In the

Supreme Court of the United States

ALBERT JOHNSON, ET AL.,

Petitioners,

v.

STATE OF MISSISSIPPI, ET AL.,

Respondents.

No. 73-1531

Washington, D. C.
February 26, 1975

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v.	:	No. 73-1531
STATE OF MISSISSIPPI, ET AL., Respondents.	:	

Washington, D. C.

Wednesday, February 26, 1975

The above-entitled matter came on for argument at 11:05 a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

FRANK R. PARKER, ESQ., Lawyers' Committee for Civil Rights Under Law, 233 North Farish Street, Jackson, Mississippi 39201, for the Petitioners.

ED DAVIS NOBLE, JR., ESQ., Special Assistant Attorney General, State of Mississippi, Jackson, Mississippi for the Respondents.

I N D E X

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 1531, Johnson against Mississippi.

Mr. Parker, you may proceed when you are ready.

ORAL ARGUMENT OF FRANK R. PARKER

ON BEHALF OF THE PETITIONERS

MR. PARKER: Mr. Chief Justice, and may it please the Court: Petitioners removed the Mississippi criminal prosecution from State court to Federal district court pursuant to the civil rights removal statute 28 U.S. Code, section 1443, which dates back to 1866. The State filed an answer and a motion to remand. The district court in evidentiary hearing on the State's remand motion, granted the motion, remanded these criminal prosecutions back to the State court.

On appeal by the petitioners, the court of appeals for the Fifth Circuit affirmed, and a divided court by a vote of 10-5 with a very strong dissent by Chief Judge John Brown denied a rehearing en banc.

The question for review is whether petitioners engaged in peaceful free speech activities designed to eliminate racial discrimination. They removed State criminal prosecutions against them to Federal district court pursuant to the civil rights removal statute to protect their peaceful exercise of rights secured by Title I of the Civil Rights Act of 1968, which is contained in the Federal Code under the title

"Federally Protected Activities,"and as codified as 18 U.S. Code, Section 245(b).

I think it's undisputed, the State doesn't dispute this in its brief, that at the time of the arrest the petitioners were and had been engaged in free speech activities specifically protected against official interference by 18 U.S. Code, Section 245(b). The police officers knew this, and this activity formed the basis for these arrests.

The petitioners all were arrested on identical arrest affidavits sworn to by the Chief of Police, which charged them with unlawfully and feloniously to bring about a boycott of merchants and businesses and there promote, encourage, and enforce acts injurious to trade or commerce, under Mississippi Code Section 97-1-1.

Now, although the testimony of the Police Chief who was the only witness to testify for the State does contain reports and complaints that he had received that there had been some interference with the merchants and the shoppers, there is no evidence at all in the record that any of these petitioners themselves are guilty of any of this unlawful conduct, guilty of harassing or intimidating any shopper or merchant. And the State cites none in its brief.

The petitioners were arrested solely and exclusively because of their peaceful free speech activities designed to protest and eliminated racial discrimination. As

petitioner John Ferguson testified, and his testimony was not contradicted, when he was booked he heard Police Chief Brown of Vicksburg comment, "Anybody on the street with a picket sign will be arrested," and that's what happened.

QUESTION: Doesn't it have to show under Peacock that they have an unqualified right to do what they were charged with doing and not just that they had an unqualified right to do what they in fact might have been found to be doing?

MR. PARKER: Mr. Justice, we believe that the evidence in this case does meet the Peacock standard. First of all, the statute in both Section 245(b) does establish a right for them to engage in this activity, and secondly --

QUESTION: What activity were they charged with in the Mississippi criminal prosecution?

MR. PARKER: The evidence --

QUESTION: I mean the charge, not the evidence.

MR. PARKER: The charge was to unlawfully and feloniously bring about a boycott of merchants and businesses and to promote and encourage acts injurious to trade or commerce. Now, this necessarily must involve free speech activities.

QUESTION: But don't you have to show under Peacock that the Federal statutes you rely on gave them an unqualified right to feloniously and injuriously do what they were doing?

MR. PARKER: We think that's true in this case. The

Federal statute does give them an unqualified right to engage in free speech and peaceful assembly to oppose the denial of the opportunity to participate in the enumerated benefits and activities under the statute, including private employment without discrimination. So the defendants under this statute had an unqualified right to engage in free speech activity opposing racial discrimination in employment, and that was the purpose of the boycott.

QUESTION: But they were charged with doing something more than that, weren't they?

