: Yes, sir.

Q Is that the way you understand it?

MR. SMITH: Yes, sir. That's right.

Q Right.

Q You tendered that issue of harassment?

MR. SMITH: Yes, sir, that is facially raised in the plea.

Q Very good. Thank you.

MR. SMITH: Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Marky.

ORAL ARGUMENT OF RAYMOND L. MARKY, ESQ.,

ON BEHALF OF THE APPELLEES

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

The position of the appellees before the Court is that the three-judge court properly concluded that the anti-injunction statute was an absolute bar, that 1983 was not an express exception to that particular provision in property, declined to grant injunctive relief.

The question that is not before the Court is whether

the court erred in perhaps declining to grant declaratory relief. Thus we don't have the dilemma raised in the sextet, Younger, et cetera, wherein,Justice Brennan, I believe you discussed the differences that may exist in declaratory relief.

So I wish to make it clear that subsequently the court declined to grant declaratory relief; but that has not been raised on appeal, and it has not been cited as error, and it has not been argued; so I will not address myself to the question of whether they should have perhaps gone on and granted declaratory relief for whatever purpose it may serve.

The only reason I mention that is I know there's a question of the Court as to whether the same standards are always applicable to a declaratory relief as opposed to injunctive relief.

And I want to make certain that that is not in issue before the Court.

Q Counsel --

MR. MARKY: Yes, Your Honor?

Q Do you say that the federal court properly proceeded to grant declaratory relief?

MR. MARKY: No, they did not grant declaratory relief, Your Honor, they did include it --

Q Well, would you say that they properly could proceed --

MR. MARKY: I don't know what the answer to that is, Your Honor. There is some confusion, even in Mr. Justice Black's majority opinion in Younger as to whether the same standards applicable are always applicable in declaratory relief that are in injunctive relief situations.

So --

Q Your point is that that's a question you need not answer in this case?

MR. MARKY: Yes, Your Honor. I've got enough confusion without that.

Q And we need not answer it in this case?

MR. MARKY: Correct.

The position of the appellees is that Atlantic Coast Line is absolutely dispositive of the issues raised herein. And that 1983 is not an exception to 2283.

Now, I cite in my brief several cases, specifically so holding; and we are relying on, in the main, the case of Baines vs. City of Danville, out of the Fourth Circuit in 1963, wherein that court made a lengthy analysis of the problems that would be created in this situation, the confusion and the disorder over one federal judge attempting to get into the bonafideness, or the lack thereof, of the prosecutor and trial judge or any other institutional officers.

They also concluded that unlike the removal statute, which, implicit within that very statute itself, is that the

court has total jurisdiction.

And I would agree that, by necessary corollary, that when they remove it they have added, for all purposes, "singularly".

There is no such antagonism when we're talking about 1983 and 2283. In fact, all 2283 is is a limitation upon the chancellor's authority to engage in a certain limited type of injunctive relief; although he may occupy a general grant or general power of equity.

And I would suggest that that is clearly correct. Civil rights actions authorizing injunctions against university presidents, penal institution wardens, all sorts of people, wholly and completely unrelated to the criminal State prosecution, or indeed a civil prosecution; and in that context I would note that while there has been some suggestion that because this is a civil case we have a problem.

But Mr. Justice Stewart, in footnote 3 of your concurring opinion, noted that there is no distinction in the civil -- in the anti-injunction statute itself, as the civil and the criminal provision.

Secondly, I thought that the law was that each party had the right to seek out his own forum, and I would be aghast, if I were a State plaintiff, to be suddenly thrust in a federal court as a federal defendant, and now having to fight my way back into the court that I selected first.

So I would suggest that because it's civil should make no difference as to the application of the anti-injunction statute. Moreover, the State, in fact, is a party in these proceedings. The State is trying to implement a substantial State interest that they have, and that is expressed in the penal laws.

Under Kingsley Books, Inc. vs. New York, this Court recognized that we could use alternative methods, civil and criminal; we have elected to attempt the civil.