MR. PARKER: No, we don't believe they were, your Honor. We believe they were specifically charged with protected activity under the statute. And certainly even going behind the charges, the testimony of the Police Chief himself when he was asked, "What were these petitioners doing prior to their arrest," responded, They were stopping people and telling people not to shop in the store that there was a boycott on. And the purpose of the boycott, as the testimony reveals, was to protest racial discrimination in employment.

QUESTION: That's the evidence; that's not the charge.

MR. PARKER: That was the basis of the charge. It was that, but --

QUESTION: It's not the charge itself.

MR. PARKER: Well, the charge of boycotting and the charge of restraining trade necessarily contains elements which

contradict the protected activity guaranteed by the statute because the boycott necessarily involves word-of-mouth publicity, free speech activity, to persuade shoppers not to stop in the stores, and that's specifically protected by the statute.

QUESTION: I take it, then, you would suggest that when an indictment like this is filed, or its information is filed, that you would have been entitled to dismissal of the indictment if you had moved to dismiss and cited the Federal statute, that the Federal statute is an absolute bar to the prosecution.

MR. PARKER: That is the relief that we are requesting in Federal district court.

QUESTION: I know, but that's what you say should have been granted if you had moved for it in the State court.

MR. PARKER: I think the posture in the State court would have been more constitutional question whether the State statute under which the charges were brought are over-broad --

QUESTION: You are suggesting, though, that the Federal statute is a defense, a full, complete defense to going forward with the charge at all.

MR. PARKER: Yes, that's correct.

QUESTION: And I take it you agree that that is the test under Rachel and Peacock.

MR. PARKER: That is one of the tests that the Court laid down. However, we don't believe that this is a necessary test. In other words, if the petitioners in Rachel had not been charged with the trespass -- in Rachel they succeeded and the court sustained removal -- if the petitioners in Rachel had not been charged with trespass, they had been charged with aggravated burglary, for example, or murder or rape, the result should have been no different, because the facts of that case clearly showed and were alleged properly in the removal petition that the charges were based upon their refusal to leave the restaurant after they were asked to do so because of their race. And that's the purpose of the evidentiary hearing. Rachel requires an evidentiary hearing in district court to establish the fact and permit petitioners to prove the allegations of the petition. And once they have done that and shown that the arrests are based on protected activity, then they have a right of removal under Rachel.

The testimony, as I mentioned, of Police Chief Marion Brown himself indicates that the basis of these arrests were the free speech activity of the petitioners protesting racial discrimination and that, of course, is protected specifically by the statute.

Now, these mass arrests, as the testimony, uncontradicted testimony, indicates brought a complete halt to any picketing in Vicksburg designed to protest or eliminate racial

discrimination. And that complete halt of any racial protest picketing in Vicksburg continues down to the present day.

I think from these facts the conclusions that can be drawn are clear. These arrests were made in bad faith. They were solely for the purpose of harassing these petitioners in the peaceful exercise of their federally protected free speech rights to protest racial discrimination. They were made under a State conspiracy statute which is extremely questionable, punishes any acts injurious to trade and commerce, punishes any acts injurious to public health, public morals, using vague terms and overbroad terms which can be easily used to suppress free speech rights as was done in this case. And this was done to the great and immediate irreparable injury of petitioners and persons similarly situated.

Now, the purpose of Congress in enacting this removal statute -- and it goes back to 1866. It was re-enacted in 1870, re-enacted in 1871, and Congress in 1964 took another look at this removal statute and provided an appeal to strengthen its provisions. Congress has over the past century tended to provide a Federal forum in instances in which conduct by State officials violates equal civil rights of petitioners and those rights are denied and cannot be enforced in the State court. In enacting the civil rights removal statute, Congress carved out a narrow but express

exception to the usual doctrine against Federal court interference with State criminal prosecutions. Under 1443, removal of State criminal prosecutions to Federal district court, this is justified where petitioners can rely upon a right under any law providing for the equal civil rights of citizens, and Rachel construed this to mean stated specifically in terms of racial equality.

So we are not arguing that the court include in the civil rights removal petition a broad spectrum of what we generally classify as civil rights or constitutional rights or civil liberties. This is a very narrow statute, it can be narrowly construed, but covers this case, because this statute undeniably, and the Fifth Circuit held that section 245(b) clearly deals with equal civil rights. This statute undeniably is a statute providing for equal civil rights stated in terms of racial equality. And that's indicated by the legislative purpose of the statute.

In our opinion the Fifth Circuit completely ignored the legislative history and legislative purposes of the statute because the committee reports and the quotations which we include in our brief indicate that Congress intended to protect persons engaged in free speech activities protesting racial discrimination.

QUESTION: What if they had come down the street with a combination of automobiles and a parade carrying signs

expressing the sentiments that you have referred to and then stop for 20 minutes to block the traffic as part of their demonstration to call public attention to it. Would you think they could be arrested for traffic violation?

MR. PARKER: Of course, that's another case. They weren't charged with that here. It would depend on the facts of the case.

Again, I believe the same standards that apply to regulation of first amendment conduct would apply. Certainly the State has an interest in regulating time and place.

QUESTION: Is this first amendment, then?

MR. PARKER: No, this is not first amendment. This is a statutory, this is a right created by Congress.

QUESTION: I am talking about the conduct that I just described, that's a protest, a demonstration. Is it protected by the first amendment?

MR. PARKER: Well, the statute indicates that the conduct of the persons engaged in the free speech activity must be lawful. So therefore, if the conduct of petitioners in that case violated a State statute, and the State established this by the evidence that they violated a constitutional ordinance or State statute, then we would take the position that removal would not be allowed if the prosecution was based not on an effort to suppress free speech activity but was based on the enforcement of a constitutionally valid

ordinance or State statute.

QUESTION: What did the State claim here? What was the charge of the State in this case?

MR. PARKER: Well, the State has changed its position a couple of times.

QUESTION: What was the charge originally?

MR. PARKER: The initial charge was under 97-1-1, that is, conspiracy to restrain trade or commerce. That was the charge that was initially logged and then later on in appeal they changed that.

It's clear to us that the notion of restraining trade and commerce is sufficiently broad to cover the free speech activity which is protected by the Federal statute because a civil rights boycott which we had in this case in which various merchants are accused of racial discrimination in their employment practices and persons are urged not to shop in these stores, this can be considered by the State a restraint of trade or commerce, that is, the customers stay out of the store as part of the boycott. But even though it might be restraining trade or commerce under the State statute, it's protected by section 245(b) because it is free speech activity protesting racial discrimination in private employment. And that is specifically covered by this statute, by section 245(b).

The other part of the removal section that we have to show is that petitioners are denied or cannot enforce their

rights, their equal civil rights in State court. Now, the statute invoked is very specific on this. It prohibits whoever, whether or not acting under color of law, and this specifically refers to law enforcement officers, by force or threat of force, and this refers to any threatening conduct, willfully injures, intimidates or interferes with or attempts to injure, intimidate, or interfere with the exercise of protected rights.

Now, of course, if these mass arrests based on the free speech activity of the petitioners are not intimidation or interference, I don't know what is. So from the very instigation of these arrests, the arrest affidavits were attested to by the city judge, these petitioners are denied and they cannot enforce in State court their rights because the statute involved here, the Federal equal civil rights statute, provides a right as the statute did in Rachel not even to be prosecuted for the exercise of protected activity. It prohibits any interference, any intimidation, including arrest and prosecution.

The removal, we contend, is based -- grows out of the Court's decision in 1966 in Georgia v. Rachel. Georgia v. Rachel involved title II of the Civil Rights Act of 1964. Title II was a statutory scheme which is very close and very closely resembles section 245(b) which we are invoking in this case.

As I indicated the Court held that you have to rely

on a statute of Federal law providing for equal civil rights stated in terms of racial equality. The Court in Rachel held that title II qualified because it prohibited racial discrimination in places of public accommodation.

Similarly, the statute invoked here, section 245(b), clearly qualifies as such a law, it clearly deals with equal civil rights, as the Fifth Circuit itself acknowledged. It prohibits forcible interference because of race with the enumerated activities mentioned. And it clearly provides a right on the part of petitioners to be free of any interference from official sources with their free speech activities protesting racial discrimination.

The Fifth Circuit held that section 245(b) of the criminal statute is not a law which provides for equal civil rights. But this holding is completely contrary to the purpose and intent of Congress in enacting this statute. The legislative history indicates to the contrary. On August 15, 1967, Representative Madden at 113 Congressional Record 22670 said, referring to this statute, "The pending legislation will provide the means and weapons to effectively enforce the provisions set out guaranteeing all American citizens equal rights.

QUESTION: Well, is 1983 then such a Federal statute?

MR. PARKER: I believe the Court in Peacock, Mr. Justice White, rejected 1983 --

QUESTION: Well, it gives a right to recover damages

from State officers if they interfere, say, with free speech activities.

MR. PARKER: Yes, but we --

QUESTION: Let's assume in a removal case you allege and the State says, well, that may be true that you engage in free speech and that you are bound to win, that you are bound to win the State criminal case by interposing a Federal defense. That isn't enough, is it?