In this context, I would like to tell the Court that I am fully aware of -- painfully aware of, I might add, in light of the Florida Supreme Court's reversal of my judgment -- that it was in error.

I would agree that I was wrong, just as the trial judge was wrong in Atlantic Coast Line; but that is not bad faith. Many of us make mistakes. I frequently do, and I think I probably will in the future.

Indeed, my argument right here may be a mistake.

And yet I would suggest that an erroneous initial application, and a subsequent declaration that I was wrong, cannot retroactively go back and impute to me a bad faith on my effort to merely augur a legal position that may or may not prevail.

Many defendants claim the rights of Gideon, long before they prevail; so it's not unusual that the prosecutor

on occasion is going to be auguring the position that may be contrary to the law; but I think that's the way the law gradually is effectuated and made more meaningful.

So, for these reasons, I would suggest that it makes no difference whether it's civil or criminal.

Going back to Baines vs. City of Danville, I find it very interesting that in Hemsley v. Myers, an 1891 case, involving a situation not unlike this, where the defendant, the State defendant attempted to put the court, or the parties in a squabble, more or less to "divide and conquer" by thrusting the State into a federal-state collision, to get this worked out.

In the meantime there is delay, there's protraction, there is confusion, and no one is properly distributed. That judge, in the Hemsley case in 1891, concluded that it would just be chaos to allow the question begging that goes on invariably in these kind of lawsuits:

Is the statute constitutional? Is there bad faith? Et cetera, et cetera.

Interestingly, in that case, Judge Caldwell completely interpreted 720, Section 720, the predecessor to 2283, consistent to the way this Court did in the Atlantic Coast Line Railroad case: that it is an absolute bar unless you can fit within one of the exceptions. And that the exception, which then did not exist, the Civil Rights Act was not an exception

to it. That the Civil Rights Act did nothing to change the relationship of the State government and the Federal government; that they remained reasonably intact.

I say that this is consistent, and it shows the history -- the history, because this was 20 years after the Civil Rights Act was enacted; that at that time the framers did not in fact intend for the Civil Rights Act to be a repeal of the principles recognized in Atlantic Coast Line, which are embedded in the Tenth Amendment.

I would say that that dispute that is going on, that went on with the framers, that Mr. Justice Black talked about, that there were those who disagreed as to whether we should have an independent federal judiciary to determine all federal questions.

I say that that debate was resolved by the framers, but the debate rages on, and the debate is brought to this tribunal; it is actually brought to this tribunal. And I would urge to this Court that this is not the proper place to bring it.

The reconsideration or the re-evaluation of the policy decision made two hundred years ago more properly rests in the Congress. And I would buttress this by noting that this Court, when they talked to the removal statute, in a civil rights setting, not in a dirty-book case, quote-unquote, a legitimate civil rights action.

In construing the Civil Rights Act, this Court took the view expressed by the Fourth Circuit in, again, Baines vs. City of Danville, another case but related to removal, and strictly construed that; instead of a statute of this vintage ought not be loosely construed and to providing the reason thereon, to wit: Justice Holmes noted, to cut red tape and intervene.

So I would suggest that this Court's interpretation of the Civil Rights Act, and you noted in there, the absolute chaos that would result in this respect, the appeal of the removal ruling, perhaps to the Court of Appeals and denial of cert to this Court; and that hearings to be conducted, 200 miles away. You noted that a year and a half later, after all the legal proceedings were over, it might get back to trial.

Well, I would like to relate this aspect to the case.

Q How do you construe the word "inequity" in 1983?

MR. MARKY: That merely recognizes, Mr. Justice Douglas, that injunction may issue in, say, a suit by a prisoner against a warden. If there was no equity grant there, there would be no power for a federal court, for example, to enjoin the warden of a penal institution, or the president of a university.

So I think the general grant of equity should not be loosely interpreted to mean that 2283 is no longer applicable, because Atlantic Coast Line says we must not loosely construe

this -- these -- 2283; that it should not be eroded. The proper respect for State and Federal relations should not be intruded.

Now, I am merely suggesting --

Q There was no constitutional First Amendment claim in Atlantic Coast Lines?