MR. PARKER: No, it's not. The statute invoked has to be a Federal equal rights statute specifically stated in terms of racial equality. And the Court in Peacock held that the first amendment due process clause 1983 did not qualify as Federal laws providing for equal civil rights stated specifically in terms of racial equality. And this statute passed in 1968, we believe, fills this void.

QUESTION: Any Federal statute, then, that said no one will interfere with free speech where the reason for the interference is race, purely race.

MR. PARKER: That would qualify.

QUESTION: That would qualify.

MR. PARKER: That's correct.

The civil rights removal is much narrower than the 1983 rights. It only covers activity, free speech activity involving racial discrimination, protesting racial discrimination.

QUESTION: What right does the statute create or provide?

MR. PARKER: The statute provides the right to be free of interference --

QUESTION: The Constitution certainly provides the protection, if the origin of the right is constitutional, I take it, in such a statute.

MR. PARKER: Yes, the power of Congress to enact the legislation, I suppose, would be constitutional. Yes. But the first amendment does not qualify, the Court held in Peacock, as a statute providing for rights in terms of racial equality. The statute has to be racial legislation from Congress designed to protect persons protesting -- engaged in certain conduct protesting racial discrimination. And the statute we contend clearly qualifies in this instance.

QUESTION: Mr. Parker, does your position depend upon the soundness of a prediction that the rights of your clients cannot be vindicated in the State courts?

MR. PARKER: Mr. Justice Powell, in this case the prediction is a certainty. The statute invoked provides the right not even to be prosecuted in State courts as the statute did in Rachel. In other words, the equal civil rights which are provided by the statute are, include, an equal civil rights to be free of any interference from official sources for engaging in protected activity. And this would include

prosecutions.

QUESTION: In Rachel the statute, as I recall, banned attempts to punish in the State courts violation of State trespass laws, and you analogize the statute here involved to that language.

MR. PARKER: Yes. The statute in Rachel which was section 203 of the Civil Rights Act of 1964, has three sections there. Section (b) was no person shall intimidate, threaten, or coerce any persons for the purpose of interfering with protected rights or punish or attempt to punish any person for exercising or attempting to exercise these protected rights. Of course, the intimidate, threaten, or coerce language of title II is identical to the language indicated in the statute.

It's clear also that even in this statute the purpose of Congress was to prevent the State from punishing persons for the exercise of protected rights, and this is indicated by the quote from Representative Celler at page 10 of the State's brief. The State's quotation of extensive legislative history is very helpful in this regard because Representative Celler specifically said, referring to protection against punishment, he said, "For example, the jury would have to find that defendant's purpose was to deter persons from voting or applying for employment or applying for admission to a public school or to punish persons who have

done so."

So this legislative history reveals that part of the purpose of Congress was to provide a right to be free of punishment for the exercise of protected rights.

QUESTION: Does all this turn, in your opinion, on a factual issue as to whether or not picketing was peaceful and lawful?

MR. PARKER: There is a factual issue created. The plaintiffs do have to show that their activity was protected activity under the statute.

QUESTION: The plaintiffs have the burden of proof on that factual issue.

MR. PARKER: Petitioners do, yes, sir.

QUESTION: That was the issue in the removal proceeding.

MR. PARKER: There were two issues in the removal proceeding. The first was a factual issue whether petitioners' activity was protected, and the second one was that even if it was protected, as a matter of law, can section 245(b) provide a basis for removal.

Now, the Fifth Circuit only reached the legal issue. The Fifth Circuit only held as a matter of law that removal cannot be provided under the statute. We believe that that was an error of law and is contrary to the intent of Congress as revealed by the quotes that we have indicated in the brief.

Now, the factual issue has yet to be determined. The two-judge court rule doesn't apply because the Fifth Circuit didn't review the facts. We have two alternatives we are suggesting. First alternative is that this Court can make an independent examination of the record, determine facts as in Cox v. Louisiana. Or it can reverse the Fifth Circuit on the issue of law and send it back and let them resolve the facts.

QUESTION: I thought the district judge in this case found as a fact that there was unlawful picketing.

MR. PARKER: The district judge did so find, your Honor. We challenged that as clearly erroneous in the Fifth Circuit, and the Fifth Circuit did not reach that issue because of its resolution of the legal question. I think that anyone reading the record would see that that finding is clearly erroneous and that the petitioners' activities were peaceful and protected at all times.

QUESTION: Do you view that as an issue before us?

MR. PARKER: Yes, I do. It can be resolved either by this Court or by the Fifth Circuit on remand. The Court does not have to resolve the factual issue if it rules for us on the legal issue. It can simply remand the case back to the Fifth Circuit for resolution of the legal question -- of the factual question, I'm sorry.

QUESTION: Do we ordinarily deal with factual issues

not resolved in the court of appeals?