MR. MARKY: Your Honor, there was no mention, but men were picketing and attempting to picket in a very public way by which to attempt to redress their grievances in a labor dispute. To ignore the context, Your Honor. What I am saying is that if the Civil Rights Act were an exception, the people in the Atlantic Coast Line, although it could not have gotten in under Norris-LaGuardia, would have been the first to urge to Your Honors the Civil Rights Act. I say it makes the anti-injunction statute --

Q 1983 wasn't before us there.

MR. MARKY: No, no, I say if you construe 1983 to be an exception, who will need Norris-LaGuardia? Who will need any other statute? Who will need removal? They will just file a civil rights action. If 2283 becomes meaningless -- in fact, this is exactly what the Court held in Baines vs. City of Danville. They said, If we interpret, we open it up to such loose construction, we avoid the reason for the statute's existence.

So I would again urge that we look at it in this

respect. It just will not work, Your Honor. Counsel has alluded to Machesky vs. Bizzel. This is also in Sheridan vs. Garrison. The Fifth Circuit didn't say 1983 was an express exception. They held, in fact, that they could grant injunctive relief because 2283 was a rule of comity, not an absolute bar.

But that was repudiated in the Atlantic Coast Line Railroad and with it went Sheridan and Machesky. And this, if it please the Court, is why Judge Arnow actually receded after Atlantic Coast Line, because the theory under which he was --

Q In Florida, can you put a man out of business permanently because of the ideas that he has, the way he's voted, --

MR. MARKY: Your Honor, again, that --

Q -- his philosophy?

MR. MARKY: -- issue was resolved against me in the Florida Supreme Court, and I concede that it was an erroneous initial application. It's my First Amendment, and I respect it the same. I don't like, of course, trampling on it.

But, quote, unquote, whenever a trampling -- in other words it requires a close examination, and an articulation between opposing counsel before we can understand or even appreciate that there has in fact been a trampling of rights.

In this respect, Mr. Justice Douglas, we had a case that is cited in both Sheridan and Machesky, it's called

Dawkins vs. Green? There it was a civil rights case, allegedly, where a man threw a Molotov cocktail into a laundry store. They filed a civil rights action in the District Court in Tallahassee. I handled the case. They claimed that it violated their First Amendment freedom and we were harassing them.

The court granted a motion to dismiss on my basis. An appeal was lodged in the Fifth Circuit. The Fifth Circuit reversed and said hold a hearing. By the time we got to hearing, Mr. Counselor said -- files a motion for voluntary dismissal. But the State defendant, who was then the federal plaintiff, was gone from the custody of the State of Florida. It was 18 months later, and he was gone.

Now, either Your Honor -- I think it was in Perez vs. Ledesma? or in Dyson, one of the two -- said, Well, who would suggest that you can throw rocks and bottles in the name of speech? Yet Mr. Dawkins got in under the concept of Dombrowski, which I have no objection to. Dombrowski -- that man could not have vindicated his rights in any State proceeding. The obtaining of the lists --

Q But there is a slight difference between selling a book and throwing a Molotov cocktail.

MR. MARKY: Mr. Justice Marshall, I think it, in itself, it's comparable.

Q And I don't know, just because somebody says that

throwing a Molotov cocktail is symbolic to speech, that doesn't make it so. We're dealing here with selling what could be protected by the First Amendment. I'm not saying it is or not.

MR. MARKY: No. I agree with that, Your Honor, but only when a court gets seated and starts going into the matter can we determine whether they're protected or not protected. I mean, somehow we've got to start a proceeding, unless this Court recedes from Roth v. United States and United States v. Reidel, and those cases. Unless you recede from that --

Q But you admit that this was -- you say that this nuisance injunction is the same as a criminal proceeding.

MR. MARKY: It disposes of attempting to enforce a legitimate procedure.

Let me put it in this context --

Q What happens at the first conviction? Was he convicted?