MR. PARKER: The Court did in Cox v. Louisiana. Of course, this was an appeal from a State supreme court. But this is an unusual instance in which the court of appeals did not rule on our factual contentions, simply felt it was unnecessary because of their view of the law. I think that a fair reading of the record will indicate that the district court's determinations in this regard were clearly erroneous.

QUESTION: Can you suggest any case in which we have reviewed a factual issue that the court of appeals has not reviewed?

MR. PARKER: There are two criminal cases that we cite in our brief. We discussed this question in our brief at page 40 and we referred specifically to United States v. Brims and Cole v. Ralph at page 43 of our brief.

The Fifth Circuit seemed to take the view, and we only suggest this to the Court, the Fifth Circuit seemed to take the view that petitioners' activity was protected because it starts its opinion by saying, "No one questions the right of petitioners to engage in picketing and free speech activities." So that implies to us that the Fifth Circuit believed that the petitioners' activity was protected and therefore was required to rule on the legal issue. And we think a fair reading of the record will support that contention. If the Court believes if there is any conflict in this regard, it can

resolve the legal issue and send it back to the Fifth Circuit for a factual determination.

This was certainly the procedure followed in Rachel. In Rachel there was no evidentiary hearing, but the Court sustained the allegations of the removal petition in Rachel and sent the case back to the lower court for an evidentiary hearing on petitioners' allegation.

I would like to reserve the remainder of my time for rebuttal.

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

Mr. Noble.

ORAL ARGUMENT OF ED DAVIS NOBLE, JR.

ON BEHALF OF RESPONDENTS

MR. NOBLE: Mr. Chief Justice, and may it please the Court: I would first like to address myself to some of the facts brought out by counsel opposite.

While it is quite true that we admitted in our brief that there was at one time or another activities which might border on free speech, that was not why these individuals were charged. They were charged for other activities, not for free speech, at one time or another.

Next, it was brought out that they were charged initially under 97-1-1 of the Mississippi Code of 1972. That is true, but while on remand by the district court and before the appeal was perfected, the grand jury of Warren County,

Mississippi, met in session on March 12, 1973, and charged these individuals under 97-23-83 and 97-23-85 which specifically address themselves to secondary boycott activities and threats or force in the use of affecting normal and lawful business activities.

This is clearly a case of interpretation of Rachel and Peacock, may it please the Court, and in that sense it is interesting to note that the individuals rely on 18 U.S.C. 245 subsection (b). In doing so throughout their brief they cannot cite a particular case, either in the circuit court of appeals or in the district court, which in and of themselves affect removal that is triggered under 1443(1). We think that is correct. It cannot be analogized with 1443(1)'s requirements because it is not a civil statute, it is a criminal statute. It protects, it does not provide. And in that protection, it actually protects rights which have already been granted either by statute of the United States or the Constitution of the United States. This is clearly brought out, may it please the Court, in the congressional history of this particular statute, first, by the House of Representatives in the initial statement which we allude to in our brief by Congressman Celler. He speaks of four objectives, first, that it protects individuals in the sense of force or interference in civil rights, that is for itself; secondly, that it spells out those particular activities which would be protected by

this criminal statute; thirdly, it brings individuals who are participating in activities within the protection of the criminal nature of this statute; and, fifth and more importantly, twice in this statute it spells out the penalties which are assessed if it is found by a jury that an individual has been participating in these activities.

It is quite true, as counsel opposite has said, that a jury must find, but we think that that is in the criminal nature of itself and not in a civil nature.

The Senate in the majority report, 791, specifically states that it is to protect the individuals against acts of violence. There is no indication that this particular statute is for the ongoings of criminal processes of the State. And, of course, individuals should be acting lawfully, which these individuals were not.

The language of the statute itself is clear. It is codified in the U.S. Code as a criminal statute. It begins in section (a) by speaking that it does not in and of itself cut loose the State processes which might be charged under this particular statute and that no charges, no charges, shall be brought under this statute by the Attorney General, by the Department of Justice without first the written permission of the Attorney General of the United States or its deputy and a conclusion that that particular charge is in the public interest.

18 U.S.C. 245 is criminal. Therefore, it does not meet the prerequisite of either Rachel or Peacock. Rachel has two prerequisites. First, that the statute must provide for equal civil rights stated in terms of racial equality; and, secondly, that it must be proven and clearly predicted that that particular right will be denied or can be denied in the State court. Like we said, in the first instance this is a criminal statute which provides protection. It does not provide new rights. 245(b) spells out the specific instances, ten in fact, which are protected by this statute. Therefore, it does not come within the 1866 model as this Court projected in Rachel in the decision by Mr. Justice Stewart. In the 1866 model it granted and therefore guaranteed new rights to citizens of the United States.