MR. MARKY: His salesmen were convicted. Their conviction was confirmed by the Florida Supreme Court, and no appeal was lodged to this Court from that conviction. The books that counsel has described, the District Court of Appeals had first described them as autophallicial and masturbation was one of the books, which cannot fit within any case ever decided by this Court. I'm reasonably confident of that, Your Honor.

So I don't want to get into an inquiry as to whether

the books were obscene, not obscene, or anything else, because I think, as it actually happened, the State court could have solved this. And did resolve it.

Q You say that the State of Florida, in order to enforce its criminal law, must put a man out of business?

MR. MARKY: No, Your Honor.

Q That it's necessary?

MR. MARKY: No --

Q Well, why did you close him up?

MR. MARKY: The judge concluded that the store, based on the stipulation or the representation of counsel, that all of the books that were being sold were obscene. And since all of the books were obscene, the store was actually operating as a public nuisance. Now, that judge was wrong, Your Honor, I --

Q But that's the State of Florida, isn't it?

MR. MARKY: Yes, sir.

Q So the State of Florida, you say, is doing -- needs this nuisance statute in order to enforce its criminal law.

MR. MARKY: No. No, that's --

Q That's where I get in a lot of trouble.

MR. MARKY: -- that is not what I'm trying to suggest, Mr. Justice Marshall. I'm saying that many times a civil action may be a part of the State's machinery for enforcing -- is to protect the area. For example, enforcement

cases. We have civil injunctions against it, with fine and forfeiture, and we also have criminal penalties.

So the State many times uses its civil remedies.

Now, I couldn't help but note counsel's reference to Hobbs vs. Thompson, which he cited to this Court, 448 Fed 2d, just decided by Judge Goldberg in the Fifth Circuit. They did say a lot about what this Court said in Younger, but the negative predicate of Younger has not been qualified by what you do here today in this case; and Mr. Justice Stewart noted that in either footnote 2 or 3 in his concurring opinion in Younger vs. Harris. It's a negative predicate. You don't decide the case, at the same time saying, Well, we won't answer that in these proceedings. The case is here now to be decided.

But in the Hobbs case they used that negative predicate to actually answer the question.

Q That's in Hobbs?

MR. MARKY: Yes. And, Your Honor, at page 466 of the Hobbs opinion you'll see this, and I would like to just read it:

In the instant case we are not even faced with the force and applicability of the anti-injunction act. The present challenge to the Macon ordinance and charter provisions not only is outside the criminal sphere but also poses no possibility of interference with pending state proceedings.

The present challenge simply requests relief against allegedly unconstitutional state action in the form of conditioning employment upon the surrender of political activity.

Now, that is nothing but Braddock vs. Bullitt, where you said you could not make a man surrender his employment in lieu of signing a loyalty oath. So there is nothing strange about Hobbs. If it didn't interfere with the State proceeding, why did it go into discussing the import of Younger? All they have now done is create a morass. And I rather doubt -- I don't know what the law in the Fifth Circuit is.

Which goes to the point that I guess the appellee is stating; there's clear authority that this Court should not interpret 1983 as an express exception.

Why should you not?

First of all, the practical problems mentioned in Greenwood vs. Peacock, and I cite these in the brief. Just like in the Dawkins case that I alluded to earlier, 200 miles away, 18 months later, and we don't have a defendant. Those are the practical problems.

Moreover, in every case you're going to have to hold a hearing to determine the bonafideness, where, as I think Mr. Justice Brennan noted that, normally you should be able to look at the pleadings to determine who first filed it, and that ought to be the end of it.

And I say that a construction that I augur for avoids

the necessity of these hearings. And, I might add this, every time Your Honors -- every time a hearing is held and it is denied, the appellant is going to appeal, I mean the plaintiff is going to appeal if it's denied. If it's granted, I tell you the State will appeal, because it cannot afford to have an order on the books declaring its officers in bad faith.

Consequently there will be direct appeals to this Court from every civil rights case. And I think the Court can take judicial knowledge of the increase in civil rights actions brought before this Court under 1983, in the face of a pending State proceeding.

Another reason is that I think that this, a construction similar to mine, promotes the speedy, orderly dispensation of justice.

In Florida we have adopted a new rule, guaranteeing a speedy trial within 60 days or an immediate release. The court docket is not an excuse. Nothing. If the man is not tried within 60 days, he is unconditionally released.

All this will do is delay and protract the legal proceedings.

Is this Court's interpretation, as they suggested, necessary to the enhancement of justice and the promotion of liberty in this country? I suggest the answer is in the negative.

The Fourth Circuit, the Sixth Circuit, the Seventh

Circuit, and the Second Circuit, the largest circuits in the United States, have held it's an absolute bar and 1983 is not an express exception.

I would ask the Court, in those jurisdictions where it cannot be maintained, because it is an absolute bar, which means they do not get a hearing, have our people suffered such a deprivation of their liberty that it is posing a serious threat to the country?

I would suggest the answer is in the negative.

I think that our State courts are and trying to the best of their abilities, to the ability that God gave them, to do justice.

Now, occasionally that may even be questioned, but on those rare occasions that it does occur, this Court, through its greater jurisdiction, because it is the ultimate arbiter of all action, can take care of these needs. Indeed, that is where I brought my claim for relief in the M & W Theatres case, where bad faith was stipulated not to exist, and Judge Arnow enjoined.

I sought a State order, and Mr. Justice Black granted; it's now pending before this Court, apparently to be disposed of in light of whatever you do in this case.

Q But in that case, I understand, you just told us, that bad faith or harassment was stipulated not to exist; in the present case that's never been done --

MR. MARKY: No, all I'm -- what I'm saying, Your Honor, is that I don't think there is so much widespread deprivation by State courts, and that's what we're talking about, you're saying the State charge is in bad faith.

Q Yes.

MR. MARKY: And in your case, dealing with removal in Greenwood, you said you should not put a State judge on trial. The embarrassment between the State judges and the Federal judges in their testimonies, and in their appearances before each other in this case bespeaks the answer, I would suggest to the Court.

When we think that it will -- when we know that a construction such as the appellees suggest, and suggested upon the court, makes it easier for trial judges below to dispose of whether they should proceed or not proceed. Not unlike what produced Gideon. In fact, in Gideon vs. Wainwright, one of the very reasons that prompted this Court to hold as they did was that it would avoid the necessity of having to make an independent inquiry over and over as to whether there was an abuse of discretion.

I say a rule favorable, as rendered below, will have precisely the same effect in achievement.

Q Mr. Marky, what is your answer to your brother's argument that he did allege harassment and bad faith, and he's at least entitled to a hearing in the District Court on those

allegations?

MR. MARKY: Your Honor, I've had many cases where it was alleged that there was harassment, and none was shown. And finally, after the hearing --

Q Well, we have no way of knowing that.

MR. MARKY: I understand, Your Honor. My answer to that is that the -- in the jurisdictions where they have ruled in my favor, they have not had hearings either, because it's an absolute bar; it's not an exception. Ergo, these people have not been getting hearings, either.

And I say that under Atlantic Coast Line, once he's in the State court and he has suffered an adverse ruling, this Court has emergency relief to rule on that matter.

Q In other words, you're arguing that 2283 is a complete bar, even if he can show harassment and bad faith, so long as the pending State proceeding is a civil one; is that it?

MR. MARKY: Or criminal, Your Honor.

Q Well, I know, but --

MR. MARKY: Yes.

Q -- I thought that --

MR. MARKY: In any event, that's what I'm saying.

Q But Younger points the other way, doesn't it?

MR. MARKY: No, Younger is from a negative predicate, Your Honor, again. In that case --

Q Well, I suggest that it points the other way.

Q Well, whatever -- however Younger points --

MR. MARKY: Cannot.

Q -- this Court decided exactly what you say the law ought to be. This Court in this case decided this case just the way you say it should have been done. So if the error is there --

MR. MARKY: That, yes -- yes, Your Honor.

Q -- it's on the part of the Court, and certainly not in your argument; you're simply adopting the reasoning of the District Court in this case.

MR. MARKY: That is correct.