There has been some argument about whether or not this particular statute grants or removal protects the rights of one who is engaged in first amendment or fourteenth amendment rights, such as picketing. If this Court were to decide this, it would seem to be cutting back or reversing the dictates of Rachel and Peacock in particular for in those two cases when read together this Court decided in 1966 that the broad panoply of first amendment rights and fourteenth amendment rights are not protected by removal.

As I mentioned previously, this appeal is now constituted of six individuals who are now under indictment by

the Warren County grand jury in Warren County, Mississippi. They are charged with criminal conspiracy in effecting a secondary boycott and they are charged with use of force and intimidation to effect that end.

QUESTION: Of course, that doesn't appear on the face of the charge or whatever pieces of paper instituted these proceedings in the State court. Where do you -- I gather the district court and the court of appeals have accepted your version of the charge.

MR. NOBLE: They did. Yes, Mr. Justice White, they did.

QUESTION: But how did you get that across to the court? It doesn't appear at all.

MR. NOBLE: It was explained in oral argument by questions put to us where the posture of the case stood at that particular time, and it came out in oral argument to the Fifth Circuit.

QUESTION: So you were charging these people with the use of threats and coercion.

MR. NOBLE: Yes, sir. As a matter of fact, only two of the six actually. Four are charged with criminal conspiracy and secondary boycott, and two, it is my understanding by conversations with the district attorney, since we did not handle, my office does not handle --

QUESTION: You are representing the State here.

MR. NOBLE: But two are charged under the force and effect statute, that is, 97-23-83, and four are charged with the secondary boycott statute 97-23-85.

QUESTION: Let us suppose that on the removal hearing, I gather you think that a removal hearing in the district court is a proper thing.

MR. NOBLE: A removal hearing was had, sir.

QUESTION: Yes. Well, suppose there that the people seeking to remove claim and demonstrate, at least according to them, that you arrested them for peacefully protesting certain conduct, and suppose the charge says force and violence, the use of force and violence. But the State then comes back and says, "Well, I guess we really are just charging them with peaceful picketing." Would that case then be removable?

MR. NOBLE: No, sir, it would not.

QUESTION: Why not?

MR. NOBLE: Well, under Rachel and Peacock in its interpretation of 1443(1), first amendment rights in and of themselves are not removable. You must look to the charges against the individuals.

QUESTION: Let's assume that it's alleged that the people were arrested solely because of their race, peacefully protesting activities and they were arrested because of their race.

MR. NOBLE: I still do not think under Rachel and Peacock that this particular instance of picketing would in and of itself constitute removal, no, sir, for this reason: It requires two things for removal according to Rachel's precepts, that you prove a specific civil rights stated in terms of racial equality, and secondly, that those particular rights would be denied in the State courts of Georgia and Mississippi. In this particular instance, the State of Mississippi has no particular statute which denies one the right to picket, nor does the City of Vicksburg -- as is shown in the evidence of the case by testimony by Chief Brown -- nor does the City of Vicksburg have any ordinance which denies one the right to peacefully picket. Therefore, they would come under and satisfy this particular right through an appeal to the State court.

QUESTION: You would say any time you charge somebody on the face of a complaint with some act that was obviously within the State police power, it could never be removable, even though predictably the defendant might win in the State court.

MR. NOBLE: According to Rachel and Peacock that's true, sir.

QUESTION: Well, in Rachel the charge was trespass, wasn't it?

MR. NOBLE: Mr. Justice Stewart, that is true.

However, you had a conflict with a State statute, Federal and State statutes, shortly before you decided Rachel.

QUESTION: Hamm had been decided.

MR. NOBLE: Hamm had been decided, there interpreting 2008(c) which said that public accommodations granted a specific right, therefore it substituted a right for a crime. Here there is no substitution for, even given 245. It substitutes no right to participate in the crime charged by the State of Mississippi against these individuals. So removal is not effective.

In conclusion, I would like to say, or I would like to paraphrase, if I might, Peacock, that this case differs from what is alleged in the petition in this wise: There is no Federal statute, in particular 245(b), for any statute on the books which gives these individuals the right to participate in a secondary boycott or to intimidate one in the normal course of business activities, nor is there any statute which has been cited to replace -- to allude to the question by Mr. Justice Stewart --

QUESTION: What was the secondary boycott in this case?

MR. NOBLE: What was it? Mr. Justice Marshall, it was brought out that these people were engaged in a conspiracy to stop individuals from participating in ongoing business activities with certain individuals in the city of Vicksburg.