Q Which, to be sure, did not have the benefit -- if that's the word -- of the, of our opinions in Younger and related cases.

MR. MARKY: Right. Yes.

All I'm -- in addition to the avoidance of the question that I need not even go into, my argument is consistent with ACL, their argument applies to the things of it.

So when we look at the totality of the reasons and justifications that I have pointed out to the Court, the benefits to be inured, the simplicity of resolution, the avoidance of conduct; and we contrast that with what they want, disorder, chaos, delay -- I'm not impeaching your integrity or morality; all I'm saying is that if I were a defense lawyer,

as this Court has noted in Stefanelli, every defense lawyer would feel obliged to come forward and raise this on behalf of his client.

That is the only benefit that will come from such a ruling, and I respectfully urge this Court to affirm the action taken by the three-judge court in the case below.

Thank you very much.

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

Mr. Smith, you have three minutes left.

REBUTTAL ARGUMENT OF ROBERT EUGENE SMITH, ESQ.,

ON BEHALF OF THE APPELLANT

MR. SMITH: Just a few brief things: Judge Fitzpatrick on the 6th day of April 1970, when he entered his preliminary order, held that the activities of the defendant in Panama City were prima facie, injurious, and damaging to the morals and manners of the people of the State of Florida; were prima facie subversive to public order and decency; and prima facie constitute a public nuisance. And that the plaintiff had demonstrated irreparable harm and damage to the plaintiff -- that case being the State -- to the morals and welfare and safety of the people of the State of Florida.

There was no evidence before that court of any kind in that regard.

And the court ordered: they are further hereby enjoined from operating and maintaining any business on the

premises, and are further enjoined from removing any thing from the premises.

And thereafter an immediate request was made for superseding this: Stay the effect of your order, Your Honor, so we can appeal.

No, he would not do so. Immediate request for supersedeas was made to the Court of Appeals, and they denied the same, and, by order, denied the same and said that they could not say that the judge below was in error; and denied us the relief, and we had to await our appellate relief there. It was thereafter that the federal suit was filed.

And, although Judge Fitzpatrick said the defendants can have an expeditious hearing, time and time again defense counsel filed a request for an expeditious hearing and it was denied. It was for this reason that the federal court intervention was sought, because we felt that the whole circumstances were -- an irreparable harm was present, we wanted to prove our bad faith; we felt the use of the nuisance law, and the way it was used in this case, was erroneous and we felt we'd like to have the right, and would like to have the right to go back to the District Court and so demonstrate that to the court.

Q Well, Mr. Smith, if we should decide this case in your favor, on the inapplicability in this case for some reason or another, if Section 2283, or, more precisely, if we should

decide either that 2283 were as inevitable or that one of the exceptions therein provided were applicable, in 2283, then, what you're telling us now is just the matter that you would then be permitted to present to the District Court. Because that's never been litigated at trial or even considered by the District Court, other than in the three-judge District Court action.

MR.SMITH: Yes, that's why I said we would want to go back --

Q But you're not -- it's not the point of your argument, there's no sense in --

MR. SMITH: Yes, sir, Your Honor.

Q Only except to say that it was in your complaint and you had --

MR. SMITH: It's not moot --

Q -- and you brought it to the attention of the District Court.

MR. SMITH: Yes, sir.

Q Well, one other question, while I've interrupted you: I just read Hobbs v. Thompson, insofar as one can read while he's trying to listen. I don't find that that case involves any application of 2283, did it?

There wasn't a pending State proceeding, was there?

MR. SMITH: All I said, sir, was that it was a good discussion of what this Court had said in Younger, and a good

discussion on this issue. I wasn't saying that it was --

Q Well, whatever you were saying, did it involve a pending State proceeding?

MR. SMITH: No, sir.

Q I didn't think so.

MR. SMITH: Yes, sir. It's just a good discussion.

Q Right. Thank you very much.

MR. SMITH: Thank you.

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

Thank you, Mr. Marky.

The case is submitted.

[Whereupon, at 2:11 p.m., the case was submitted.]