QUESTION: And that's secondary boycott.

MR. NOBLE: According to the State statute, it is. Not in the sense of telling someone to do it, but they were using activities to engage in a secondary boycott, that's right.

QUESTION: They just urged people, "Don't patronize this store"?

MR. NOBLE: No, sir, I don't think that was the charge.

QUESTION: We don't know what they were charged with, do we? Do you?

MR. NOBLE: Well, --

QUESTION: Do you know what they were charged with?

MR. NOBLE: With all due respect to you, Mr. Justice Marshall, I can only represent to you what the indictment says. They are charged with secondary boycott and intimidation of the individuals and patrons going into these particular stores. Those were the two charges logged against them.

QUESTION: That's all we know.

MR. NOBLE: That's right.

QUESTION: You are necessarily saying, then, that the Federal statute would be no defense to those charges.

MR. NOBLE: Absolutely, Mr. Justice White.

QUESTION: And that if they were convicted, the people who convicted them couldn't be indicted under the Federal

statute for having interfered with these activities.

MR. NOBLE: The statute speaks -- the Federal statute which they allude to, 245(b), specifically refers to force or threats of force in the following activities, and if they do so, and if you go to the bottom of the statute, then they may be fined or there is imprisonment involved.

QUESTION: How about the policeman's threat to take the man to jail, couldn't that qualify as a threat of force under the Federal statute?

QUESTION: To be put in jail or arrested is pretty forceful, isn't it?

MR. NOBLE: I wouldn't think that that would be, Mr. Justice Rehnquist. It would be a threat, but there was no force involved here. The only thing that was effective here in the city of Vicksburg was the ongoing criminal processes.

QUESTION: Even if they could be convicted, and maybe they couldn't -- I am depending, of course, on what the actual facts might be -- that's not enough to justify removal as was pointed out in Peacock.

MR. NOBLE: No, sir.

QUESTION: That was one of the remedies, was the Federal criminal law as well as the Federal civil law.

MR. NOBLE: That is correct, Mr. Justice Stewart. They have several remedies which they may take advantage of which you spoke to in your opinion, that is, injunctive

process, habeas, perhaps damages.

QUESTION: And perhaps a criminal prosecution.

MR. NOBLE: Right. Criminal prosecution, and of course appeal throughout the State system to this Court itself.

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

Do you have anything further, Mr. Parker?

REBUTTAL ORAL ARGUMENT OF FRANK R. PARKER

ON BEHALF OF THE PETITIONERS

MR. PARKER: Yes, Mr. Chief Justice, and may it please the Court: First of all, the indictment is contained on 142 and 143. There is the boiler plate language "with force and arms," but that's not part of the factual recitation in the indictment. The indictment simply charges them with promoting and encouraging unlawful boycott so as to prevent black persons from trading or doing business. But the testimony of Police Chief Marion R. Brown indicates that his notion of preventing black people from doing business is telling them that there's a boycott on.

For example, page 126 of the appendix, why was John Ferguson arrested? He was actually participating in the boycott, and in fact at the beginning was very actively participating in it. That's the Chief of Police. "The only thing I've seen him, I've seen him actually carry a picket sign, I've seen him stopping people on the street and talking to them." That's protected activity under the statute. That,

according to the Police Chief was the basis for the arrest in this case. The same with the other petitioners, and the evidence is in the appendix.

Now, the State maintains that a criminal statute, a Federal criminal statute providing for equal civil rights cannot be a statute providing for equal civil rights under 1443 because it's a criminal statute, it doesn't compare with the 1966 model. The 1866 model, the original removal petition statute, was a criminal statute. In section 2 it provided criminal penalties. It was re-enacted in 1870 as a removal statute and providing criminal penalties. The model 1866 was a criminal statute. A criminal statute can provide for equal civil rights.

Now, it is contended that the Fifth Circuit did not accept petitioners' version of the facts. This is not true. The Fifth Circuit did not resolve the factual conflict. The Fifth Circuit did not accept respondents' version of the facts. The Fifth Circuit did not reach the factual question at all.

QUESTION: Let's assume that the indictment or the charge was that someone killed somebody or broke into some store, broke into a store in the course of a demonstration. Assume that's the charge. Now, there is no conflict on its face between that charge and the Federal statute.

MR. PARKER: That's correct.

QUESTION: But would you say it's nevertheless removable?

MR. PARKER: If the facts show that the charge is spurious.

QUESTION: So you would say that any time at a hearing you can show that this is a completely fraudulent prosecution, that it should be removed?

MR. PARKER: That's right, if the prosecution is fraudulent --

QUESTION: You don't think that's contrary to Peacock?

MR. PARKER: No, it's not contrary to Peacock at all. This is discussed extensively by Chief Judge Tuttle of the Fifth Circuit in the Walker case, which is cited in the brief. The statute in Rachel was not unconstitutional on its face, and the charges were not unconstitutional on its face. The charge was trespass, and trespass under Georgia law is refusal to leave the premises when requested to do so by the manager. There is no indication of Rachel motivation in the charges. And it was only when the petitioners could prove that they were asked to leave for racial reasons that this racial motivation behind the charge, that they could succeed. The same thing here. The evidence shows that there was racial motivation behind these charges, that the sole and exclusive purpose of these charges was to suppress a boycott, suppress free speech activity protesting racial discrimination. Now, the statute

here does substitute a Federal right for a State crime. If a boycott, as the State maintains, is criminal under State law, and if it's criminal to urge people not to shop at these stores because of their racially discriminatory hiring policies, then that directly conflicts with the Federal right under this statute because the right protects any free speech activity protesting racial discrimination. The boycott was free speech activity protesting racial discrimination, is covered by the statute, and the statute therefore clearly and directly substitutes a Federal right for a State crime.

QUESTION: It is equally true, isn't it, about the civil statutes, the civil rights statutes, going back to the Reconstruction days?

MR. PARKER: What is equally true?

QUESTION: What you have said about this criminal statute is equally true about the Federal civil statutes.

MR. PARKER: Yes.

QUESTION: And yet we held, the Court held, did it not, in the City of Greenwood case that that wasn't enough to protect the right. The statute had to confer the right.

MR. PARKER: Well, the Court in Peacock, I believe the ruling, the holding of the Court was that those statutes invoked were not specifically statutes which stated in terms of racial equality.

QUESTION: But some of the statutes were.

MR. PARKER: Yes, but those statutes, 1981 and 1971, were not statutes that specifically protected the conduct and activity of the petitioners. Petitioners were engaged in voter registration activity, and that was not specifically protected by either 1981 or 1971. It wasn't until Congress passed this statute, section 245(b), that this free speech activity protesting racial discrimination was specifically covered by Federal law providing for equal civil rights.

QUESTION: Pursuing Mr. Justice White's question to you, is it possible that the removal hearing might turn into a miniature trial of the criminal charges to determine in the murder case or the break-in, the housebreaking, in order to determine the issues?

MR. PARKER: Well, an evidentiary hearing is required by Rachel, and the Court indicated that the plaintiffs -- petitioners -- did have an opportunity to prove that they were asked to leave the restaurant for racial reasons.

Now, the State probably would not have to prove that they were guilty beyond a reasonable doubt, but certainly I think -- and the Fifth Circuit decisions sustain this -- that the State would have to establish the elements of a crime, in other words, the State, once petitioners have shown or proven that they were engaged in protected activities --

QUESTION: The State would have to prove a prima facie case at the removal hearing.

MR. PARKER: That is correct. They would have to establish the elements of the offense, that the petitioners were not arrested for protected activity, but they were arrested for unprotected activity. Our defense is that the State hasn't met that burden in this case.

QUESTION: Mr. Parker, in responding to Mr. Justice White, you stated, if I understood you, that if a defendant could show that the charges were fraudulent or brought in bad faith, that he would be entitled to removal; if showings could be made,he also would be entitled to an injunction, Younger would not preclude it, would it?

MR. PARKER: That's correct, Mr. Justice, under certain circumstances he would. The civil rights removal statute is a narrower statute and applies only in cases of Federal equal rights statutes providing for specific rights in terms of racial equality. The injunctive relief would be a coordinate remedy. But it's our contention that this coordinate remedy should not preempt the removal jurisdiction, that removal jurisdiction should be allowed where it applies. At least the remedies were passed at approximately the same time.

QUESTION: You are saying you would have alternative remedies.

MR. PARKER: Well, the Court certainly in Peacock held that there were alternative remedies where first amendment

rights, for example, were alleged to be violated. But our contention here is that if removal applies, if Rachel applies in this particular circumstance, that removal should be allowed because section 245(b) is a Federal statute providing for equal civil rights and does provide a right to the petitioners not even to be prosecuted in State court, provides the right to be free of any kind of interference from official sources with the exercise of protected rights.

Now, of course, we did file a 1983 action also in this case, but we were unable to get a temporary injunction which would have held the prosecution to a status quo. So the 1983 remedy was unavailing in this case.

QUESTION: Unavailing.

MR. PARKER: Unavailing.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 11:56 a.m. the oral argument in the above-entitled matter was concluded.)